

REFLECTIONS ON INDIGENOUS RIGHTS IN BRAZIL: BRIEF HISTORY AND CURRENT LEGISLATION

*Maria Veirislene Lavor Sousa**
University of Salamanca
<https://orcid.org/0000-0002-2747-3161>

ABSTRACT

This paper aims to promote a reflection and discussion about the Indigenous rights, their history, the main national and international legal landmarks, and the responsible institutions in Brazil, as a way of giving more visibility to the current debates in Brazilian scenario about this theme and to promote a collective knowledge. The methodology is on bibliographic and documentary research, which were started with the work during PhD in Social Science at the University of Salamanca in Spain about which we present this short piece of the thesis. The documentary research started about the current Brazilian legislation, and also went through the main international documents. It was revisited authors like Cunha and Barbosa (2018), Viveiros de Castro (2006), Krenak (2019), Terena (2021), Santamaría (2015), among others. The data analysis was worked and matured during the years 2020 and 2021, and the results were obtained through the research, the reading and the critical reflection of several documents revisited that compose the extensive legislation of the Indigenous peoples rights, in the search for knowledge about the theme giving emphasis to the main legal landmarks about the cause, the history and other issues related to the proposed theme. The considerations reveal the big challenges imposed on a constant struggle faced by these peoples to get their rights. Even with the achievements got since colonization, those rights are in constant attack, under several processes of violation by the noncompliance of the current legislation in their several cultural, environmental, territorial, healthy and education aspects. **Keywords:** Indigenous peoples; Indigenous rights; Indigenous rights legislation; Indigenous social movement; Indigenous resistance.

RESUMO

REFLEXÕES SOBRE OS DIREITOS INDÍGENAS NO BRASIL: BREVE HISTÓRICO E A LEGISLAÇÃO ATUAL

Este artigo tem como objetivo promover uma reflexão e discussão sobre os direitos indígenas, seu histórico, os principais marcos legais nacionais e internacionais e as referidas instituições responsáveis no Brasil, buscando

* PhD student at the Postgraduate Program in Social Sciences at the University of Salamanca, Spain. Master in E-Learning Systems Management at the Universidade Nova de Lisboa (UNL). Salamanca, Spain. E-mail: veirislene@gmail.com

dar mais visibilidade aos debates atuais no cenário brasileiro sobre a temática proposta e promover conhecimento coletivo. A metodologia se constitui sobre pesquisas bibliográfica e documental, as quais foram iniciadas durante o trabalho no curso do Programa de Doutorado em Ciências Sociais vivenciado na Universidade de Salamanca, na Espanha, sobre o qual se apresenta aqui este breve recorte da tese. A pesquisa documental iniciou-se sobre a legislação brasileira vigente e percorreu-se também sobre os principais documentos internacionais. Revisitou-se autores como Cunha e Barbosa (2018), Viveiros de Castro (2006), Krenak (2019), Terena (2021), Santamaría (2015), dentre outros. A análise dos dados foi trabalhada e maturada durante os anos de 2020 e 2021, e os resultados obtidos por meio da pesquisa, leitura e reflexão crítica dos vários documentos revisitados que compõem a extensa legislação dos direitos dos povos originários, na busca por conhecimentos sobre a temática, dando destaque aos principais marcos legais sobre a causa, o histórico e demais questões ligadas ao tema proposto. As considerações revelam os grandes desafios impostos numa luta constante desses povos por seus direitos. Mesmo com as conquistas alcançadas desde a colonização, estes direitos estão em constante ataque, sob vários processos de violações pelo descumprimento da legislação vigente em seus variados aspectos culturais, ambientais, territoriais, de saúde e educação.

Palavras-chave: povos indígenas; direitos indígenas; legislação dos direitos indígenas; movimento social indígena; resistência indígena.

RESUMEN

REFLEXIONES SOBRE LOS DERECHOS INDÍGENAS EM BRASIL: BREVE HISTORIA Y LA LEGISLACIÓN ACTUAL

Este artículo tiene como objetivo promover una reflexión y discusión sobre los derechos indígenas, su historia, los principales marcos legales nacionales e internacionales y las instituciones responsables antes mencionadas en Brasil, buscando dar más visibilidad a los debates actuales en el escenario brasileño sobre el tema propuesto y para promover el conocimiento colectivo. La metodología se basa en una investigación bibliográfica y documental, que se iniciaron durante el curso del Programa de Doctorado en Ciencias Sociales vivido en la Universidad de Salamanca, en España, sobre el cual se presenta este breve extracto de la tesis. La investigación documental comenzó sobre la legislación brasileña vigente y también abarcó los principales documentos internacionales. Se revisaron autores como Cunha y Barbosa (2018), Viveiros de Castro (2006), Krenak (2019), Terena (2021), Santamaría (2015), entre otros. Se trabajó y maduró el análisis de datos durante los años 2020 al 2021 y los resultados se obtuvieron a través de la investigación, lectura y reflexión crítica de los diversos documentos repasados que conforman la extensa legislación sobre los derechos de los pueblos indígenas, en la búsqueda del conocimiento sobre el tema, destacando los principales marcos legales sobre la causa, la historia y otras cuestiones relacionadas con el tema propuesto. Las consideraciones revelan los grandes desafíos impuestos en una lucha constante de estos pueblos

por sus derechos, a pesar de las conquistas desde la colonización, estos derechos se encuentran en constante ataque bajo varios procesos de vulneración por el incumplimiento de la legislación vigente en sus diversos aspectos culturales, ambientales, territorial, salud y educación.

Palabras clave: pueblos indígenas; derechos indígenas; legislación de los derechos indígenas; movimiento social indígena; resistencia indígena.

Introduction¹

The present paper has as objective to discuss and to reflect about the Indigenous rights in the light of their main legal landmarks based on their history, fights and accomplishments got by the Indigenous social movement.

The theoretical basis of this work brings rereading of legal documents about Indigenous rights, national and international sources, thinkers of Anthropology such as Viveiros de Castro (2006), recognizing the south epistemologies from the worldview of the Indigenous peoples based on Indigenous authors like Krenak (2019) and Terena (2021). It is discussed the history from the beginning of the School of Salamanca, reflecting on documents created due the great resistance of those peoples, until the current legal landmarks and their effectuation in public policy, in their theories and practices.

The methodology used was bibliographical and documentary through updated sources about the current legislation available at many websites, repositories, and other legal channels. The criteria for the selection of the Articles mentioned are on three pillars: 1) to revisit the main elements for the basis of the work proposed; 2) to achieve the proposal of contributing on the visibility of the subject; and 3) to promote knowledge and debate about the theme. The results presented came up after the analysis of that legislation, which represent a juridic and legal accomplishment. However,

they are not enough upon the data and the facts of Brazilian reality about the implementation of those public policy in the preservation of the diversity and the identity of the Indigenous peoples. The considerations lead us to reflect on the necessity of recognition of the rights of the Indigenous peoples giving visibility to the cause of those peoples and their inclusion on the antiracist agenda of the country, respecting the multiculturalism of the Indigenous nation.

Brief history about the rights of the Indigenous peoples

The first records about Indigenous rights emerged in the fourteenth century, in the School of Salamanca, thought by the jusnaturalist theologians Bartolomé de las Casas, Francisco de Vitória and Francisco Suárez, who advocated in front of the Crown the recognition of rights of these peoples, despite of taking into account the paganism of those native peoples and their necessary conversion to Catholicism.

In this sense, the juridical debate in respect of the humanity of the Indigenous peoples persisted, but the principle of *uti possidetis*, extracted from the natural right of the peoples, predominated in Latin America, being used under two spheres: to settle the rights on domain and possession of territorial conquest from wars between two nations; and to decide on conflicts between the subjects from the same nation or kingdom. In the first case, about things taken from enemies, it became property of who had taken them, in the second case, the land under conflict would stay with its first

1 Paper translated by Ana Flávia Matos Freire. Bachelor's Degree in English from the State University of Ceará (UECE), Master's Degree in Arts from the University of the State of Rio Grande do Norte (UERN) and PhD student in Linguistics by the Federal University of Rio Grande do Norte.

owner, since they were subjects of the kingdom, with “rights subscribed in the juridical order of that community” (CUNHA; BARBOSA; 2018, P. 105). However, history has a great number of records that, even with the beginning of the discussion about Indigenous rights in the colonial period, in America the Indigenous peoples were already put in absolute disadvantage, despite of the creation of juridical instruments that favored the Indigenous rights thought by that Spanish School. In practice, the local culture itself, the communities and their lifestyles were unappreciated and that fragilized gradually the Christian jurisprudence thought itself and its initial influence, including favoring forces against that jusnaturalist position, as Santamaría (2015, p. 25) states:

Las leyes españolas desde el primer momento consideraron a los indios como hombres libres, súbditos de la corona, con ampla capacidad de poseer y disfrutar de sus bienes de cualquier naturaleza; los indios eran así sujetos de toda clase de derechos, incluyendo el de propiedad, sin ninguna excepción. Pero atendiendo a que ellos eran personas necesitadas de tutela a semejanza a los incapaces, les impuzeron, con ánimo de favorecerlos y defenderlos, determinadas trabas al libre ejercicio de sus facultades dominicales sobre las tierras de su propiedad. Mas estas estas limitaciones no querían decir que las tierras se les daban a los indios únicamente en usufructo, reservándose, la Corona la propiedad.

In Brazilian case, the Portuguese Crown followed legal requirements similar to the Spanish ones about the ownership of lands, but without the direct influence of the School of Salamanca and its theologians.

In the year of 1611, the first juridical instrument that emerges in Brazil, through Royal Charter on April 1, the possession on a land must be respected, reassuring the Indigenous rights, since these peoples were the first owners. Yet, in 1755, a new law regulates that the land is also said as Indigenous natural domain. However, with the colonization processes, in which the idea about the humanity of the Indigenous peoples were undermined, depreciation

of their cultures, the steal of wealth in many expeditions, among many other processes of exploitation, violence etc., it was being forged the deconstruction of the rights of the Indigenous peoples and being implanted the concept of private property, among other concepts preached by the invaders, which influence Brazilian debates and judicial decisions until now, when it comes to the rights of the original peoples about their lands and territories, even after the Constituent of 1988.

In the colonial period, the Indigenous people were submitted to Portuguese colonial jurisdiction, and, in theory, they were seen as subjects. The papal bull *Immensa* of 1741, directed at the bishops who were in Brazil and in the West Indies, stated that no one (either secular or ecclesiastic person) could have Indians as slaves or hold them captive; if this law was broken, the person would be in serious risk of being excommunicated.

In the 18th century, even with the rapid growth of slavery processes, conflicts, deaths, and genocides on the original peoples, those remained resisting, which made the Crown to choose African slavery, a decision that was also strengthened by other historical conjunctures. The integrationist project persists allied to the attempts of slavery of the Indigenous peoples by the Portuguese Crown, although such movement did not have the declared support of the Jesuits, besides the permanent fight of the native peoples, imposing their resistance, by being in conflict, fleeing to other lands, or even after seeking refuge in quilombos, allying to the black people who managed to escape slavery.

In the period of Brazilian Empire, even with the Decree-law no. 37.627 of October 27, 1831, which prohibited the slavery of Indigenous peoples, the recognition of the rights of native communities continued under constant attacks and threats. In this historical period, it persists the integrationist view, and from the condition of slaves, the original peoples start to have their lives protected by the State intermediated by judges, equivalent to the condition of orphans,

disabled people. Such condition eliminated completely the legal recognition of autonomy, the fight for their lands, the individual and collective power, and the citizenship of Indigenous peoples. In order to legitimate the issue about the ownership of Indigenous lands, those were treated as a “specific territorial ownership, based on the Right of Peoples² (CUNHA; BARBOSA, 2018, p. 107).

With the implementation of the Land Law (BRAZIL, 1850)³, in Brazilian Empire, it could be seen the weakening of juridical issues about the right to the lands by the Indigenous peoples even more, since those were considered not as owners, but only occupants, landholders without titles or rights on the property.

With Industrial Revolution, in the 19th century, the surplus of agricultural exports and the beginning of labor market of immigrants resulted in the expansion of new frontiers and mining, promoting, yet, structural economic changes in the country, which starts to be republican, following liberal orientation, scenario that affected even more the life of the Indigenous peoples, their lands and territories, specially, the areas still untouched and reinforcing the issue of tutelage, with an integrationist

basis, which also sees the Indigenous person as a subject to be prepared for subordinated and hard work. That persisted in many documents that were being created and it was perpetuated on the last two constitutions before the one of 1988, which historically represents the great watershed on the issue of the rights of the original peoples in Brazil.

Current legislation about the Indigenous rights

It is observed that Brazilian legislation about Indigenous rights emerged tardily, at high costs, throughout history, from intense fight and resistance of these communities, which began to organize themselves through their social movement, being steadily established in the decade of 1980, with the help of the Catholic Church, through pastoral missions in many Brazilian municipalities. Nowadays, the documents that compose the list of the current legislation in the country, the international normative texts, such as Conventions, Treaties, Declarations, and others, of which Brazil is signatory are: Constitution of the Federative Republic of Brazil of 1988 (BRAZIL, 1988) – Articles 231 and 232; Penal Code – Decree-law no. 2.848 of February 7, 1940 (BRAZIL, 1940); Code of Criminal Procedure – Decree-law no. 3.689, of October 3, 1941 (BRAZIL, 1941); The Indian Statute – Law no. 6.001, of December 19, 1973 (BRAZIL, 1973); The International Covenant on Economic, Social and Cultural Rights of the United Nations Organization (UN) – Decree-law no. 591, of July 6, 1992 (Brazil, 1992a); The International Covenant on Civil and Political Rights of the UN – Decree-law no. 592 of July 6, 1992 (BRAZIL, 1992b); The American Convention on Human Rights of the Organization of American States (OAS) – The Pact of San José from Costa Rica – Decree-law no. 678, of November 6, 1992 (BRAZIL, 1992c); Convention no. 169 of the International Labour Organization

2 “The concept of *ius gentium*, which was also called the rights of peoples, even having its origin in Roman Law and having passed through, under different versions, the Middle Ages, is received by the generation of the School of Salamanca, and specially by Suárez, with some adjustments and updates. It starts to be understood as a right that considers the cultures of the peoples with legitim authority that must be respected, a consideration to which was build by the peoples over time and that we do not have the right to violate under any allegation. Those are the cases of institution of private property, matrimony, employment regimes, international treaties, among others. The concept of Right of Peoples, corresponding to what we know now as Human Rights, is important because, even being a right that it is expressed in positivity, in a written norm, has its basis on a rationality that considers cultures, diversity of ways of cultural manifestation. And, at the same time, it seeks its universality.” (FACHIN, 2017)

3 Law no. 601 of 1850, which regulated the private property in Brazilian lands and the consolidation of property titles, including wastelands. Wastelands were those considered vacant, not being titled to owners, therefore attributed, or returned to the states of the Federation to be, this way, protected in favor of whom would have interest on cultivating them.

(ILO) – Decree-law no. 5.051 of April 19, 2004 (BRAZIL, 2004); Convention no. 169 of the International Labour Organization in Guaraní-Kaiowá (ILO, 2012); Convention no. 169 of the International Labour Organization in Terena (ILO, 2012); Declaration of the United Nations on the Rights of Indigenous Peoples – UN – September 13, 2007 (UN, 2017); and The Convention on the Protection of Children and to the Co-operation in Respect of Intercountry Adoption promulgated by the Decree-law no. 3.087/1999 (BRAZIL, 1999).

Among those, it is proposed here a reflection on some of the main landmarks abovementioned, highlighting: The Indian Statute, The Constitution of 1988, The Convention 169, and The Declaration of the United Nations on Indigenous Rights. In Brazilian case, the legislation on Indigenous rights is treated only in federal sphere, that is, it is responsibility of the Chamber of Deputies, the National Congress, and the President of the Republic.

The Indian Statute

The Indian Statute is the denomination of the Law no. 6.001 promulgated on December 19, 1973, which establishes in its Principles and Definitions the regulation of the “juridical situation of the Indigenous or Forest peoples and Indigenous communities with the purpose of preserving their culture and integrating them, progressive and harmoniously, to the national community” (BRAZIL, 1973). Although the document states that Indigenous customs and traditions must be preserved, in practice, the idea preached was to integrate the traditional peoples to the national community, a developed work to be associated to the catechetical work and to the Church assistance, which already existed since the first contact of the colonizers. According to the referred document, Indigenous person is “every individual from pre-Columbian origin and ascendancy who identify themselves and it is identified as belonging to an ethnic group, whose cultural

characteristics distinguish them from the national society” (BRAZIL, 1973).

Regarding the Indigenous rights and their protection, it is delegated the responsibility to the Union, to the Federated States, to the Municipalities and to their entities of Brazilian indirect administration, as described in Article 2:

I – to extend to the Indigenous peoples the benefits of common legislation, whenever is possible its application.

II – to assist the Indigenous peoples and the Indigenous communities that have not been integrated yet to the national community.

III – to respect, when providing to the Indigenous peoples means for their development, the peculiarities inherent to their condition.

IV – to ensure to the Indigenous peoples the possibility of free choice of their lifestyles and subsistence.

V – to guarantee to the Indigenous peoples the voluntary permanence in their habitat, providing them resources for their development and progress.

VI – to respect, in the process of integration of the Indigenous person to the national community, the cohesion of the Indigenous communities, their cultural values, traditions, uses and customs.

VII – to execute, whenever is possible on collaboration with the Indigenous peoples, the programs and projects aimed to benefit the Indigenous communities.

VIII – to use the cooperation, the spirit of initiative and the personal qualities of the Indigenous person, having in mind the improvement of their life conditions and their integration in the process of development.

IX – to guarantee to the Indigenous peoples and the Indigenous communities, in the terms of the Constitution, the permanent ownership of the lands they inhabit, acknowledging them the right of exclusive use of the natural resources and all the utilities on those existent lands.

X – to guarantee to the Indigenous peoples the full exercise of civil political rights that in the face of the legislation whenever is applicable to them (BRAZIL, 1973).

The Law also conceptualizes the “Indian” in Brazil, defining them also as a “forest person”, who represents “every individual from pre-Columbian origin and ascendancy who identify themselves and it is identified as belonging to an ethnic group, whose cultural characteristics distinguish them from the national society” (BRAZIL, 1973), classifying them in three typologies, according to the degree of national integration:

I – Isolated – When they live in unknown groups or of few and vague information through occasional contacts with elements of the national community.

II – Undergoing the process of integration – When, in intermittent or permanent contact with strange groups, they keep a small or big part of the conditions of their native lives, but they accept some practices and ways of existence common to the other sector of the national community, of which they will need more and more for their own sustenance.

III – Integrated – When they are incorporated to the national community and recognized in the full exercise of civil rights, even though they keep uses, customs and traditions characteristic of their culture. (BRAZIL, 1973).

In general, this document follows a central point of the former Brazilian Civil Code, dated in 1916, which considered the Indians as partially “disable”, therefore, they needed to be framed in a tutelary policy through a federal indigenist agency.

Regarding the Civil and Political Rights, mentioned in Chapter I, the Principles, the Indians are considered citizens of Brazilian nationality, according to the Federal Constitution in its Articles 145 and 146 and it establishes the exercise of their rights. In the Indian Statute, in its Art. 6, it declares that must be: “respected the uses, customs and traditions of the Indigenous communities and their effects, in the relations of family, in the order of succession, in the regime of property and in the acts or transactions made among Indians, except if they choose the application of common law.”

In that Law is also established the assistance

and the tutelary policy, that is, the Indians and the Indigenous communities that have not been “integrated to the national community are subjected to the tutelary policy” (BRAZIL, 1973). However, the Indian, or the entire community itself, will be able to require their full emancipation, since it is proved by a responsible federal agency, after enquiry conducted and the full integration of the applicant or of the Indigenous community to national community.

According to the document, to leave the tutelary policy the Indigenous person must prove their civil capacities broadly, taking into account some points considered important such as learning Brazilian Portuguese, having a useful professional activity to the national society, besides the “comprehending of uses and customs of the national community” (BRAZIL, 1973), as mentioned in the Art. 9. Such steps must be proved through judicial homologation and their civil registry. Conditioned to those capacities, the Indigenous person would be suitable to the exercise of their rights, what makes clear the approach based on assimilation and acculturation. Through the reading of this document is clear that there is not a higher appreciation of the Indigenous cultural identity, because inside this construction, despite of stating some important points, it is concluded the non-recognition of their traditions as an integrant part of the national culture to be preserved and worked with the younger people from their villages, but as something procedural to be overcome with time until its integration to the national model, said as better and superior, result of outdated and secular ideas preached by colonialism, still latent in Brazilian society.

The educational issue, just like the issues of culture and health, follows this line and assimilationist paradigm and is regarded in the Articles 47 and 55 of this official document:

Art. 47. It is ensured the respect to the cultural heritage of the Indigenous communities, their artistic values, and ways of expression.

Art. 48. It is extended to the Indigenous popula-

tion, with the necessary adaptations, the current teaching system of the country.

Art. 49. The literacy of Indians will be taught in the language of the group to which they belong, and, in Brazilian Portuguese, assured the use of the first one.

Art. 50. The education of the Indians will be oriented for the integration in the national community through process of gradual comprehension of the general problems and values of the national society, as well as the utilization of their individual abilities.

Art. 51. The assistance to minors, for educational purposes, will be provided, as far as possible, without removing them from family or tribal life.

Art. 52. It will be provided to Indians the proper professional education, according to their degree of acculturation.

Art 53. Handicraft and rural industries will be stimulated, in the sense of elevating the standard of living of Indians with the convenient adaptation to the modern technical conditions.

Art. 54. The Indians have the right to the means of protection to the health offered to the national community.

Sole paragraph. In childhood, maternity, disease, and old age, it must be ensured to the forest person, special assistance of the government, in establishments destined to these purposes.

Art 55. The general rule of social security will be extensive to Indians, fulfilled the social, economic, and cultural conditions of the benefited communities. (BRAZIL, 1973)

The work of the Indigenous people is also ensured, aiming to assure equality, without any discrimination in relation to any other Brazilian worker, applying to them “all the rights and guarantees of labor laws and social security” (BRAZIL, 1973), respecting their cultures and customs, though any employment contract must go through the control agency for its effective approval.

Inside the outlines of this document, it was believed that “being an Indian” had a passerger character and soon this individual would integrate the national community, taking, this way, an assimilationist perspective. Moreover,

about causes of criminal infractions, detentions or other disciplinary issues, special and different conditions are established according to the degree of integration and tutelary policy.

Another fundamental subject in the text is the issue of land and Indigenous territory, in which are established rights, points about Occupied Lands, Areas of Reserves, Lands of Indigenous Domain, among others, including demarcation, but it is not stated the difference between land (the entire space of the village and the reserve) and territory, which also represents the sacred place for the Indigenous peoples, where are performed their rituals related to the issue of spirituality.

Regarding the Defense of Indigenous Lands, it is ensured the protection of the Armed Forces and the Federal Police:

Art. 34. The federal agency for assistance to Indians will be able to solicitate the collaboration of the Armed Forces and Auxiliaries and the Federal Police to ensure the protection of the lands occupied by the Indians and the Indigenous communities.

Art. 35. It is responsibility of the federal agency for assistance to Indians the judicial or extrajudicial defense of the rights of the forest people and the Indigenous communities.

Art. 36. Without prejudice to the previous article, the Union shall adopt the administrative measures or propose, through the Federal Prosecution Office, the appropriated judicial measures to the protection of the possession of the forest people on the lands they inhabit.

Sole paragraph. When the judicial measures foreseen in this article were proposed by the federal agency of assistance, or against it, the Union will be plaintiff or co-plaintiff.

Art. 37. The tribal groups or the Indigenous communities are legitimate parts for the defense of their rights in court, they shall receive, in case, the assistance of the Federal Prosecution Office or of the Indian protection agency.

Art. 38. The Indigenous lands are not acquired by usucapion and cannot be expropriated, except the foreseen in Article 20. (BRAZIL, 1973).

Theoretically, through the reading of the

abovementioned Articles, it is aimed to guarantee rights to the original peoples, however, nowadays, in practice, it is verified a huge growth of violence and disrespect about these points, specially, the protection to the Indigenous people in their lands and territories, land demarcations that do not go forward judicially and other critical points, as the invasion of land-grabbers, loggers, farmers, rural businessman and large companies.

In the year of 1988, with the Federal Constitution, which gives a different character to the Indigenous people, in relation to previous documents, it starts to guarantee the diversity and maintenance of their cultures, by recognizing them for their importance and traditions, breaking, this way, the assimilationist paradigm that endured for centuries until now leaving roots and marks on popular imaginary, specially on non-Indigenous people. In 1994, a proposal from The Statute of Indigenous Societies was approved by a special commission of the Chamber of Deputies, but now it is frozen in its processing. Only in 2002, Indians stopped being considered relatively disable, with the institution of the New Brazilian Civil Code (BRAZIL, 2002), in which it is established that the original peoples would be ruled by a special legislation.

This assimilationist approach has its beginning in colonization through the Jesuits, and afterwards, applied by the Indian Protection Service (IPS) with the objective of also converting them in labor market in plantations, being consolidated in the Federal Constitution of 1934, being perpetuated through this statute, percolating the Convention of 1957. Nevertheless, such approach was being deconstructed gradually due the resistance of the original peoples and the strength of their social movement, having as watershed The Federal Constitution of 1988 and, subsequently, other documents on which we will discuss as it follows.

History reveals that all indigenist legislation, since colonization, was a pathway to subjugation, which aimed to take away the right of

being Indians, followed by attempts of slavery of the Indigenous peoples, but due to some failed actions and Indigenous resistance, more violent acts of extermination and genocide were happening, according to the growth of the actions related to the expansion of colonialism and occupation of Brazilian lands.

The Federal Constitution of 1988 – FC/88

With the FC-88 (BRAZIL, 1988), the assimilationist and acculturated approach on the Indigenous people is overcome and the differences and the diversity of Indigenous cultures start to be considered, something pioneer for the decade of 1980, and this approach was abolished completely, theoretically, in the following year, in The Indigenous and Tribal Peoples Convention of 1989 (INTERNATIONAL LABOUR ORGANIZATION, 1989) organized by ILO, overcoming issues established in the optics of International Law of The Indigenous and Tribal Peoples Convention of 1957.

Historically, this Magna Carta brings many innovations about the theme, being the first one to dedicate a specific chapter to the protection and defense of the rights of the Indigenous peoples, guaranteeing, yet, the procedural capacity, since before it, the Indigenous peoples were even “authorized to file suits” (CUNHA; BARBOSA, 2018, p. 13), despite of the fight and the great effort to make this Constitution a reality for the Indigenous nation. In their work *“Rights of the Indigenous Peoples in Dispute”*, Cunha and Barbosa (2018, p.15) state that “To talk about the future of the rights of the Indigenous peoples is not a candid formulation in the air. Rather, it is a normative project anchored in the long-standing Indigenous resistance, with vitality in the present of many local, regional, and national Indigenous associations.

It is observed that this association of resistance for the right goes beyond the national sphere, gathering strength and some inter-

national visibility, reaching other traditional peoples from Latin America too.

With the Federal Constitution of 1988, Brazil closes a period of obscurantism on the Indigenous rights, because it recognizes and guarantees to the original peoples, in its Art. 231 “their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy. The Union is responsible for demarcating such lands, protecting, and ensuring respect for all of their property” (BRAZIL, 1988). That is an important historical landmark, because by validating the right of the Indigenous people to maintain their own culture, it breaks with the secular tradition of the indigenist view, integrationist, which pursued the idea of homogenization of ethnicities to a supposed national model and treated the Indian as relatively disable, someone who should be tutored by the State.

In its Art. 232, the Magna Carta also guarantees the procedural capacity to those traditional communities, when it says: “the Indians, their communities and organizations have standing under the law to file suits to defend their rights and interests” (BRAZIL, 1988), including against the State.

The current Brazilian Civil Code of the year of 2002, consequently, follows the rules of the current Federal Constitution, not treating the Indigenous person as someone who is disable or who needs to be tutored anymore, instead, it says that such capacity must be regulated by a special legislation. On that matter, there is a lawsuit with frozen processing in Congress since 1994 for this to be revised, under the name of the Statute of Indigenous Societies, besides bills of law for the regulation of elements determined on the FC/88 and, with that it shall adjust the old legislation completely to what is determined on the Magna Carta.

It is a fact that, even after 33 years of the Magna Carta in Brazil, the guarantee of the rights established is still achieved under great pressure, fight, and articulation of ethnicities

through the Indigenous social movement and its several national and international associations, besides supporters and allies of the cause. Among many entities and associations that are part of this movement, it is pointed out some names, from different orders (religious, political, educational, scientific, artistic, judicial, non-governmental etc.): The National Association of Indigenous Action (ANAI); Articulation of Indigenous Peoples from Brazil (APIB); Amerindian Studies Center (CEstA); Indigenist Missionary Council (CIMI); Council of Mission among Indigenous Peoples (COM-IN); Pro-Indian Commission of Acre (CPI-AC); Pro-Indian Commission of São Paulo (CPI-SP); Indigenous Work Center (CTI); Greenpeace; International Institute of Education from Brazil (IEB); Institute of Research and Indigenous Education (IEPÉ); *Índio é Nós* – Portal of Campaigns; Institute of Socioeconomic Studies (INESC); Socio-environmental Institute (ISA) and its programs: Monitoring of Protected Areas Program, Socio and Environmental Policy and Law Program, Rio Negro Program, Xingu Indigenous Park Program; KANINDÉ – Association of Ethno-Environmental Protection; Native Amazon Operation (OPAN); KAINGANG Portal (spread of the culture and the rights of Kaingang people); Project Video in the Villages; A drop in the Ocean; WAIMIRI-ATROARI Program, PARAKANÃ – PROPKN Program; Project Literacy Trails; Nucleus of Indigenous History and Indigenism from the University of São Paulo (NHII/USP); and Research Laboratory on Ethnicity, Culture and Development (LACED). There are many others across the country, Latin America and the world that are in favor of the fight, protection and guarantee of these rights.

Yet, about the Magna Carta, Viveiros de Castro (2006) states:

“The Constitution of 1988 interrupts judicially (ideologically) a secular project of desindianization, by recognizing that it had not been completed. And it was this way that the communities in process of distance from Indigenous reference start to realize that to come back ‘being’ Indian – that is, to become Indian again,

to retake the incessant process of becoming Indian – could be an interesting thing. To convert, to revert, to pervert or to subvert (as you wish) the mechanism of subjection set since the Conquest in order to make it a mechanism of subjectivation; to let them suffer their own indianity and start enjoying it. A gigantic collective abreaction, to use old psychoanalytic terms. An ethnic carnivalization. The return of what is nationally repressed”.

This moment is considered unique in history because it represented the approval of the rights by politicians from many positions: from right, center, and left orientations. It was also an important moment for the Indigenous social movement, which marked its genesis in the national scenario, besides the recognition of some important Indigenous leadership protagonists of this process in the year of 1988, such as Ailton Krenak, Álvaro Tukano, David Kopenawa, among many others.

Convention 169

Convention 169 of the International Labour Organization (ILO) on The Indigenous and Tribal Peoples published on June 7, 1989 (INTERNATIONAL LABOUR ORGANIZATION, 1989) and later promulgated through Decree-law no. 5.051, of April 19, 2004 (BRAZIL, 2004), had its validity in Brazil since July 25, 2003, and it reviews the previous convention (Convention no. 107 of 1957). The referred document of the permanent organization, juridical person of Public International Law, of which Brazil is a member, among many other countries, states in its Art. 3 that “the Indigenous peoples must enjoy the fundamental human rights and freedom, without obstacles or discrimination”. From this prior right are described the other ones in the same international document, which approaches the issues about the protection of territories, culture, values, and social, cultural, and spiritual practices, besides the necessity of recognition of collective and individual problems of the original peoples.

Differently from the previous convention, which disciplined assimilationist purposes by the minority communities to the national model, the current one demands that the original peoples must “take control of their own institutions and lifestyles”, and their languages, religions, cultures and, essentially, identity must be preserved and respected in the area of the States where they live.

Declaration of the United Nations on the Rights of Indigenous Peoples

The document with 46 articles recognizes and states the rights of the original peoples, approaching them in a broad way about culture, health, territories, education, and other essential subjects to fundamental rights. Such declaration, even after long debates for two decades, discussed in assembly and approved in 2007, is still a challenge in Brazilian ground due to the difficulties on its implementation and a series of infractions under several aspects, among the main ones are the violence of all degrees against the original peoples, with persecutions, deaths, assassinations, genocides; the slowness and stagnation of the demarcation of their territories; the discrimination and racism suffered by these individuals who are considered by the government as people who represent lag and that are barriers to development etc. With this document, some more advances are considered:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development [Article 3] [...]. Indigenous peoples and individuals have the right not be subjected to forced assimilation or destruction of their culture [Article 8]. (UNITED NATIONS ORGANIZATION, 2008).

To recognize and to restate the rights of the original peoples in Brazil is an endless fight, even with the current legislation. In general, and seen in several instances (sociocultural,

political, economic etc.), it can be assumed that Brazilian people need to recognize their own identity, since, in general, it is a population that does not know its own history as people, does not preserve or has memory of itself when does not recognize itself on its strong Indigenous roots, what reinforces the processes of reproduction of colonial violence.

Although the proposal of this paper is not to promote a legal debate, it is worth revisiting Sartori (2010), when he states the importance of the Indigenous fight, because it represents the fight for differences, their ways of subsistence and of social reproduction inside a homogenizing contradictory model imposed by capitalist system.

Considerations

For more than five centuries, since colonization, passing through processes of invasion and exploitation of their territories, genocides, slavery, among many others, and despite of the advances on Indigenous rights, though historically very late, at the cost of many fights, resistance, lifetime and deaths of many people, those rights continue under attack in Brazil, not being implemented and are increasingly evaded and usurped, especially within the current political scenario, with the country's current president, denominated Xauara⁴ by the original peoples.

Yet, it is important to mention one of the serious events that marked the world scenario involving two defenders of the Indigenous cause, the Brazilian indigenist Bruno Pereira and the English journalist Dom Philips, who were brutally assassinated by gunfire, burned, and buried on June 5, 2022, in Javari Valley, Amazon region, in which they were making an expedition, place of fierce dispute, dominated by drug dealers, gold miners and loggers. This type of crime, among others, unfortunately, is repeated in the Amazon. Most of the times

⁴ According to the great shamans, it means person with a sick mind.

their real representatives go unpunished, as it happened with Chico Mendes in 1988, with American missionary sister Dorothy Stang in 2005, among other leaders and indigenists, persecuted and assassinated by the same cause. According to Carazza (2022), the Global Witness Organization informs that in Brazil, only between the years of 2012 and 2020, 317 people were killed because they defended the forest, its native populations, and the rights of those peoples. Also, it is worth to point out that this tragic number could be bigger, in case of adding the happenings of other Indigenous territories by the country, with Brazilians and invisible leaders, which were not counted on that list.

Those rights, which were supposed to be guaranteed to the Indigenous nation, are taken away from many spheres and expressed by the violence on Indigenous peoples, denounced in several channels in Brazil and around the world, even after the democratic opening of the years 1990 and the guarantee of their original rights, among others described. The Indigenous people suffer with the disrespect of the demarcation of their territories; the invasion of gold miners, squatters, farmers and companies on their territories; issues related to education and precariousness of their schools and teaching work; public health, specially now, during Coronavirus pandemic, which were the most affected communities, among many other causes for which they fight and continue to resist, such as, more recently, hunger and scarcity in their territories, while the ineffective system acts in its necropolitics.

The report *Brazil 2021 Human Rights: A Report of Social Network for Justice and Human Rights* (STEFANO; MENDONÇA, 2021) denounces, in detail, the countless atrocities and numerous processes about the violation of those rights and the fight of these peoples, always, besides issues directly related to the cause, such as climate and environmental crisis, criminalization of those peoples who seek the legalization of the FC/88 itself, agribusiness,

environmental setbacks on the Amazon, among many issues.

Eloy Terena (2021), one of the coordinators of this cause, related to the Articulation of Indigenous Peoples from Brazil (APIB), in his paper *The criminalization of Indigenous leaders as repression of political action*, reports how this type of social process, composed by a series of steps, trying to criminalize the social movement itself, makes it even more difficult the guarantee of the rights: “As a strategy of repression of political action of Indigenous peoples, criminalization integrates an extensive repertoire of state and parastate forms of domination and control.” (TERENA, 2021, p. 93).

Finally, in addition to the actions to dismantle the institutions that should protect the Indigenous people, such as Funai itself, there are several arbitrary and criminal actions imposed that try to manipulate the non-validation of the rights of those peoples and the non-viability of their causes and lawsuits, which drag on or even are stagnated in several government administrative instances, reproducing the secular colonization processes of historical erasure, social exclusion, homogenization of their identities, disrespect to their sciences, knowledges etc., despite the advances documented in the Federal Constitution of 1988, according to which rights should be enforced and promote permanently the necessity of decolonization of thought and of a production of more effective public policy in favor of diversity and Indigenous identity, truly including them in the national project.

REFERENCES

BRAZIL. **Decree-law 37.627 of October 27, 1831**. Brasília: Chamber of Deputies, 1831. Available at: [Portal da Câmara dos Deputados \(camara.leg.br\)](http://Portal da Câmara dos Deputados (camara.leg.br)). Accessed on Nov 3, 2017.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 601 of September 18, 1850**. About the Empire wastelands. Rio de Janeiro, 1850. Available at: <https://www.planalto.gov.br/>

[ccivil_03/LEIS/L0601-1850.htm](https://www.planalto.gov.br/ccivil_03/LEIS/L0601-1850.htm). Accessed on Nov 14, 2017.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 2.848 of December 7, 1940. Penal Code**. Rio de Janeiro, 1940. Available at: https://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del2848.htm. Accessed on Aug 2, 2019.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 3.689 of October 3, 1941. Code of Criminal Procedure**. Rio de Janeiro, 1941. Available at: https://www.planalto.gov.br/ccivil_03/Decreto-Lei/Del3689.htm. Accessed on Jan 18, 2020.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 6.001 of December 19, 1973**. About the Indian Statute. Available at: http://www.planalto.gov.br/ccivil_03/leis/l6001.htm. Accessed on Apr 18, 2019.

BRAZIL. Presidency of the Republic. Civil Affairs. **Constitution of the Federative Republic of Brazil of 1988**. Brasília, DF, 1988. Available at: https://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm. Accessed on Feb 10, 2019.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 591 of July 6, 1992**. International Acts. International Pact on Economic, Social and Cultural Rights. Promulgation. Brasília, DF, 1992a. Available at: https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0591.htm. Accessed on Apr 18, 2019.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 592 of July 6, 1992**. International Acts. International Pact on Civil and Political Rights. Promulgation. Brasília, DF, 1992b. Available at: https://www.planalto.gov.br/ccivil_03/decreto/1990-1994/d0592.htm. Accessed on Feb 10, 2019.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 678 of November 6, 1992**. The American Convention on Human Rights (Pact of San José from Costa Rica) of November 22, 1969, is promulgated. Brasília, DF, 1992c. Available at: https://www.planalto.gov.br/ccivil_03/decreto/D0678.htm. Accessed on Apr 18, 2019.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 10.406 of January 10, 2002**. The Civil Code is established. Brasília, DF, 2002. Available at: https://www.planalto.gov.br/ccivil_03/LEIS/2002/L10406compilada.htm. Accessed on Feb 10, 2019.

BRAZIL. Presidency of the Republic. Civil Affairs.

Decree-law no. 3.087/1999. The Convention on the Protection of Children and to the Co-operation in Respect of Intercountry Adoption concluded in Haia on May 29, 1993, is promulgated. Brasília, DF, 1999. Available at: <https://www.oas.org/dil/esp/Conven%C3%A7%C3%A3o%20relativa%20%C3%A0%20Prote%C3%A7%C3%A3o%20das%20Criancas%20e%20Cooperac%C3%A7%C3%A3o%20em%20Mat%C3%A9ria%20de%20Ado%C3%A7%C3%A3o%20Internacional,%20conclu%C3%ADa%20na%20Haia,%20em%2029%20de%20maio%20de%201993%20Brasil.pdf>. Accessed on Feb 20, 2021.

BRAZIL. Presidency of the Republic. Civil Affairs. **Decree-law no. 5.051 of April 19, 2004.** The Convention no. 169 of the International Labour Organization – ILO on The Indigenous and Tribal Peoples is promulgated. Brasília, DF, 2004. Available at: https://www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Decreto/D5051.htm. Accessed on Feb 10, 2019.

CARAZZA, Bruno. Chico, Dorothy, Bruno and the other 307 victims. **Economic Value.** São Paulo, Jun 20, 2022. Available at: <https://valor.globo.com/politica/coluna/chico-dorothy-dom-bruno-e-as-outras-307-vitimas.ghtml>. Accessed on Mar 11, 2022.

CUNHA, Manuela Carneiro da; BARBOSA, Samuel Rodrigues. **Rights of Indigenous peoples in dispute.** São Paulo: Unesp, 2018.

FACHIN, Patricia. The origin of human rights is in the rereading of the Right of Peoples. **Institute Humanitas Unisinos Journal** [online], n. 511, Sep 2017. Available at: <http://www.ihuonline.unisinos.br/artigo/7035-a-origem-dos-direitos-humanos-esta-na-releitura-do-direito-das-gentes>. Accessed on Mar 12, 2021.

ILO (International Labour Organization). ILO Office Director in Brazil. **Convention 169 in Guarani-kaiowá and Brazilian Portuguese.** Amandaje no. 169 Ava Ka'aguygua rehegua Tetã Sãsoyguakuéruguáva ha Ñemobohechapyrã ojejapo va'erã pe OITre ñemoñe'epyre Ava 197 ka'aguygua rehe./. Brasília: International Labour Organization, 2012. Translators from the ethnicity Guarani Kaiowá Cajetano Vera and Tónico Benites. Available at: http://www.funai.gov.br/arquivos/conteudo/cogedi/pdf/LEGISLACAO_INDIGENISTA/Legi%20slacao-Fundamental/169_guarani_kaiowa_web_812.pdf. Accessed on Jun 2, 2021.

ILO (International Labour Organization). **Conven-**

tion 169 in Terena and Brazilian Portuguese. Convention no. 169 koyúhoti kopénotihiko yoko trîbuhiko ya pói poké'e yoko Resolução Koyúhoti ítuke ra OIT xapákuke kopénotihiko yoko trîbuhiko. Brasília: International Labour Organization, 2012. Indigenous peoples, tribal peoples, human rights, ILO Convention, ILO Resolution, commentary, application 14.08. Translation of the Convention no. 169 on Indigenous and Tribal Peoples and Resolution to the action of ILO for Indigenous Brazilian Terena Language. Available at: [169.terena.indd\(direitosocioambiental.org\)](http://169.terena.indd(direitosocioambiental.org)). Accessed on Apr 14, 2021.

INTERNATIONAL LABOUR ORGANIZATION (ILO). **Convention no. 169 on Indigenous and Tribal Peoples and Resolution to the action of ILO.** 1989. Available at: <http://www.oit.org.br/convention>. Accessed on Mar 28, 2018.

KRENAK. Ailton. **Ideas to postpone the end of the world.** São Paulo: Companhia das Letras, 2019.

SANTAMARÍA, Rosember Ariza. El regimen jurídico de las tierras, la Convención 169 de la OIT y la actuación del poder judicial frente a los derechos del territorio. *In:* GEDIEL, José António Peres; CORRÊA, Adriana Espíndola; SANTOS, Anderson Marcos dos; SILVA, Eduardo Faria. **Conflicting Rights: social movements, resistance, and case law.** v. 2. Curitiba. Kairós, 2015. p. 25.

SARTORI, Vitor Bartoletti. **Ontological critic of Law.** São Paulo: Cortez, 2010.

STEFANO, Daniela; MENDONÇA, Maria Luisa (eds). **Brazil 2021 Human Rights: A Report of Social Network for Justice and Human Rights.** São Paulo: Outras Expressões, 2021.

TERENA, Luiz Eloy. The criminalization of Indigenous leaders as repression of political action. *In:* STEFANO, Daniela; MENDONÇA, Maria Luisa (eds). **Brazil 2021 Human Rights: A Report of Social Network for Justice and Human Rights.** São Paulo: Outras Expressões, 2021. p. 91-94.

UNITED NATIONS ORGANIZATION (UN). **Declaration of the United Nations on the Rights of Indigenous Peoples.** Rio de Janeiro, 2007. Available at: https://www.acnur.org/fileadmin/Documentos/portugues/BDL/Declaracao_das_Nacoes_Unidas_sobre_os_Direitos_dos_Povos_Indigenas.pdf. Accessed on Jul 1, 2018.

UNITED NATIONS ORGANIZATION (UN). **Declaration of the United Nations on the Rights of Indigenous Peoples.** Rio de Janeiro, 2008. Available at: <http://www.un.org/esa/socdev/unpfii/>

[documents/DRIPS_pt.pdf](#). Accessed on Nov 2016.

VIVEIROS DE CASTRO, Eduardo. **“In Brazil, everybody is Indian, except the ones who are not”.**

Interview granted to the Socio-environmental Institute (ISA) on April 26, 2006. Available at: https://pib.socioambiental.org/files/file/PIB_institucion-

[al/No_Brasil_todo_mundo_%C3%A9_%C3%ADn-dio.pdf](#). Accessed on Sep 14, 2019.

Received in: 15/04/2022

Approved in: 11/07/2022



Este é um artigo publicado em acesso aberto sob uma licença Creative Commons.