

COVID-19 AND INDIGENOUS PEOPLES IN BRAZIL: ETHNIC-RACIAL ANTI-DISCRIMINATORY LAW AND MINORITY RIGHTS

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ABSTRACT

This article examines the adverse effects caused by the new coronavirus (Sars-Cov-2) pandemic on Brazilian indigenous peoples as a result of a discriminatory policy by the Brazilian State. Taking as a starting point the historical experience of violence and discrimination faced by indigenous peoples in Brazil, the article analyzes the emergence of the pandemic at a global level, as well as its consequences in the national context, highlighting the disproportionate impacts on indigenous peoples, especially from the northern and central-western Brazilian regions. To this end, the article points out indigenous peoples' main sources of vulnerability and identifies a series of measures adopted or omitted by the Brazilian government towards these populations in the pandemic context. The article then analyzes

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the theoretical and legal framework of anti-discrimination law in order to verify whether and to what extent the state policies adopted in relation to these peoples violate the commandment of ethnic-racial equality and the International Convention on the Elimination of all Forms of Racial Discrimination. The anti-discrimination protection afforded, in a universal perspective, to indigenous individuals is simultaneously considered, as well as the specific protection addressed to minority groups. The research starts, therefore, from a concrete and current problem presented as a result of bibliographical and documentary investigation and is directed to the theoretical and legal analysis of its framing as ethnic-racial discrimination practiced by the Brazilian State.

Keywords: Anti-discrimination Law; ethnic-racial discrimination; indigenous peoples; minorities; coronary virus pandemic Sars-Cov-2.

COVID-19 E OS INDÍGENAS NO BRASIL: PROTEÇÃO ANTIDISCRIMINATÓRIA ÉTNICO-RACIAL E DIREITOS DE MINORIAS

RESUMO

Este artigo examina os efeitos adversos da pandemia provocada pelo novo coronavírus (Sars-Cov-2) sobre os povos indígenas brasileiros como decorrência de uma política discriminatória do Estado Brasileiro. Tomando como ponto de partida a experiência histórica de violência e discriminação enfrentada por povos indígenas no Brasil, o artigo analisa a emergência da pandemia em nível global, bem como seus desdobramentos no contexto nacional, salientando os impactos desproporcionais sobre os povos indígenas, em especial das regiões norte e centro-oeste brasileiras. Para isso, o artigo aponta as principais fontes de vulnerabilidade dos indígenas e identifica uma série de medidas adotadas ou omitidas pelo governo brasileiro em face dessas populações no contexto da pandemia. Em seguida, o artigo analisa o referencial teórico e jurídico do direito da antidiscriminação a fim de verificar se e em que medida as políticas estatais adotadas com relação a esses povos violam o mandamento da igualdade étnico-racial e a Convenção Internacional para a Eliminação de todas as formas de Discriminação Racial. Considera-se de modo simultâneo a proteção antidiscriminatória conferida, em perspectiva universal, a indivíduos indígenas, como também a proteção específica dirigida a grupos minoritários.

A pesquisa parte, portanto, de um problema concreto e atual apresentado como resultado de investigação bibliográfica e documental e se dirige à análise teórica e legal de seu enquadramento como discriminação étnico-racial praticada pelo Estado Brasileiro.

Palavras-chave: *Direito da antidiscriminação; discriminação étnico-racial; minorias; pandemia do coronavírus Sars-Cov-2; povos indígenas.*

INTRODUCTION

The impact of the COVID-19 pandemic has been overwhelming in the most varied spheres of life, in all quarters. Its social, political, economic and cultural repercussions challenge the understanding and the construction of answers for the current world and for the future. In the midst of this uncertain and risky horizon, the persistence of dynamics of discrimination and violence previously under way is not surprising, much less the greater intensity of damage and harm to individuals and groups that have long been discriminated against.

Since 2017, the situation of indigenous peoples in Brazil has been worsening in a worrying way. However, in the COVID-19 pandemic, the situation deteriorated, although partially mitigated by the inclusion, in January 2021, of part of this population in the priority vaccination group. In this context, this article is attentive to the situation faced by indigenous peoples in Brazil in the pandemic caused by the new coronavirus (Sars-Cov-2), specifically analyzing the performance and omission of the Brazilian State regarding these peoples and individuals. Then, using an anti-discrimination legal perspective, the article analyzes whether and to what extent the Brazilian government's performance fits into the concept of discrimination in order to make it possible to activate the respective protective legal mechanisms.

To this end, after briefly describing the emergence of the pandemic and its impacts given the vulnerability of these peoples (part one), we propose a legal understanding based on the prohibition of ethnic-racial discrimination, as well as the required legal protection for minority groups (part two). In part one, which is eminently descriptive, the authors carried out a bibliographic and documentary research, looking for official data and information, sometimes confronted with unofficial sources, on the situation of the pandemic among Brazilian indigenous peoples, as well as technical

analyses on the differentiated risks to these collectives, with a look into the performance of the Brazilian State. In part two, the article starts from the information found to analyze it in the light of the set of rules and interpretations of anti-discrimination law, in order to examine whether and to what extent the Brazilian State, in addition to violating other rights, such as life and health, also incurs in discriminatory practices against indigenous peoples, violating, for example, the UN International Convention on All Forms of Racial Discrimination.

1 THE COVID-19 PANDEMIC AND THE BRAZILIAN INDIGENOUS PEOPLES

The first part of this article begins with an overview of the pandemic outbreak, resulting from a new coronavirus around the globe, in order to emphasize its disproportionate consequences given the particular vulnerability experienced by indigenous peoples in Brazil.

1.1 The new coronavirus and the COVID-19 pandemic

The world was surprised in early 2020 by COVID-19, a disease caused by a new coronavirus (Sars-Cov-2) that, after registering the first cases in the city of Wuhan, China, in December 2019 (WHO, 2020a), spread rapidly around the world. On March 11, 2020, the World Health Organization (WHO) declared COVID-19 as a pandemic (WHO, 2020b). According to the WHO, by March 18, 2021, 120,383,919 confirmed COVID-19 cases had been reported to the organization, including 2,664,386 deaths (WHO, 2021).

The COVID-19 virus is highly transmissible, as it passes from person to person through invisible droplets that come out of the nose and mouth and disperse, for up to 2 meters, when an infected person coughs, sneezes or speaks, and can stay on surfaces for hours. If a person breathes these droplets or touches objects where they have fallen and then touches his/her eyes, mouth or nose, he/she can become infected with the virus. Washing your hands frequently, wearing masks and staying away from others are the best ways to protect yourself from this disease (BID, 2020).

The mortality rate of the disease – not yet definitively determined – is

higher among the elderly and people with comorbidities, but it also affects younger people (KOFF, WILLIAMS, 2020; WHO, 2020c). The WHO estimates that about 40% of the cases will have mild illness, 40% will suffer moderate illness, including pneumonia, 15% of the cases will suffer severe illness and 5% of the cases will be critical (WHO, 2020c). The rapid spread of the disease ended up collapsing the health systems of some of the many affected countries that lost the ability to care for patients before completing a month since the first record of contagion of the disease (Feb 20), leading thousands of people to death due to lack of medical support ('EM COLPASO'..., 2020; SHALDERS, 2020; HOROWITZ, 2020). For this reason, the WHO states that COVID-19 "threatens human life, livelihoods and the way of life of all individuals in all societies" (WHO, 2020c).

In Brazil, the Ministry of Health (MS) declared, on March 2, 2020, a "Public Health Emergency of National Importance (ESPIN) due to Human Infection with the new Coronavirus (2019-nCoV)" (BRASIL, 2020b) and, on March 20, 2020, "state of community transmission of coronavirus throughout the national territory" (BRASIL, 2020c). Law no. 13,979 was enacted on February 6, 2020, to provide for "measures to address the public health emergency of international importance resulting from the coronavirus responsible for the 2019 outbreak" (BRASIL, 2020a).

1.2 Indigenous peoples in Brazil and vulnerability to the COVID-19 pandemic

Brazil is home to 896 thousand persons who declared themselves or considered themselves indigenous, 572 thousand (63.8%) residing in rural areas, according to the 2010 IBGE census. Of this total, 517 thousand (57.7%) lived in officially recognized Indigenous Lands (IL). The 2010 Census also accounted for approximately 300 ethnicities and 270 spoken languages, which represents one of the highest levels of sociodiversity in the world. Therefore, it is estimated that 60% of the country's indigenous population lives in an area that corresponds to 98% of the total extension of indigenous lands (especially in the Legal Amazon) and that the remaining 40% live in indigenous lands that are equivalent to 2% of the total territorial extension (FIOCRUZ, 2020).

According to the Fundação Nacional do Índio (FUNAI), there are 567 indigenous lands (IL) in Brazil, of which 440 are definitively regularized

(ARAÚJO, 2006)⁴. Another 127 lands are awaiting regularization and 117 are being studied by FUNAI for demarcation purposes (FUNAI, 2020). However, there are many indigenous communities living on lands that they claim as traditional ones and for which FUNAI has not even demarcation studies. These communities are in a situation of extreme vulnerability.

Regarding the incidence of COVID-19 among indigenous peoples, the Epidemiological Bulletin of the Special Secretariat for Indigenous Health (SESAI/MS), updated on March 18, 2021, reported 44,956 confirmed cases and 615 deaths (SESAI, 2021). However, the survey of the Articulation of Indigenous Peoples of Brazil (APIB), by including not only the cases of indigenous villagers, but also those who live in cities outside indigenous lands, indicated significantly higher numbers on the same date: 50,853 confirmed cases and 1015 deaths (APIB, 2021).

In view of the high contagion capacity of the new coronavirus and the risk factors associated with its lethality (old age and comorbidities), coping with COVID-19 requires the ability to maintain social isolation and preventive routine, linked to hygiene care, as well as availability of medical assistance in intensive care units (ICUs) (AZEVEDO *et al.*, 2020). For indigenous peoples, the situation of regularization and effective protection of the indigenous land occupied by the community is another relevant factor, as it is related to the protection network it receives (AZEVEDO *et al.*, 2020). In properly demarcated and protected indigenous lands, indigenous peoples are able to ensure their own subsistence, without having to resort to urban centers to guarantee their livelihoods, thus protecting themselves from contact with the foci of infection concentrated in the cities. In addition, in regularized areas, it is easier to control the entry of non-indigenous people, reducing the spread of contagious diseases.

Taking this picture into account, studies carried out by prestigious

4 To demarcate Indigenous Lands in Brazil, the State uses an administrative procedure, which today is regulated by the provisions of Executive Power Decree no. 1775, of January 8, 1996. The procedure is divided into several stages: (1) Identification – At the first moment of the demarcation procedure, FUNAI appoints an anthropologist to prepare an anthropological study to identify the Indigenous Land in question. (2) Contradictory – This refers to the opportunity given to any and all interested parties, including states and municipalities, to comment on the procedure for demarcating a given Indigenous Land and to challenge it through administrative means. (3) Declaration of limits – The Minister of Justice will issue, within 30 days, an ordinance declaring the limits of the area and determining its physical demarcation. (4) Physical demarcation – Once the limits of the area have been declared, FUNAI will make its physical demarcation, which implies placing landmarks on the ground, signposts, trails when necessary, etc. (5) Homologation – The entire demarcation procedure will, finally, be submitted to the President of the Republic for ratification by means of a decree. (6) Registration – The demarcated and approved Indigenous Land will be registered, within 30 days, at the property registry office of the corresponding district and at the SPU (Union Patrimony Secretariat) (ARAÚJO, 2006, p. 50-51).

Brazilian institutions point out that indigenous peoples have several vulnerability factors to cope with COVID-19. One of these studies relates high vulnerability to COVID-19 to the following factors: (a) percentage of elderly people in the Indigenous Land; (b) average number of residents per household in the Indigenous Land; (c) existence of a bathroom for exclusive use or toilet in the residences of the Indigenous Land; (d) water supply network in the residences of the Indigenous Land; (e) location of the Indigenous Land in relation to the municipalities with availability of ICU beds, and (f) regularization status of the Indigenous Land (AZEVEDO *et al.*, 2020); among its important conclusions, it highlights that of the 1,228 Brazilian municipalities where there is at least one stretch of indigenous land, only 108 have at least one ICU bed and that, regarding the degree of vulnerability, there are 13 ILs in critical situation, 85 in intense vulnerability, 247 in high vulnerability and 126 in moderate vulnerability (AZEVEDO *et al.*, 2020).

The Oswaldo Cruz Foundation (FIOCRUZ), a renowned public health research institution, points out that indigenous peoples' greater susceptibility to COVID-19 in relation to the rest of the population is due to the pre-existing inequities in their living and health conditions, the high prevalence of nutritional deficiencies and infectious and parasitic diseases, concomitantly with the emergence of chronic non-communicable diseases (FIOCRUZ, 2020)⁵. In this sense, compared to the health situation of the rest of the national population, the health indicators of indigenous peoples are significantly worse. These pre-existing conditions to the emergence of the pandemic that now leave indigenous peoples in a situation of extreme vulnerability and imminent risk to life are directly related to the structural and secular context of racial discrimination.

Since the colonization of Brazil, indigenous peoples have had a historical trajectory marked by innumerable land conflicts associated with the expansion of national agricultural and demographic frontiers, which resulted in the appropriation of their territories by private individuals and agents of the State, with the consequent destruction of their own ways of being and living. In addition, the spread of contagious diseases, the dehumanization practices and speeches directed against indigenous peoples, the official denial of various public rights and policies for indigenous peoples until the Federal Constitution of 1988 – up to which an openly assimilationist perspective prevailed –, and the processes of environmental degradation,

⁵ In the same sense, see Carlos Jr. (2014)

among other factors, have produced long-lasting effects that strongly impact the social and health indicators of indigenous peoples even today.

For indigenous peoples, this results in a great delay in relation to the social advances seen in the country over the past decades, particularly in the fields of health, food, income, education, housing and sanitation. Several researches on various ethnicities since the 1990s have already demonstrated the structural context of social inequalities in health care that create an abyss between indigenous and non-indigenous persons in Brazil, thus composing a clear picture of racial discrimination, in which the ethnic condition condemns indigenous peoples to living conditions far below those of the average Brazilian national population. In other words, “being indigenous in the country implies a greater chance of dying before one year of age, suffering from malnutrition and anemia during the growth period, living with a high burden of infectious and parasitic diseases, and being exposed to a rapid nutritional transition process, responsible for the emergence of such diseases as obesity, high blood pressure and diabetes mellitus, found in an increasing number of communities” (CARLOS JR., 2014, p. 856).

In addition, many indigenous peoples reside in remote locations; if, on the one hand, this benefits isolation, on the other it makes transportation difficult in the event of the need for hospital care. Furthermore, the municipalities to which the indigenous lands are close have a precarious structure of services and health (FIOCRUZ, 2020). Another serious problem is the history of rapid spread of infectious diseases that usually affect a large part of these populations, with severe manifestations in children and the elderly. These situations disrupt the organization of daily life and the maintenance of health care (FIOCRUZ, 2020).

Early in the pandemic, researchers warned of the significant risk of death because, in the past, there were cases of measles and even the flu that resulted in a large number of deaths among indigenous peoples (CARDO-SO, 2014; GUTIERREZ, 2020)⁶. Regarding the impact on elderly indigenous persons, demographer Marta Azevedo warns that

⁶ “Indigenous and non-indigenous people are immunologically susceptible to viruses that have never circulated before, as is the case with the new coronavirus that causes Covid-19. Studies in various parts of the world and in Brazil show, however, that Indians are more vulnerable to epidemics due to worse social, economic and health conditions than those of non-Indians, which amplifies the potential for the spread of diseases” (ISA, 2020a). “Particular conditions affect these populations, such as the difficulty of access to health services, either due to geographic distance, or due to the unavailability or insufficiency of health teams” (ISA, 2020b).

[...] there is concern that the disease, which has a higher fatality rate among the elderly, will suddenly interrupt entire cultures. Among these indigenous peoples, knowledge is passed on verbally to the new generations, and without the older members of the tribes, a significant part of the accumulated knowledge would no longer be transmitted (GUTIERREZ, 2020).

The same concern with preserving the lives of the elderly is pointed out by the main Brazilian indigenous organization (APIB, 2020) and by researchers from the Socio-Environmental Institute (ISA) and the Federal University of Minas Gerais (UFMG) (OLIVEIRA *et al.*, 2020)⁷.

The same researchers also warn that the increase in the vulnerability of indigenous lands results from the threat of intense activity by gold-miners, as is the case of the Yanomami IL (OLIVEIRA *et al.*, 2020), which motivated the Federal Prosecution Service to present a lawsuit asking the federal government to promptly remove these individuals in order to minimize the risks of the pandemic for these peoples, who have already lost a 15-year-old due to COVID-19 (MPF, 2020a). The gold-miners invasions also motivated the Inter-American Commission on Human Rights (IA-CHR) to grant precautionary measures in favor of the Yanomami People (OAS, 2020).

FIOCRUZ concludes, as other studies, that, with regard to indigenous peoples, the best measure is to prevent SARS-CoV-2 from entering in communities, since the challenges to ensure social isolation and the application of preventive hygiene recommendations, due to the indigenous ways of life and limited access to sanitary equipment, are “huge” (FIOCRUZ, 2020, p. 29).

2 ETHNIC-RACIAL DISCRIMINATION AND INDIGENOUS PEOPLES IN THE CONTEXT OF THE COVID-19 PANDEMIC

If the damage and insults suffered by indigenous peoples throughout their history were not enough, the impacts of the COVID-19 pandemic have aggravated the context of discrimination experienced by them. In fact, in the current context, an even more intense discriminatory scenario can be seen, violating a series of anti-discriminatory and protective legal protections for the rights of these ethnic-racial minorities.

⁷ Less than 5% of the population [of the Vale do Javari Indigenous Territory] is over 60 years old, with a quarter of that population being under 14 years old. The disappearance of the elderly may have irreversible consequences for the cultural heritage of the Javari peoples” (OLIVEIRA *et al.*, 2020, p. 4).

In view of this, taking into account the emblematic situation of indigenous peoples in northern and midwestern Brazil, we have performed a legal examination of such a picture of discrimination at the expense of ethnic-racial protection, revealing how actions and omissions threaten, at the same time, human and fundamental rights of individuals and indigenous peoples.

2.1 Indigenous peoples and ethnic-racial discrimination in the context of the pandemic

In the report of the *on-site* visit of the Inter-American Commission on Human Rights (OEA, 2021) to Brazil, in 2018, the persistence of a scenario of social inequality and structural and systemic discrimination against indigenous peoples and other minority social groups was found, in addition to the increase in hate speech to the detriment of these collectivities. For the IACHR, the forms of manifestation of this type of discrimination include various discriminatory behaviors against individuals based on their belonging to historically vulnerable groups. These behaviors, which may be present in norms, rules, routines, patterns of social behavior, continue to occur over time as a consequence of an unfavorable historical, socio-economic and cultural context for such groups (OEA, 2021). It is noted that, in 2016, the Special Rapporteur on the rights of indigenous peoples of the United Nations (UN), Victoria Tauli-Corpuz on a mission to Brazil, also pointed out extreme concerns about the continuity of this scenario of discrimination (TAULI-CORPUZ, 2016).

In the context of the COVID-19 pandemic, the indigenous peoples' critical situation of vulnerability has only increased. However, the Brazilian State not only fails to adopt effective measures to protect indigenous communities, but also adopts measures that clearly aim to expose them to the risk of contamination by coronavirus. Despite the fact that the Federal Supreme Court determined the Federal Union to adopt a General Plan to Combat COVID-19 among Indigenous Peoples, the Brazilian State has been reluctant in presenting an action plan that includes special preventive actions and measures in order to avoid the disproportionate and adverse impact of the COVID-19 pandemic on this population (STF, 2021). For the time being, the most effective measure adopted by the government has been the inclusion of indigenous people in the priority vaccination group, currently making a total of 280,857 indigenous persons vaccinated with the first dose and 190,656 with the second dose (MS, 2021). However, the

indigenous people who do not live on homologated indigenous lands are excluded from the vaccination plan, which is why Min. Luís Roberto Barroso, from the STF, determined their inclusion (STF, 2021).

Regarding indigenous health care, although the Brazilian State has a public subsystem of special care (FIOCRUZ, 2020)⁸, it has been plagued by underfunding or questionable use of its resources, in many cases providing precarious assistance marked by health centers in terrible conditions, with absence of medical equipment for exams, as well as lack of vehicles and fuel for serving the villages and transporting patients (LEITE; TOMAZELA, 2019; ANGELO, 2017). Specialized studies have shown numerous weaknesses in this subsystem: weak coverage of indigenous territories; absence of physical infrastructure and adequate human and hospital resources; lack of conditions for carrying out the expected medical procedures and for the creation of local teams connected with the medium and high complexity medical and hospital network of the Unified Health System (SUS); small positive incidence of health actions carried out in Special Indigenous Sanitary Districts (DSEIs), due to the chronic deficit of health teams duly trained to address the needs of indigenous communities; and high turnover of professionals in these areas. Given this scenario, the final result is mirrored in the available data on the poor health situation of indigenous populations in Brazil.

Such a specialized indigenous health system is responsible for dealing with low complexity cases. Therefore, serious cases of COVID-19 among indigenous people need health care in medium and high complexity hospitals, usually located in state capitals. In the case of the northern region, where studies indicate greater vulnerability of communities, the health system has already collapsed in several states, with emphasis on the city of Manaus. In addition, other states in the northern region that are home to numerous indigenous communities suffer from insufficient hospital beds and ICU beds⁹.

8 “The National Policy for Attention to the Health of Indigenous Peoples was operationalized through the Subsystem for Attention to Indigenous Health (SASI-SUS), implemented in 1999 as a subsystem of the Unified Health System – SUS (Brazil, 2002). Since 2010, SASI-SUS has been coordinated by the Special Secretariat for Indigenous Health of the Ministry of Health. SASI-SUS is structured as a network of primary health care services in 34 Special Indigenous Sanitary Districts (DSEI), spread throughout the country, where villages and indigenous lands are located. They must act in conjunction with the other complexity levels of SUS at the municipal, state and federal spheres, in order to comply with its principles and guidelines, in particular universality, equity, integrality and community participation. Health actions are carried out within the scope of the DSEI and the villages by Multidisciplinary Indigenous Health Teams, with the aim of expanding the coverage, access and acceptability of SUS to this population” (FIOCRUZ, 2020, p. 4).

9 The seven states that make up the northern region of Brazil (Amazonas, Roraima, Amapá, Pará,

At the beginning of May 2020, the indigenous people of the municipality of Tefé, in the region of Médio Solimões, denounced that the DSEI Médio Solimões failed to comply with norms for the protection of villages and demanded an action plan to confront COVID –19. In a letter to the Prosecutor of the Republic, the indigenous people reported that the DSEI had sent a health professional to the Base Pole, who already had the flu and was feeling ill, and who, for a week, delivered nursing care for the indigenous people, had contact with the other team members, slept in the same room and lived among them normally until presenting symptoms (Rosh, 2020).

Another complicating factor is the need for air transport for patients in indigenous areas, which, given the gigantic territorial dimensions of the Amazon region, demands resources and planning that are not available. Since the indigenous lands do not have the necessary hospital capacities for the care of the most serious patients, it is necessary to move to the capitals of the Amazon region, whose capacity to receive patients is already saturated. There are reports of several sick indigenous people who tried to reach Manaus hospitals by boat but were already dead by the time they got to the city (INDÍGENAS MORREM... 2020).

In this context of crisis and exhaustion of the specialized hospital network in the Amazon, a worrying data at the moment is the increase in deforestation in the so-called Legal Amazon¹⁰ in the first quarter of 2020,

Tocantins, Rondônia and Acre) have 1,454 (one thousand, four hundred and fifty-four) ICU beds, of which 918 (nine hundred and eighteen) are from SUS and 536 (five hundred and thirty-six) are identified as non-SUS (MS, 2020).

10 The Legal Amazon is an area that encompasses the states of Acre, Amapá, Amazonas, Pará, Rondônia, Roraima, Tocantins, Mato Grosso and part of Maranhão, west to the 44th meridian west, in the form of complementary Law no. 124, of January 2007. This is a region that comprises approximately 61% of the Brazilian territory, having initially been instituted by Law 1,806, of 1953, which created the extinct Superintendence of the Amazon Economic Valorization Plan (SPVEA), with the purpose of promoting economic and social development in the region, then defined, in the form of art. 2, as the “Brazilian Amazon” for legal purposes and for economic planning and execution of the plan defined by said law. This law annexed the states of Maranhão, Goiás and Mato Grosso to the Brazilian Amazon. In 1966, by Law 5.173, SPVEA was replaced by the Superintendence of Development of the Amazon (SUDAM), and the Amazon for the purposes of this law, in the form of art. 2, now covers the region comprised by the states of Acre, Pará and Amazonas, by the Federal Territories of Amapá, Roraima and Rondônia, and also by the areas of the state of Mato Grosso to the north of the 16th parallel, of the state of Goiás to the north of the 13th parallel, and the state of Maranhão to the west of the 44th meridian. In 1977, Complementary Law no. 31 created the state of Mato Grosso do Sul, which becomes part of the legal Amazon. With the 1988 Constitution, as provided for in arts. 13 and 14 of the transitional constitutional provisions, the state of Tocantins was created and the federal territories of Roraima and Amapá became federated states. It is in 2007 that Complementary Law no. 124, institutes, in the form of art. 43 of the Constitution, the Superintendence of Development of the Amazon (SUDAM), defining the area of operation of this special autarchy, which comprises the region then called the Legal Amazon. Available from: <http://www.sudam.gov.br>. Access on: May 03, 2020.

which further exposes indigenous peoples to the advance of the pandemic (MPF, 2020c). The Federal Prosecution Service (MPF, 2020c) urgently requested the Federal Justice of Manaus to order the federal government to adopt a series of measures to curb deforestation in the Amazon (NETTO, 2020). The MPF informs that, in March 2020, there was a 30% increase in the area of deforestation alerts compared to March 2019 and the highest rate of deforestation in indigenous lands in the last ten years, with growth above 74% from 2018 to 2019. Not only has deforestation in the Amazon rainforest increased since 2019, but in recent years there has been a loosening of federal inspection activity. Currently, in several locations in the Amazon, enforcement actions have been suspended due to the pandemic. But the most alarming fact was the outcome of an important IBAMA inspection operation on indigenous lands in the State of Pará, which took place in early April 2020 and expelled several invaders from there. After the action, the director of Environmental Protection at IBAMA was dismissed (VALENTE, 2020).

The lack of inspection and the punishment of civil servants by the federal government, on the rare occasions when actions take place, is an incentive for invasion and destruction of the forest by offenders who are not even intimidated by the advance of COVID-19 in the region¹¹. The increase in the exogenous human presence in the forest becomes more serious because it occurs in the presence of measures of social isolation and the urgent need to protect populations living in the forest. The Brazilian State's failure to inspect and combat deforestation, coupled with the incentive for gold-miners, land grabbers and loggers to invade the forest are ideal circumstances, according to the MPF, for the dissemination of COVID-19, to the detriment of indigenous and traditional populations that depend on the forest to survive (NETTO, 2020).

The same concern with the advance of deforestation and the collapse of the health system in the state of Amazonas was manifested in the Note of the Bishops of the Brazilian Amazon on the situation of the Peoples and

¹¹ As the MPF informs, the message sent by the Federal Government with the act of dismissal is unequivocal in the sense that the Public Power corroborates and supports the action of gold-miners and deforesters. And it is not the first time that this message has been spread by public agents who should combat environmental illegality. So much so that, as reported by the UOL website in relation to the report on the subject of the TV program Fantástico, on April 12, 2020, "in a section of the report, a squatter who represents an association that intends to occupy part of the Trincadeira-Bacajá indigenous land stated that he felt stimulated 'with that talk that came from the federal government, from the minister, to reduce 5% of indigenous areas'. 'We have this hope, this expectation, so that one day this can happen and for the government to legalize the folks in here, right? In the meantime, we are occupying here', said the land grabber. According to the report, he was expelled along with other invaders" (MPF, 2020c).

the Forest in times of COVID-19 Pandemic. In this document, the Bishops state: “[the] coronavirus that is plaguing us now and the socio-environmental crisis are already showing a huge humanitarian tragedy caused by a structural collapse. With the Amazon increasingly devastated, successive pandemics are yet to come, worse than the one we are currently experiencing” (CNBB, 2020, p. 1).

Another extremely worrying context is that of the State of Mato Grosso do Sul, which concentrates the second largest presence of indigenous peoples in the country, just after the Amazon region. The lack of demarcation of Kaiowá and Guarani peoples’ indigenous lands in the south of the State aggravates their vulnerability in the face of the COVID-19 pandemic, affecting around 50 thousand individuals in several municipalities in the region of Dourados and the Southern Cone of the State (CAMPANHA GUARANI, 2017).

Both in the overcrowded *Reserva de Dourados*, with its almost 20 thousand residents in an area of only 3.5 thousand hectares, and in the countless precarious settlements of indigenous persons on the roadsides and in the areas of conflict over land with farmers, the great population presence of indigenous people in small and restricted territorial spaces creates extreme difficulties in implementing measures of social distancing. Most communities suffer from a lack of water in urban and non-urban villages, which makes effective personal hygiene measures impossible (MORANDI, 2020). In communities where there are sources of water such as rivers and streams, their contamination by pesticides also makes individual and collective cleaning care difficult, as well as the absence of a garbage collection system in the Dourados Reserve (SANTANA, 2020).

Among the Kaiowá and Guarani peoples, a large part of the individuals live with chronic problems of malnutrition, anemia and hunger, in addition to the high incidence of tuberculosis, hypertension and diabetes (TUBERCULOSE DEIXA, 2020). If all these sources of vulnerabilities were not enough, by the end of March 2020, the federal government had canceled the delivery of basic food baskets to countless Kaiowá and Guarani indigenous communities who live in disputed areas of land tenure, aggravating a chronic situation of malnutrition and hunger (SHALDERS, 2020).

Furthermore, the lack of regularization of land and, in the case of the Dourados Reserve, the impossibility of maintaining its own agricultural production due to its restricted territorial extension, prevent communities

from providing for their subsistence and achieving economic autonomy. That forces many indigenous persons to travel to the cities in search of food and work and also make the indigenous communities dependent on a constant flow of non-indigenous street vendors. As a result, this exposure of indigenous people in cities and the flow of indigenous and non-indigenous people between villages and urban areas generate potential sources of contamination and spread of the disease. On May 13, 2020, an indigenous woman from the Reserve who works in a Dourados slaughterhouse tested positive for Covid-19 after having had contact with at least 43 other indigenous persons. Until March 18, 2021, there were 4,263 confirmed cases of COVID-19 in Mato Grosso do Sul and 85 deaths (SESAI, 2021), a number that differs from the APIB survey (2021), which indicates 107 deaths in the State. In view of the progress of the disease and the neglect of the State, in municipalities such as Dourados, Japorã, Coronel Sapucaia, Caarapó, Paranhos and Eldorado, the indigenous peoples themselves have set up and maintained improvised sanitary blocks in the access roads to the communities in order to contain the contamination (ALDEIA TEM ENTRADA..., 2020b).

Given the chronic lack of a diagnostic system and medical-hospital supplies and equipments, the State has neither the means to monitor the epidemiological progress of the disease through the testing of suspected cases nor those to provide highly complex medical care for the most severe indigenous patients (SANTANA, 2020). At the Dourados Reserve, at the end of April 2020, 25% of the servants of the indigenous health subsystem were removed, making the case mapping work more difficult (ALDEIAS TÊM BAIXA..., 2020). Moreover, there are no specialized ICU beds in most municipalities in southern Mato Grosso do Sul, which concentrate the Kaiowá and Guaraní indigenous population, and the cities are already facing problems with transporting indigenous persons to hospitals in other cities (BUREMA, 2020).

If the severity of all contexts and situations described were not enough, FUNAI issued Instruction 09/2020 (BRAZIL, 2020D), which allows its public servants to attest to the interested parties that the limits of their properties and even their possessions (occupations without deed) respect the limits of approved indigenous lands, indigenous reserves and indigenous domain lands and those fully regularized. That is, if someone – even a squatter – is occupying a piece of land where there is indigenous presence, but that land is not definitively demarcated, even if it is in one of the

stages of the demarcation process, they may obtain an official declaration, from the agency supposedly protective of the indigenous peoples, that their occupation does not affect indigenous lands. According to an ISA lawyer, Juliana de Paula Batista (2020), the big problem is that, according to data from Funai itself, there are currently 237 demarcation processes for ILs pending ratification by decree, the last phase of a complex process that goes through technical studies, approval by the president of Funai, administrative contestation and analysis and approval by the Minister of Justice. Only then the process goes to presidential approval; this process is long and time-consuming (BATISTA, 2020).

Due to the flagrant opposition to the Constitution and to Brazilian laws, as well as to international law, the MPF recommended to the president of Funai, on April 28, 2020, the immediate annulment of the Instruction (MPF, 2020b). The MPF points out that the Instruction completely disregards Indigenous Lands that are delimited and declared, interdicted, with restricted use and access by third parties and lands occupied by isolated peoples, which means, in practice, to deepen conflicts over land and encourage invasions. In other words, the Instruction accentuates the vulnerability of indigenous peoples in territories whose processes have not yet ended, often due to Funai's own omission. The most serious thing is that this Instruction is an additional incentive for the invasion and occupation of many indigenous lands, exactly at the time of the pandemic, when the indigenous populations need the State to protect them from contact with people from outside the communities.

Finally, the Brazilian State fails when it allows the presence of religious missionaries in indigenous lands with a record of a high number of isolated peoples, as is the case of one of the largest indigenous lands in the country, Vale do Javari IL, in Amazonas. At the request of the Union of Indigenous Peoples of the Javari Valley, the Federal Court of Tabatinga (Amazonas) prohibited missionaries from entering the Indigenous Land, highlighting isolated people's lack of immunity against germs that non-indigenous people can bring to them (BIASETTO, 2020). In any case, despite the judicial decision in favor of the isolated indigenous peoples of that region, pressures from missionaries, gold-miners, land grabbers and loggers persist, who insist on advancing on the territories of isolated communities in other states, such as Roraima, in the Yanomami Reserve (EM MEIO À COVID-19..., 2020; OS POVOS INDÍGENAS..., 2020).

2.2 Ethnic-racial anti-discrimination legal protection and minority rights of indigenous peoples in the context of COVID-19

From the legal point of view, the portrayed actions and omissions simultaneously constitute discrimination against the rights of individuals as such, due to their ethnic-racial belonging, as well as to the detriment of the indigenous community to which they belong, as a minority ethnic-racial group. Without ignoring or neglecting the presence, in diverse and varied international instruments for the protection of ethnic identity¹², here we stick to the International Convention on the Elimination of All Forms of Racial Discrimination.

Taken in its breadth, the right to anti-discrimination (*lato sensu*) seeks to protect not only human beings abstractly and universally considered, regardless of belonging to this or that group (object of the “right to anti-discrimination *stricto sensu*”), but also minority groups as such, irreducible to the arithmetic sum of the components of a given collectivity, whether ethnic-racial, religious or linguistic (object of the “minorities law”)¹³ (RIOS; LEIVAS; SCHAFER. 2017). More than a mere theoretical distinction, this bifurcation of the right to anti-discrimination responds to historical evolution and to the challenges imposed on the protection of violated rights. Protection of minorities¹⁴, in fact, is not restricted to the search for equal enjoyment or exercise of the same rights for all human beings, typical of universalist instruments; it demands additional measures, aimed at protecting the minority group’s identity, culture, ways of being and living as a collective existence.

Such comprehensiveness of the legal protection intertwines and brings together these normative subsets, triggering universalist anti-discrimination protection milestones, such as the International Convention on the Elimination of All Forms of Racial Discrimination, and adding to them instruments for the protection of minorities, with a particularist orientation, such as the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (DDPPM) (UN, 1992) and the United Nations Declaration on the Rights of Indigenous Peoples (GILBERT, 2004) (UN, 2007). The discrimination scenario experienced by Brazilian indigenous persons and peoples corroborates this convergence,

12 See Scheinin (2004a, 2004b) and Thornberry (2002, 2004).

13 On the distinction between Indian and indigenous community, see Viveiros de Castro (2006).

14 On the minority concept, see Bragato (2018)

since discriminatory acts and omissions against individuals and indigenous peoples endanger specific individuals and the existence of the ethnic-racial group itself, its culture and collective identity. In these legal quarters, discrimination can be purposeful (direct discrimination) or derive from the disproportionate harmful impact, albeit unintentionally (indirect discrimination), always to the detriment of individuals and protected groups (RIOS, 2008).

As recorded by the manifestations and initiatives of the Inter-American Commission on Human Rights, the Federal Judiciary, the Federal Prosecution Service, religious entities and defenders of indigenous rights, various acts and omissions put at serious risk and victimize the health of countless indigenous individuals, given the concrete consequences of underfunding and dismantling indigenous peoples' specific health care services.

In this context, if there is deliberate disregard for budget allocation and execution for such health services, direct discrimination is characterized, affecting the right to health of those who concretely and individually seek public service. In this case, it is an offense to anti-discrimination protection for all, given that the recognition, enjoyment and exercise of the right to health do not admit harmful distinction or restriction due to ethnic-racial belonging, as stipulated, in international law, by the aforementioned Convention, incorporated into Brazilian law. Additionally, even if direct discrimination is not practiced, the disproportionate harmful impact to the detriment of the ethnic-racial criterion constitutes indirect discrimination (RIOS, 2019). Finally, it is still necessary to highlight the specific vulnerability to the problems of COVID-19, due to the particular immunological condition of indigenous individuals, therefore more intensely qualifying the discriminatory violation of the right to health, as proven by the precarious or non-existent medium and high complexity healthcare provision.

The prohibition of racial discrimination, provided for in art. I, item 1, of the International Convention on the Elimination of all Forms of Racial Discrimination, covers

[...] any distinction, exclusion, restriction or preference based on race, color, descent or national or **ethnic** origin that has the purpose or effect of nullifying or restricting the recognition, enjoyment or exercise on the same level, (under equal conditions), of human rights and fundamental freedoms in the political, economic, social, cultural or any other domain of public life (BRASIL, 1969, emphasis added).

The indigenous issue has always been present in the object of protection of the Convention, as evidenced by its origins and normative development

(THORNBERRY, 2005), which is explicitly portrayed, for example, in General Recommendations no. 23 (UN, 1997) and 35 (UN, 2013) of the UN Committee on the Elimination of Racial Discrimination. In this sense, it is important to point out that the social and legal affirmation of whiteness is rooted and reproduced by the opposition to other ethnic groups (HANEY LÓPEZ, 2006), as occurs in the processes of racialization (GUIMARÃES, 1999).

Alongside these violations with direct repercussions in the sphere of universal human rights of individually affected indigenous persons, perpetrated with relevance to their ethnic identity, the situation pointed out also shows ethnic-racial discrimination against indigenous peoples as legally protected collectivities. This group dimension, subjectively different from individual protection (ALEXANDER, 2002), emphasizes the situation of disadvantage and subordination experienced by groups discriminated against as such, going beyond the mere recognition of individual violations resulting from belonging to this or that group. The group protection model warns that remedies against acts of individual discrimination are not enough in the face of collective violations, thus strengthening the intensity and scope of anti-discrimination protection¹⁵, through specific measures, such as the obligation to plan and execute public policies through the consideration of minority groups (DDPPM) (UN, 1992)¹⁶. The Convention, although devoted to ethnic-racial protection in a universalist way, did not miss this challenge, as expressed in items 4 (subparagraphs ‘a’, ‘c’ and ‘e’) and 5 of the aforementioned General Recommendation no. 23 (UN, 1997).

In fact, the absence of a specific action plan to face the pandemic and the persistence of hate speech addressed to indigenous communities affects the existence of the group itself, its ways of being and living, damaging intercultural ways of living together. In this environment, the measures of administrative paralysis regarding the demarcation of indigenous lands, inspection of land grabbing, invasion and occupation by third parties and deforestation, all consciously and explicitly engendered, are serious symptoms of a pattern whose harmful effects reach the heart of the culture that constitutes these human groups as singular collectivities, wounding them with death¹⁷.

15 See items 33 and 56 of the Commentary by the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities (UN, 2005). In the same sense, in a study on the jurisprudence of the Inter-American Court of Human Rights, see López-Cárdenas (2009).

16 Art. 5, items 1 and 2.

17 On the legal treatment of indigenous lands, paying due attention to their priceless and inseparable place for indigenous peoples’ collective rights, see Araujo Junior (2018) and Sartori Junior (2017).

CONCLUSION

The history of Brazilian indigenous peoples reveals, for centuries, the persistence of violence and discrimination in dramatic intensity, in terms of protection of the territories they traditionally occupy, their lack of representation in the main decision-making processes in public life, social perceptions about them and the deficits in the enjoyment of rights, such as health, education, life and water. If, on the one hand, the constancy of this devastating pattern on the lives of human beings and minority cultures reflects the consent, or at least the negligence, of broad sectors of Brazilian and world society, on the other, the urge to respect their existence and also their plural and concrete lives calls for awareness and coping with this situation.

This discriminatory historical scenario worsened under the new federal administration. The current government has reinstated an integrationist approach to indigenous peoples, changing the course of respect for cultural diversity outlined by the Brazilian Constitution of 1988.

The Brazilian State's precarious and totally inadequate response to the COVID-19 pandemic is consistent with the discriminatory views and assimilationist policies against indigenous peoples of the current Brazilian government. Governmental measures have been weakening indigenous protection agencies, dismantling public policies, avoiding land demarcation and validating discriminatory speeches, which encourage groups interested in land and natural resources to invade and attack indigenous territories, exposing them to a high risk of contamination and death.

Aggravated by the impact of the COVID-19 pandemic, discriminatory actions and omissions that had been previously consolidated become even more serious; they make clear the picture of systemic and structural discrimination, already outlined even before the advent of the pandemic, either by the International Committee on the Elimination of Racial Discrimination, or by the Inter-American Commission on Human Rights, or by state institutions and sectors of Brazilian society.

From a legal perspective, this is a scenario fraught with ethnic-racial discrimination against indigenous persons and peoples. In this reflection, the influx of the content and the historical development of the International Convention on the Elimination of All Forms of Racial Discrimination were highlighted, revealing themselves to be useful and necessary instruments in the face of the challenges of these dark times.

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