

THE DEMARCATION OF INDIGENOUS LANDS AND LEGAL SECURITY

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ABSTRACT

This article analyzes, under the legal security focus, the attempt to change the demarcation of indigenous lands policy proposed by the today President, based on the article 2121 XIV, § 2º and of the article 43 “i” in the Provisional Presidential Decree no. 870/2019 that, even denied by the National Parliament, the content had been reedited in the same legislative session, through the Provisional Executive Act no. 886/2070. Although the changes are related to the FUNAI’s duties have not been approved by the National Congress, the proposal resulted in several actions of unconstitutionality because it violates indigenous rights which are embedded in the Federal Constitution of 1988 and in the ILO’s Convention no. 169 on Indigenous and Tribal peoples of the International Labor Organization (ILO). A critical-dialect research was adopted, of legal-theory type, followed by a qualitative approach through bibliographic survey from primary and secondary data. At the end, it was confirmed the initial hypothesis that the Provisional Executive Act contributed for the rise of the legal insecurity of the indigenous peoples in relation to the guarantee of their territory rights.

Keywords: demarcation of indigenous lands; indigenous peoples; legal security; provisional presidential decree; territory rights.

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A DEMARCAÇÃO DE TERRAS INDÍGENAS E A SEGURANÇA JURÍDICA

RESUMO

O presente artigo analisa, sob o enfoque da segurança jurídica, a tentativa de alteração na política de demarcação de terras indígenas proposta pelo atual chefe do Poder Executivo, a partir do art. 21 XIV, § 2º e do art. 43 “i” da Medida Provisória (MP) n. 870/2019 que, mesmo rejeitados pelo Congresso Nacional, tiveram o conteúdo reeditado na mesma sessão legislativa, por meio da MP n. 886/2019. Embora as mudanças relativas às atribuições e à vinculação ministerial da Funai não tenham sido aprovadas pelo Congresso Nacional, a proposta resultou em diversas ações de inconstitucionalidade por violar direitos indígenas previstos na Constituição Federal de 1988 e na Convenção 169 sobre os Povos Indígenas e Tribais da Organização Internacional do Trabalho (OIT). Adotou-se uma pesquisa com enfoque crítico-dialético, do tipo jurídico-teórica, acompanhada de uma abordagem qualitativa por meio de levantamento bibliográfico extraído de fontes primárias e secundárias de dados. Ao final do estudo, verificou-se a confirmação da hipótese inicial de que as MP contribuíram para o aumento da insegurança jurídica dos povos indígenas com relação a garantia de seus direitos territoriais.

Palavras-chave: demarcação de terras indígenas; direitos territoriais; medidas provisórias; povos indígenas; segurança jurídica.

INTRODUCTION

This article analyzes, from the perspective of legal security, the attempt to change the policy of demarcation of indigenous lands, proposed by the current President of the Republic, based on art. 21, XIV, § 2, and art. 43, 'i,' of Provisional Presidential Decree (MP) no. 870/2019 which, although rejected by the National Congress, had the content reissued in the same legislative session, through MP no. 886/2019.

The issuance of MP no. 870 in the first day of the year 2019, with the purpose of reorganizing the federal government's administrative structure by joining some ministries, extinguishing other ones and transferring public bodies, presented significant changes in the policy of demarcation of indigenous lands.

The aforementioned MP, in its art. 21, XIV, § 2, transferred the responsibility of Fundação Nacional do Índio (FUNAI) for regularization, identification, delimitation and registration of lands traditionally occupied by indigenous peoples to the Ministry of Agriculture, Livestock and Food Supply (MAPA).

The Ministry of Justice (MJ) was responsible for supervising FUNAI, and this responsibility was transferred to the Ministry of Women, Family and Human Rights through MP 870/2019, in its art. 43 'i,' and confirmed by Decree no. 9.673/2019. The administrative process of demarcating indigenous lands was also changed by Decree no. 9.667/2019, art. 66, which transferred MJ's responsibility for demarcating indigenous lands to MAPA.

Based on the 1988 Constitution of the Federative Republic of Brazil (CF/88), several manifestations arose regarding the unconstitutionality of this reorganization contained in MP no. 870/2019, since it introduced a policy dissociated from the respect for the indigenous peoples' original rights to their territory, contradicting the literalness of the constitutional guarantees expressed in art. 231 of CF/88.

The controversy occurred because of issuance of art. 21, XIV, § 2, and art. 43 of the MP, as it would not be coherent to transfer the responsibility for demarcating indigenous lands to MAPA, a ministry commanded by people from the rural sector and committed to promoting interests contrary to land demarcation. Likewise, it would not be consistent to withdraw the ministerial supervision of FUNAI from MJ.

After a lot of criticism against the proposal presented by the MP, on May 22, 2019, the Plenary of the Chamber of Deputies approved the basic

text of MP no. 870/2019, not accepting the changes promoted by the federal government. Thus, the responsibility for demarcation of indigenous lands returned to FUNAI and this body remained linked to the MJ.

The text was then sent to the Senate. The MP initial proposal was rejected and the changes made at the Chamber of Deputies were maintained. Thus, in June 18, Law no. 13.844/2019 came into force. However, the following day, the President of the Republic issued MP no. 886/2019, amending art. 21, XIV, § 2 of said law.

The intention was, again, to transfer the competence to identify, recognize, delimit, demarcate and registry lands traditionally occupied by indigenous peoples from FUNAI to MAPA, contrary to the National Congress' decision.

The change was challenged in the Federal Supreme Court (STF) by three opposition political parties. The grounds for the actions were based on the wording of art. 62, § 10, of CF/88, which establishes that "It is forbidden to reissue a provisional measure in the same legislative session in which it was rejected or lost its effectiveness due to lapse of time". As the National Congress did not agree with the wording of art. 21, XIV, § 2 of MP no. 870/2019, the President could not reissue another MP in the same legislative session dealing with similar content.

Thus, a preliminary decision was granted by Minister Luís Roberto Barroso, which suspended the changes made through MP no. 886/2019 to art. 21, XIV, § 2 of Law no. 13.844/2019. In addition, the Minister stressed that the National Congress had previously held FUNAI as responsible for demarcating indigenous lands. Therefore, the act was unconstitutional and constituted a clear violation of the principle of separation of Republic powers.

In this context, it was necessary to bring to the academic discussion and critical reflection the legislative changes proposed by the Executive Power through MP no. 870 and MP no. 886/2019. Although the proposed changes have not been approved by the National Congress, it is necessary to address the content of MP no. 870 and MP no. 866/2019, issued by the current Head of State.

Thus, this research aims to elucidate the process of change in the policy of demarcation of indigenous lands proposed by the President, through MP no. 870/2019 and MP no. 886/2019. Therefore, it starts from questioning about how the change process took place so that it would generate legal insecurity for indigenous peoples.

The hypothesis presented is that the changes foreseen in MP no. 870/2019 and MP no. 886/2019 triggered a growing legal insecurity for indigenous peoples, both with regard to the guarantee of the demarcation of their lands by the Union, provided for in art. 231 of CF/88, and for violating their right to prior consultation, as determined by art. 6 of ILO Convention 169.

Regarding the methodological aspects, initially, an exploratory research was carried out on the websites of the Federal Public Ministry (MPF), the Chamber of Deputies, the Federal Senate, and the Federal Supreme Court (STF), to update the information that was in the process of analysis and debate by the Legislative and Judicial Powers. Then, the study was complemented by reading the content of doctrine, jurisprudence, and national and international standards.

The research presents a qualitative approach, with a critical-dialectical focus. As for the type of research in law, we opted for a legal-theoretical research, accompanied by a bibliographic survey on the topic. Regarding the nature of the data, primary sources were used, such as analysis of the legislation on the subject, besides secondary sources, as books and scientific articles specialized in the subject.

1 LEGAL SECURITY

Addressing legal security is not a simple task in view of the conceptual ambiguity that the expression raises and the differences regarding its definition as a constitutional principle, implicit or expressed in CF/88.

Ávila (2011) considers that the preamble to CF/88 already shows the importance of legal security in a rule-based democracy. In addition to the preamble, other direct and indirect references to the term are present in art. 5, which provides for the fundamental right to security.

CF/88 mentions security as a fundamental value in its preamble, and also includes it as an inviolable right in the head provision of art. 5, but at no time the constitutional text has an express reference to a right to legal security (ROCHA, 2005). In spite of no express mention of this right, several provisions of CF/88 contemplate it (SARLET, 2010).

It can be seen that, despite different interpretations regarding the definition of the concept of legal security, there is a common understanding that the principle stems from art. 5 of CF/88 and “has a direct connection with fundamental rights” (MELO, 2006, p. 136).

The central idea of legal security is based on two basic concepts (CANOTILHO, 2000): (1) stability of decisions; once adopted, they cannot be altered in an authoritarian or abusive manner, but only in situations where considerable material hypotheses are present; (2) predictability, based on the idea of trust, citizens' certainty about the legal effects of the rule. The author adds that it refers to two material principles that underpin the general principle of security:

[...] The principle of determinability of laws expressed in the demand for clear and dense laws and the principle of protection to trust, translated into the demand for laws that tend to be stable, or, at least, not detrimental to the predictability and calculability of citizens regarding their effects (CANOTILHO, 2010, p. 372).

In a context of instability in decisions, legal security assumes the primary role against the practice of arbitrariness and in the search for social pacification, justice and protection to rights. Therefore, it must be inherent in the regular functioning of the legal system of a rule-based democracy.

The fundamental value of the principle of legal security lies in the very existence of Law, as it is a foundation that sustains the stability of legal relations and does not consent "to affect situations already recognized and properly consolidated, born under the previous law in force, with retroactive application of new interpretation of the law" (OLIVEIRA, 2003, p. 224).

It should also be noted that CF/88, art. 5, item XXXVI, determines that the law shall not prejudice the acquired right, the perfect legal act and the *res judicata*. Article 6 of the Act of Introduction to Brazilian Law Norms (LINDB) indicates the same direction: the perfect legal act, the acquired right and the *res judicata* must be respected when the new law enters into force.

The wording of these articles is related to the subjective concept of legal security, corresponding to the "limits to the retroactivity of State acts, even when they qualify as legislative acts. Therefore, it concerns the protection to acquired rights, perfect legal act, and *res judicata*" (COUTO E SILVA, 2004, p. 273). From this point of view, in the objective aspect, legal security refers to the stability of legal relations, while in the subjective aspect it is related to the protection to confidence in the validity and stability of the acts performed (CANOTILHO, 2000).

It is important to consider that legal security and protection to trust cannot be absolute values capable of preventing the State from making

changes of public interest. However, it is not possible to admit the State adopting measures capable of surprising those who trusted in their rights emanating from the constituent power (COUTO E SILVA, 2004).

Limits are imposed on the State to practice acts and to change them. Thus, the succession of laws over time must ensure the value of legal security due to people's confidence that the relationships established under the validity of a certain standard will be valid until they are replaced by others (SILVA, 1998).

For this reason, Rocha (1997) considers legal security as a principle that supports the State, capable of providing the individual with firmness in the application of justice and compliance with citizens' rights. However, the protection to the citizen is sought through the respect for fundamental rights by the new legal norm; it cannot be disproportionate or inadequate (CANOTILHO, 2000).

Therefore, a rule-based democracy has the principle of legal security among its foundations. Acts emanating from the powers of the Republic must be subordinated to the respect for acquired prerogatives and cannot promote setback to fundamental rights.

The very definition of the concept of legal security is associated with maintaining stability and effectiveness in guaranteeing acquired rights, their non-violation, and prohibition of measures with content that present withdrawal or suppression of rights already assured.

It is in this scenario that the principle of prohibition of social setback also stands out. According to Sarlet (2010), protection to fundamental rights is only possible through a minimum level of legal security in which Law also ensures protection to trust, the dignity of the human person and the prohibition of retrogressive measures.

The ban on retrogression comes from the following principles: principle of the social democratic state that obeys the rule of law, which requires a minimum level of legal security; principle of human dignity; principle of maximum effectiveness of the norms that define fundamental rights, and principle of protection to trust (SARLET, 2010).

From the moment that the citizens are unprotected against retroactive laws that affect their rights or when their confidence in the consolidated legal order is damaged, the relationships become unstable and legally insecure. Thus, it is the role of the State to provide legal security in social relationships, especially in relation to the enjoyment of fundamental rights, as it is the indigenous peoples' right to the traditionally occupied territory.

2 INDIGENOUS PEOPLES FUNDAMENTAL RIGHT TO THE DEMARCATION OF THEIR LANDS

Art. 231 of CF/88 recognizes that “Indians shall have their social organization, customs, languages, creeds and traditions, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property” (BRASIL, 1988, p. 68).

Before CF/88, the recognition of indigenous rights was restricted to the right to possession of the lands that they traditionally occupied. After the promulgation of CF/88, there was an expansion of rights, which extended to respect for their social organization, customs, languages, creeds and traditions. Barreto (2014), Souza Filho (1998), and Wagner (2019), among others, point to this direction.

According to Fernandes (2017), indigenous possession in Brazilian law is configured as a fundamental right and present both in CF/88 and in infraconstitutional legislation. Its protection is not linked to private property, nor does it compare to civilian possession, since indigenous peoples have a community view of the land and a different way of understanding and relating to it.

The advancement in legislation represented the guarantee of the right to difference and the legitimation of territorial rights, in addition to enabling the maintenance of their social organizations and establishing the appropriate pattern of contact with the rest of society, without removing their cultural identity, breaking with the idea of a homogeneous Brazilian society to which the indigenous peoples should be integrated.

For Cunha (1998), the demarcation represents an act of recognition by the State that the indigenous peoples hold the original title over their lands. The Executive Power issues only an act declaring a right prior to the legal system itself.

The land traditionally occupied by the indigenous peoples, constitutionally guaranteed, is a right that is beyond the recognition or non-recognition by the State: it is prior to the law itself, it is a pre-existing right. “And this presumption has a strong trace of reality, the indigenous peoples were already in that land before the non-indigenous ones arrived” (SOUZA FILHO, 1998, p. 148).

The Federal Prosecution Service (MPF), through the 6th Chamber of Review (indigenous populations and traditional communities), when

issuing a technical note against the Proposed Constitutional Amendment (PEC) No. 215/2000 that aims, among other points, to make the National Congress responsible for the approval of demarcation of indigenous lands, considered that it violates fundamental rights, such as the indigenous peoples' right to traditionally occupied lands (art. 231) and acquired rights granted directly by the CF/88, in its art. 5, XXXVI (SARMENTO, 2013).

The Federal Supreme Court (STF) Plenary has already emphasized the importance of the originality and precedence of the indigenous peoples' right to their territories:

“ORIGINAL” RIGHTS. The rights of the Indians over the lands they traditionally occupy have been constitutionally “recognized,” and not simply granted, with the result that the demarcation act is of a declaratory, and not exactly constitutive, nature. Declaratory act of a pre-existing active legal situation. That is why the Constitution called them “original,” to translate a right older than any other, in order to preponderate over alleged acquired rights, even those materialized in public deeds or titles of legitimation of possession in favor of non-Indians. Acts that the Constitution itself declared “null and void” (§ 6 of article 231 of the Constitution) (BRASIL, 2009, p. 237).

The struggle of the indigenous movement and sectors of civil society, in the midst of the process of redemocratization in Brazil, contributed to breaking the perspective of assimilation and protection to indigenous peoples that prevailed in law until 1988. Thus, “land issue was one of the most controversial subjects in the drafting of the 1988 Constitution, which sought to surround this fundamental right with all guarantees” (SILVA, 2014, p. 871).

According to Santilli (2000) and Luciano (2006), CF/88 abandoned the assimilationist ideas and introduced the recognition of indigenous peoples' permanent rights, considering them present subjects, with the right to future existence as differentiated peoples. It was recognized that the land has an identity meaning to indigenous peoples, represents their physical and cultural survival, the maintenance of their way of life and knowledge.

It can be said, then, that CF/88 broke with the systematic policy of assimilation and cultural uprooting and inaugurated a welcoming policy, providing the understanding that a pluralist democracy does not exist without the presence of minorities with respected rights (DORNELLES, 2017).

As a fundamental right (SILVA, 2014), the recognition of the right to traditionally occupied lands demands a formal act of this recognition, which is demarcation. Demarcation is important for both indigenous and

non-indigenous people, so that the explicit recognition of this right to the former and the others' duty to respect it is evident.

In general terms, it is understood that demarcation of lands is an administrative act of a declaratory nature that is within the competence of the Union in order to delimit the territory traditionally occupied by indigenous peoples. Such act is linked to art. 231 of CF/88 and the Union cannot stop practicing it, in view of the fact that it is important to explain the limits of indigenous possession and guarantee greater legal security.

Although the Constitution has ordered the Union to demarcate indigenous lands, there are several areas without definition of their limits so far³. Art. 67 of the Transitional Constitutional Provisions Act (ADCT) determined a five-year period from the promulgation of CF/88 for demarcations in Brazil to be concluded.

More than three decades have passed and this has not occurred in its entirety. The stipulated period is constitutional, it is a goal to be met, but it is clear that the Union interprets it as a discretionary act, with no defined period for execution.

On this matter, the STF expressed itself, in a decision in the Writ of Mandamus no. 26.212, in the sense that the provision of art. 67 of the ADCT has no statutory limitation period. It is a programmatic standard to be fulfilled within a reasonable period (BRASIL, 2011).

Prior to CF/88, the Indian Statute, Law no. 6.001/1973, in art. 65, ordered the Executive Power to demarcate indigenous lands within five years, that is, in 1978 all known indigenous lands should be already properly demarcated. It is clear that this deadline was also not met and the omission did not have any legal or administrative consequences. "The Union is indebted to the indigenous peoples and to the obligation to promote the demarcation that the head provision of art. 231 establishes" (SOUZA FILHO, 1998, p. 150).

The Indian Statute, elaborated in the context of the 1967 Constitution, is based on an integrationist vision that sees the indigenous peoples still under the tutelage regime, considering them incapable to exercise certain acts of civil life. At this point, therefore, out of step with CF/88. The Bill (PL) no. 2.057/1991, known as the "Indigenous Societies Statute," to regulate constitutional provisions and to adapt the Statute to the terms of CF/88, is pending before the Chamber of Deputies, and the project has

³ FUNAI discloses that there are 440 regularized indigenous lands, that is, with the demarcation process completed and 127 indigenous lands in different phases of the demarcation and 117 areas under study (FUNAI, 2016).

been paralyzed since 1994, with no prospect of approval (BRASIL, 1991).

In this scenario of the Executive Power's omission, the indigenous peoples' subjective right to seek in the Judicial Power the fulfillment of the constitutional determination appears. While the demarcations do not completely occur, indigenous communities are exposed to insecurity and vulnerability promoted by the Union's slowness in meeting constitutional determination.

The situation tends to worsen with the federal government policy implemented from 2019. There is a strong tendency to restrict indigenous rights, especially those related to the recognition of their territories, as well as protection to those already demarcated.

3 PROVISIONAL PRESIDENTIAL DECREES

CF/88 allows the President of the Republic to issue MP, normative instruments with force of law and production of immediate effects that shall be adopted only in cases of relevance and urgency, and must subsequently be submitted to the appreciation of the National Congress to be voted into law.

The term of an MP is 60 days, renewable once for an equal period. If it is not voted within 45 days from its publication, it will suspend the agenda of Congress (Chamber of Deputies or Senate). After being sent to the National Congress, a mixed commission, formed by deputies and senators, is created in order to prepare an opinion on the provisional decree. In case of approval of the opinion, the text is sent to the Plenary of the Chamber of Deputies, then to Plenary of the Senate.

Otherwise, if the Chamber of Deputies or Senate does not agree with the opinion, or the MP has lost its effectiveness, it will be necessary to issue a legislative decree by parliamentarians to guide the legal effects caused during its term.

In the situation where the content is changed, the MP starts to be processed as a conversion bill. When it is approved by the Chamber of Deputies and Senate, the MP or the conversion bill is sent to the President of the Republic for sanction. The latter may veto the text in parts or in full.

This entire processing process described is provided for in art. 62 of CF/88, which also defines the topics on which the edition of MP is prohibited. Despite the use of MP, Figueiredo and Limongi (2001) understand that the evaluation of the advantages of using this type of instrument needs

to be analyzed under two effects, one positive and the other negative: the first measures the increase in gains achieved with the purposes for which the provisional decree was intended, while the second takes into account the ability to prevent certain loss of rights.

Despite the fact that the relevance and urgency for the issuance of MP is required as a presumption, Rocha (2005) criticizes the subjectivism that exists in the Executive Power's evaluation in defining what would be relevant and urgent. This ends up hindering control by the National Congress and allowing the Judicial Power to interfere with the legislative activity exercised. The legal system requires protection through legislative proposals of standards alteration and innovation in order to adapt them to the principle of legal security.

The possibility of innovating in the legal order by means of a species of rule of an emergency nature may result in the abusive use of legislative attributions by the Head of State. As at the beginning there is not a republican discussion about the topic to be addressed, "these provisional decrees are usually seen as another characteristic of Latin American presidentialism, an authoritarian residue inherited by the new democracies" (FIGUEROA; LIMONGI, 2001, p. 125.).

As a result, attention must be paid to the principle of separation of Powers, since each of the Powers – Executive, Legislation and Judicial – has certain functions. The Powers, due to this separation, must follow their purposes (Bonavids, 2000). Although autonomous and independent from one another, one Power needs to control the other by means of what is called the checks and balances system, in which a Power is able to contain any abuse by the other, returning the balance necessary to ensure the Rule of Law and the functioning of institutions.

In the case of the MP, the Executive Power receives a constitutional authorization to exercise a special legislative function, an exception to its administrative function, aimed at providing greater readiness and agility for the creation of norms in certain situations.

Hence the need to strengthen the checks and balances system in order for MPs to be used carefully, so as not to attend only government projects that are disconnected from society's interests. The Executive Power cannot use MPs in an excessive and inconsequential manner to legislate, taking advantage of the immediate effectiveness and the force of law that they have.

4 ARTICLES 21 AND 43 OF PROVISIONAL PRESIDENTIAL DECREE NO. 870/2019 AND LEGAL INSECURITY

Articles 21 and 43 of MP no. 870/2019 generated a series of criticisms, not only from representatives of indigenous movements, but also from parliamentarians and the media (LOTFI; BRITTO, 2019). Art. 21, XIV, § 2 had the following wording:

Art. 21. The areas of competence of the Ministry of Agriculture, Livestock and Food Supply are:

XIV – agrarian reform, land regularization of rural areas, Legal Amazon, indigenous and quilombola lands;

§ 2. The competence referred to in item XIV of the head provision includes:

I – the identification, delimitation, demarcation and registration of lands traditionally occupied by indigenous peoples (BRASIL, 2019c).

In turn, art. 43, ‘i,’ of MP no. 870/2019, transferred the ministerial supervision of FUNAI, which was the MJ’s responsibility, to the Ministry of Women, Family and Human Rights:

Art. 43 The Ministry of Women, Family and Human Rights is responsible for:

i) indigenous rights, including the monitoring of health actions developed for the benefit of indigenous communities, without prejudice to the powers of the Ministry of Agriculture, Livestock and Food Supply (BRASIL, 2019c).

The change was confirmed by the publication of Decree no. 9.673/2019. The administrative process of demarcating indigenous lands was also modified through art. 66 of Decree no. 9.667/2019, which transferred the MJ’s responsibility for demarcating them to MAPA.

This competence deconcentration would result in removing tasks carried out by FUNAI aimed at environmental licensing for undertakings capable of generating impacts on indigenous peoples. Thus, both the demarcation process and the performance of environmental licensing with an impact on indigenous lands would become the responsibility of MAPA’s Secretariat of Land Affairs.

The position of the current government, with a clear discourse of an integrationist view regarding indigenous peoples, leads one to believe that MP no. 870/2019 aimed to weaken these peoples’ rights guaranteed in the Brazilian legal system (PALMQUIST *et al.*, 2019).

Despite the difficulties in carrying out its duties, FUNAI has an organizational structure aimed at protecting indigenous peoples’ right to land. The principles that support it are based on the consolidation of the

democratic State, with recognition of these peoples' social organization, in the preservation of their customs, languages, creeds and traditions (FUNAI, 2016).

Land demarcation is an extremely complex procedure, which requires interdisciplinary expertise in several areas of knowledge. It also depends on a trust relationship, already established by FUNAI with the indigenous peoples, and this historical vocation could not be simply disregarded.

It is noticed that the proposals for changes in indigenous policy elaborated through MP no. 870/2019 would result in the impossibility of new land demarcations, a violation of the right provided for in art. 231 of the Constitution, producing enormous insecurity regarding the continuity of the already existing demarcation processes and the difficulty of starting new processes for the recognition of indigenous territories.

5 DIRECT ACTION OF UNCONSTITUTIONALITY NO. 6062 AND ARTICLES 21 AND 43 OF MP 870/2019

The Direct Action of Unconstitutionality (ADI) no. 6062, filed by the Brazilian Socialist Party (PSB), questioned the wording of art. 21, XIV, § 2. The argument maintained that the provisional presidential decree was detrimental to the subsistence of indigenous groups, since FUNAI's duties would be transferred to a body with no experience in the matter and with different opinions from those of indigenous peoples. It was also alleged that the rules failed to comply with the guarantees of indigenous peoples to a public administration with a structure compatible with the legislation and that there was no prior consultation with the main subjects involved in the elaboration of the MP (BRASIL, 2019e).

The provisional remedy was rejected by the Rapporteur Minister Luiz Roberto Barroso, who considered the restructuring of the bodies by the President of the Republic an act of a political nature, part of his discretionary competence. In addition, the matter was still under the appreciation of the National Congress and could undergo remodeling. Nevertheless, the Minister stressed that the structuring of the organs of the Presidency of the Republic is subject to judicial control as to form, purpose and proportionality (BRASIL, 2019e).

Regarding the form, he stressed that the change of the competent body for demarcation of indigenous lands would not be a reason to compel the Executive Power to carry out the prior consultation determined in the ILO

Convention 169, as it would not mean interference with indigenous communities' interests. Regarding the purpose, the Rapporteur considered that it is not acceptable to make a pre-judgment that the Union would no longer demarcate indigenous lands with the provisional presidential decree, since its competence is linked to this attribution and is not subject to political positions. With regard to proportionality, the Minister understood that it was not possible to foresee the failure of the Public Administration to carry out its constitutional obligation to protect indigenous peoples' rights (BRASIL, 2019e).

Therefore, in the abstract plan, the Judicial Power did not identify unconstitutionality in the content of art. 21, § 2, and art. 43, 'i,' of MP no. 870/2019. He left the National Congress responsible for assessing whether it would reject or approve its content.

On the one hand, the Judicial Power did not want to intervene in a matter that it considered a discretionary act of the President of the Republic's, understanding that judicial intervention was not necessary at that time. On the other hand, the decision proved to be inefficient, since the issue returned to the STF due to the insistence of the President of the Republic to approve the matter according to his sovereign will, in disagreement with the determination of the National Congress.

6 INDIGENOUS PEOPLES' RIGHT TO PRIOR CONSULTATION PROVIDED FOR IN ILO CONVENTION 169 AND ITS VIOLATION

ILO Convention 169 has as one of the central elements the right of indigenous peoples to be consulted and participate in decisions made through administrative and legislative measures that address their interests.

This consultation will be carried out through legitimate representatives and using appropriate procedures in order to lead to a negotiation aimed at a joint decision, which takes into account the opinion of the main actors involved.

Inserted in the Brazilian legal system by Decree no. 5.051/2004, ILO Convention 169 has the nature of a supralegal normative act, as it is an international human rights treaty, and its content must be observed in the development of standards, under penalty of being held liable at the international level for noncompliance with a ratified treaty. "The great merit of receiving ILO Convention 169, therefore, is the international commitment

assumed by Brazil in relation to its indigenous peoples, now in accordance with what is foreseen internally” (WAGNER, 2014, p. 260).

For Souza Filho (2009), this Convention guarantees the recognition of indigenous societies in the legal order of the countries that adopt it, in view of determining to States the protection of property, demarcation of indigenous territories, and prior consultation. Art. 6 of ILO Convention 169 states that:

1 – In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly (BRASIL, 2004).

In a nutshell, it is stated that any legislative or administrative measure capable of affecting indigenous peoples depends on free, prior and informed consultation with interested parties, so that non-compliance will imply the State being held liable. Administrative measures are considered “administrative acts with the force of law and normative acts arising from the Executive Power, such as provisional decrees, decrees, ordinances, normative instructions” (GLASS, 2019, p. 87).

Therefore, arbitrary political measures that interfere with indigenous peoples’ lives without their participation are not allowed. It is essential to listen to them and adjust decisions to your needs. The State cannot seek to serve only political and economic interests, without paying attention to guaranteeing the rights of the main affected individuals. “A new milestone was thus imposed to guide the relationship between indigenous and tribal peoples and national states, which points to a scenario of greater respect and less asymmetry” (YAMADA, 2019, p. 11).

In addition to ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples also provides for the right to prior consultation:

Article 19 – States will consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (BRASIL, 2004).

It is inferred from the articles the requirement of consultation with indigenous peoples before legislative and administrative measures that deal with issues related to their territories, resources and development are taken and applied.

These legal instruments prove the State's obligation to consult indigenous peoples when issuing provisional decrees, such as MPs no. 870 and MP no. 866/2019, which dealt with significant changes in indigenous policy.

It is not possible the existence of discretion or legitimacy on the part of the government that allows waiving the indigenous peoples' right to prior consultation and the imposition of measures contrary to their interests. From this angle, it is incorrect to say that there is democracy when there is no participation of the subjects involved in political decisions. For being the nation's indigenous peoples, they have the right to information and participation in the decisions of their interests (VILLARES, 2009).

It is important to emphasize that the Brazilian Judicial Power has already been applying art. 6 of ILO Convention 169. As an example, the judgment made in 2017 stands out, in which the Regional Federal Court of the 1st Region (TRF1) determined the indefinite suspension of the prior license to install the Canadian mining company Belo Sun Mining and determined prior consultation with the affected indigenous communities, Juruna and Arara de Volta Grande do Xingu (MINISTÉRIO PÚBLICO FEDERAL, 2018).

The company intends to install the largest open pit gold mine in the country in the municipality of Senador José Porfírio (PA), approximately 10 km away from the Belo Monte Hydroelectric Plant (UHE), in the municipality of Altamira, in the state of Pará. The TRF1 decision complied with the request for a public civil action filed by the MPF since 2013, which requests prior consultation with indigenous peoples who may be affected by the installation of the project (MINISTÉRIO PÚBLICO FEDERAL, 2018).

According to Duprat (2015), despite the legal determination of prior consultation, there is a constant disrespect from the Brazilian State, as it considers it an unnecessary formality. The State considers itself qualified to point out what would be indigenous peoples' interest, implement policies according to its own orientation.

In order to ensure this right, several indigenous peoples have created their own prior consultation protocols to formalize before the State the appropriate procedure to dialogue with each people in deciding on their priorities in the face of government proposals that interfere with their rights or territories. This initiative seeks to certify the existence of the right to prior consultation and to carry it out with the appropriate means, considering the

specific characteristics, and social and cultural organization of each people involved (GLASS, 2019).

The protocols constitute the exercise of the indigenous peoples' right to consultation. This alternative dialogue is an opportunity to express their opinions and participate in decision making along with the State. The protocols "can thus guarantee security and legitimacy to processes that, at the outset, tend to be conflicting and unequal" (GRUPIONI, 2017, p. 84).

According to Glass (2019), legislative measures that violate the indigenous peoples' right to consultation and consent may have their constitutionality questioned. The acts emanated by them can be considered null regarding both the unconstitutionality and the unconventionality of the law.

MP no. 870/2019 it is an example of an administrative measure that would directly affect indigenous peoples' lives and that has not fulfilled the duty of consultation with them. In this case, the provisional presidential decree classified as "non-consultative" has an unconstitutionality defect (GLASS, 2019).

Palmquist *et al.* (2019) points out that MP no. 870/2019 had vices that would lead to the nullity of the changes presented in art. 21, XIV, § 2, and art. 43, since there was no relevance and urgency for issuing the matter in question, and the requirement for prior consultation, provided for in ILO Convention 169, was not met.

ILO Convention 169 guarantees that indigenous peoples have their interests respected when a specific public policy is directed at them. The State has a duty to apply the rules and principles that deal with indigenous peoples' fundamental rights. It simply cannot, for the sake of interests, exclude them from decision making.

7 RE-ISSUANCE OF MATTER REJECTED IN MP 870/2019 AND THE AGGRAVATION OF LEGAL INSECURITY FOR INDIGENOUS PEOPLES

In view of the rejection of the amendments proposed by MP no. 870/2019 to the policy of demarcating indigenous lands, the President of the Republic decided to reissue the content of art. 21, XIV, § 2, through MP no. 886/2019 and thus to return FUNAI supervision to MAPA, not complying what had been determined by the National Congress.

This amendment to art. 21 of Law No. 13.844/2019, promoted by art. 1 of MP no. 886/2019, was challenged before the STF based on art. 62, §

10, of the CF/88, which clarifies that “It is forbidden to reissue a provisional measure in the same legislative session in which it was rejected or lost its effectiveness due to lapse of time”. As the content was not approved by Congress, the President could not resubmit the proposal in another Provisional Presidential Decree in the same legislative session.

8 DIRECT ACTION OF UNCONSTITUTIONALITY AGAINST MP NO. 886/2019

There were three actions of unconstitutionality against MP no. 886/2019: ADI n. 6172, filed by the Rede Sustentabilidade (REDE) Party, which challenged art. 1 regarding the part in which it changes art. 21, item XIV and § 2, and art. 37, item XXI, of Law no. 13.844/2019; the other actions, authored by the Workers’ Party (PT) and the Democratic Labor Party (PDT), respectively ADI 6173 and ADI 6174, were limited to challenging the changes promoted in art. 21, item XIV and § 2. The claimants alleged that the provisions were unconstitutional because they reissued a rule that intended to transfer competence for demarcation of indigenous lands from FUNAI to MAPA.

According to the applicants’ arguments, there was formal unconstitutionality, for violation of art. 62, § 10, of CF/88, and material, in the following aspects: (a) violation of the principle of separation of powers (article 2 of the Constitution), since the MP was a way of circumventing the deliberation of the National Congress; (b) disregard of the Rule of Law (article 1 of the Constitution); (c) non-compliance with indigenous peoples’ rights to the demarcation of their lands (art. 231 of CF/88), considering that there are conflicting interests, and (d) violation of ILO Convention 169 (BRASIL, 2019e).

In view of this, Minister Luís Roberto Barroso granted a preliminary injunction for the three proposed ADI and, thus, suspended the passage of MP no. 886/2019 that transferred the competence to demarcate indigenous lands to MAPA.

For the Minister, the requirements for granting the preliminary injunction were present. The final decision fell to the National Congress, which acted in its typical function, by rejecting, in the process of converting MP no. 870/2019, transfer of land demarcation to MAPA. Furthermore, issuance of MP no. 886/2019 confronted the rule of art. 62, § 10 of CF/88.

Thus, there was suspension of the changes made by art. 1 of MP no. 886 to art. 21, item XIV and § 2 of Law 13.844/2019, recognizing the

impossibility of reissuing the MP dealing with rejected content in the same legislative session. The following thesis was consolidated by the STF:

It is characterized as unconstitutional a provisional measure or law resulting from the conversion of a provisional presidential decree whose normative content characterizes reissuance, in the same legislative session, of a previous rejected provisional decree, of effectiveness exhausted due to time expiration or that has not yet been considered by the National Congress within the term established by the Federal Constitution (BRASIL, 2019e, p. 3).

Thus, on August 1, 2019, the STF ministers unanimously endorsed the provisional remedy granted by Minister Luís Roberto Barroso. It was found that the Head of State ignored the Constitution when promoting changes in art. 21 of Law 13.844/2019. Consequently, the competence to demarcate indigenous lands remains with FUNAI and no longer with MAPA.

The mobilization of indigenous leaders and parliamentarians opposed to changes in indigenous policy contributed to the revision and alteration of content contrary to the indigenous peoples' interests (ENTITIES CRITICATE..., 2019). The absence of prior consultation with indigenous peoples and the format adopted by the Presidency of the Republic to propose changes – through MP – that did not allow for a wide and open debate with society and, above all, with the indigenous peoples, who would be directly affected by changes, was not adequate.

Although the STF's decision was based on disrespect to the provisions of art. 62, § 10, of the CF/88, it is really necessary to question the option taken by the President of the Republic. It is noticed that the change in the proposed demarcation policy is out of step with the current stage and understanding of the legal norms that recognize indigenous peoples' rights, especially the right to demarcate their lands and the right to be consulted about administrative and legislative measures that can interfere with their lives.

CONCLUSION

It was possible to prove the hypothesis initially presented in the research. The MPs under analysis contributed to the increase in the legal insecurity for indigenous peoples with regard to the guarantee of the demarcation of their lands by the Union, provided for in art. 231 of CF/88,

and for violating their right to prior consultation in its preparation, as determined by art. 6 of ILO Convention 169.

The attempt to transfer the attribution of demarcation of indigenous lands from FUNAI to a Ministry that has functions incompatible with the demarcation is deeply worrying. In practice, it evidences the non-recognition of indigenous peoples as the main subjects affected by the changes suggested, denounces the lack of interest in maintaining a policy of recognition and guarantee of their traditionally occupied territories and, worse than that, places the State as the only responsible for the decision making.

The same interpretation is made when trying to understand the change in FUNAI's ministerial link. Upon withdrawing it from the MJ, FUNAI would be virtually unable to act in the monitoring and inspection services of indigenous lands.

CF/88 recognized the indigenous peoples' territorial rights, granted them different treatment and broke with the integrationist view that had prevailed until then. Thus, any policy contrary to this position will be considered incompatible with the constitutional precepts.

It is not possible to allow the return of the integrationist logic, ended with the CF/88. This would represent a real setback to Brazilian society, after several years of struggle and persistence by indigenous peoples in gaining recognition of their rights. It would be unfair to admit the legitimacy of unconstitutional proposals aimed at removing the protection of their fundamental rights.

It is unacceptable to legitimize a discourse of denial of the existence of these peoples, of cultural assimilation and disrespect for the maintenance of indigenous identity and culture. The truth is that these discourses aim to serve the interests of a few and not the nation's interests in general, having among their objectives the liberation of indigenous lands for economic exploitation without concern for the preservation of the environment or for the maintenance of these communities' cultural and social organization.

Through statements designed to enhance prejudice, racism and the feeling of hatred against indigenous peoples, the President of the Republic promotes intolerance towards the different ones. The issuance of the content of MP no. 870/2019 represented the beginning of the federal government's attempt to dismantle the policy of defense and guarantee of indigenous territorial rights.

The insistence on maintaining the demarcation of indigenous lands as the responsibility of MAPA, through MP no. 886/2019, has caused great

legal insecurity for indigenous peoples. The approval of the matter would condition land demarcation to the political and economic interests of the rural sector that commands MAPA.

It is true that the rejection of the proposals presented in MP no. 870 and MP no. 886/2019 will not paralyze the intention of the Head of State to consolidate his political project for indigenous peoples, whose perception seems to be more aligned with the integrationist vision than with CF/88.

It was also found that the legal insecurity caused to indigenous peoples is present not only in the edition of MP no. 870 and MP no. 886/2019, but in several statements by the President of the Republic. As, for example, by stating that it will no longer demarcate any centimeter of indigenous lands and will still review those already demarcated to reduce territorial extensions (RESENDE, 2018), or even when positioning himself, for example, in favor of the regulation of mineral exploitation and agricultural activity in indigenous land (EUSÉBIO, 2019).

In this direction, there is the recent Bill no. 191/20, forwarded to the President of the Chamber of Deputies, which intends to regulate § 1 of art. 176 and § 3 of art. 231 of the Constitution, to establish specific conditions for conducting research and mining mineral and hydrocarbon resources and for using water resources to generate electricity in indigenous lands, besides instituting indemnity for the restriction of usufruct of indigenous lands (BRASIL, 2020).

Therefore, it is necessary to continue monitoring the development of the federal government's current indigenous policy, so as not to allow setbacks in relation to indigenous peoples' fundamental rights guaranteed in CF/88, such as the demarcation of traditionally occupied lands.

The attempt to restructure FUNAI by withdrawing its responsibility for land demarcation and transferring it to MAPA can be seen as a cause of enormous legal insecurity for indigenous peoples, since their original right to lands traditionally occupied could be disqualified.

No reasonableness was identified in the decision taken by the Executive Power regarding the content alluding to demarcation of indigenous lands or in the decision to transfer the ministerial supervision of the body. The reason given for organ restructuring, in order to offer more economy and rationality in the organization of the federal public administration in its ministries, did not justify the proposed changes for FUNAI's duties.

Indigenous peoples have manifested themselves, clearly expressing their opinion and worldview. The Consultation Protocols prepared by

several indigenous peoples are an example of this manifestation. In those, the indigenous peoples explain a little about their way of life and clarify how dialogue with non-Indians should take place. Several indigenous peoples have developed their protocols, published widely in different media, including on the Internet, such as the Wajãpi people, the Juruna people, the Krenac people, the Munduruku people, and so on (GLASS, 2019). Another example is the Life Plans, which express the planning for the future, defining priorities and objectives of that respective community. As an example, the Life Plan of Oiapoque Indigenous Peoples and Organizations can be cited (APIO, 2009).

They are documents built collectively, with the participation of the community involved, in assemblies that can last for several days. Some of these meetings may even have participation of and support from non-Indians, but even so, they are the materialization of the desire of that community, those indigenous people.

Then, the right to be heard and manifest, provided for in art. 6 of ILO Convention 169, is effectively exercised by indigenous peoples. Why is it so hard to hear them?

A right that is so obvious – the right to express themselves, manifest an opinion and be heard in relation to the measures and actions that affect them – is systematically disregarded and, therefore, fragile. The explanation goes through the state tutelage, which left its deep marks on some people who occupy important public positions, such as the Head of State. However, the explanation goes far beyond the tutelary vision with regard to the indigenous peoples and goes through worldview conflicts, including about what is valuable and must be preserved. It goes through legal security and good faith. However, the right to consultation has been recognized at the legal level both internally and internationally. Therefore, by enacting CF/88 and ratifying ILO Convention 169, the Brazilian State made a commitment and generated a fair expectation that it would effectively comply with that commitment and effectively comply with legislation that it itself approved.

In this scenario, the legal security that should permeate relations between indigenous peoples and state agents is weakened. In its place, legal insecurity for indigenous peoples grows, according as their constitutional right to demarcation of traditionally occupied lands is not enforced by the Union and the right to consultation is not fully respected.

To reinforce such legal insecurity, there is the position of the Head

of State, who makes public statements contrary to land demarcation and proposes the exploitation of lands traditionally occupied by indigenous peoples in ways incompatible with those established by the indigenous themselves. Thus, the possibility of new provisional decrees contrary to the indigenous peoples' interests and in disagreement with CF/88 and ILO Convention 169 is on the horizon and only increases legal insecurity.

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