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Self-determination, territorial autonomy and access to justice:

Insights into the situation of Indigenous Peoples
in Brazil from the Indigenous Navigator



Acampamento Terra Livre (Free Land Camp), Brasília, 2023.
CREDIT: ACERVO FUNAI

While substantial progress has been made in Brazil in the last 20 – 30 years towards the formalization of Indigenous rights and the actual implementation of such rights in different areas, we would like to highlight that the country has a very fragile institutional framework and it is subject to pressure by different interest groups particularly, economic ones.

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LIST OF ACRONYMS

ADPF	Arguição de Descumprimento de Preceito Fundamental
APIB	Articulação dos Povos Indígenas do Brasil
C-169	Convenção 169 sobre Povos Indígenas e Tribais da Organização Internacional do Trabalho
CCPLI	Consulta e consentimento livre, prévio e informado
CNJ	Conselho Nacional de Justiça
DEPEN	Departamento Prisional Nacional
FNEEI	Fórum Nacional de Educação Escolar Indígena
Funai	Fundação Nacional dos Povos Indígenas
IBGE	Instituto Brasileiro de Geografia e Estatística
INA	Associação Indigenistas Associados
Inesc	Instituto de Estudos Socioeconômicos
MPI	Ministério dos Povos Indígenas
NI	Navegador Indígena
OIT	Organização Internacional do Trabalho
PGTA	Plano de Gestão Territorial e Ambiental
PICC	Protocolo indígena de consulta e consentimento
PNGATI	Política Nacional de Gestão Ambiental e Territorial das Terras Indígenas
Sesai	Secretaria Especial de Saúde Indígena
SLAT	Suspensão de Liminar e Antecipação de Tutela
SNUC	Sistema Nacional de Unidades de Conservação da Natureza
STF	Supremo Tribunal Federal
TI	Terra Indígena



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EXECUTIVE SUMMARY

The purpose of this report is to produce data and insights about the way in which Brazil is applying the international rules included in the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169); United Nations Declaration on the Rights of Indigenous Peoples, 2007, as well as other relevant human rights documents. Its main source is the qualitative and quantitative data available on the Indigenous Navigator (IN).

The *Indigenous Navigator* was created to help different interest groups as well as Indigenous and non-Indigenous communities monitor the realization of Indigenous Peoples' rights in different all countries. There are 112 questions divided into twelve separate indicators, for instance: (1) self-determination; (2) cultural integrity; (3) land, territories and natural resources; (4) fundamental rights and freedoms; (5) participation in public affairs; (6) legal protection, access to justice and remedy; (7) cross-border contact; (8) freedom of expression and media; (9) economic and social development; (10) education; (11) health; and (12) right to work and equality in employment and occupations.

In this first report, we focus our analysis on the first six indicators and the relevant guiding questions for each of them. It is important to consider that many questions refer to the formal legal status of a certain right, and this will be reflected on the content produced. Since the idea is not to provide a comprehensive analysis of the content of each question, in some cases, the information presented will be more summarized.

While substantial progress has been made in Brazil in the last 20 – 30 years towards the formalization of Indigenous rights and the actual implementation of such rights in different areas, we would like to highlight that the country has a very fragile institutional framework and it is subject to pressure by different interest groups particularly, economic ones. The most evident example of this was the recent Bolsonaro administration, which disregarded rights that were well-established in the public administration. Another aspect to bear in mind is the fact that the composition of Brazil's current National Congress is mainly conservative and against recognizing Indigenous rights, especially, those rights included and detailed in C-169. This may affect their current set of rights negatively.

In this sense, and in order for the Indigenous Navigator to fulfil its main purpose – to help different interest groups and communities monitor the realization of Indigenous Peoples' rights in all countries – we suggest adopting a dynamic methodology in order to register each countries' information. This means adopting a strategy that allows for the continuous update and addition of data and for the analysis of the status and implementation of their rights by the States. The reason why this is needed is because the object of analysis is dynamic by nature.



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INTRODUCTION

In the 1988 Brazilian Constitution, there are two articles that, to our mind, are related to the right to self-determination and territorial autonomy of the Indigenous Peoples and communities of the country. The first mention is in section 231, which establishes that “Indians shall have their social organization, customs, languages, beliefs and traditions recognized, as well as their ancestral 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”. Secondly, according to section 232, “Indigenous Peoples, their communities and organizations have standing under the law to sue to defend their rights and interests”.

Then, even though the representatives who drafted the Constitution did not use the terms self-determination or autonomy – which is somehow understandable considering the political tensions and confrontations at the time the Constitution was being drafted² – the content of text and the chain of meaning that support each of the sociocultural aspects that are mentioned (“social organization, customs, languages, beliefs and traditions”) make it possible for us to infer and extract related meanings.

Since these terms are not expressly mentioned, and due to the ambiguity and controversy this generates, creating endless political, legal and ideological disputes, we understand that ILO’s Indigenous and Tribal Peoples Convention No. 169 (incorporated to Brazilian legislation by means of Decree no. 5,051/2004) plays a crucial part in the political struggle to achieve the actual acknowledgment and implementation of these rights by the Brazilian State. Otherwise, it would not be the target of so many challenges when applied, including, for instance, bills aimed at denouncing the Convention.³

2. Cf. Gaiger (1989), Lacerda (2008, 2009), Cunha (2018)

3. For example, the Legislative Decree Project (in Portuguese, PDL) No. 177/2021, which purpose is to authorize the president to denounce Convention 169. Due to this attack by anti-Indigenous groups in Congress, the Federal Public Prosecutor’s Office (in Portuguese, MPF) sent a technical note to the Congress on 11/17/2021, in which the Office explains the inconsistencies and the invalidity of the proposed denunciation. The technical note can be found on the following link: [https://www.mpf.mp.br/pgr/noticias-pgr/denuncia-da-convencao-169-da-oit-pelo-brasil-e-inconstitucional-invalida-e-inocua-afirma-mpf-em-nota-tecnica#:~:text=O%20Minist%C3%A9rio%20P%C3%BAblico%20Federal%20\(MPF,sobre%20Povos%20Ind%C3%ADgenas%20e%20Tribais](https://www.mpf.mp.br/pgr/noticias-pgr/denuncia-da-convencao-169-da-oit-pelo-brasil-e-inconstitucional-invalida-e-inocua-afirma-mpf-em-nota-tecnica#:~:text=O%20Minist%C3%A9rio%20P%C3%BAblico%20Federal%20(MPF,sobre%20Povos%20Ind%C3%ADgenas%20e%20Tribais).

Additionally, our assessment is that this legal framework has not been enough to generate, on its own, conditions to secure the self-determination and territorial autonomy of Indigenous Peoples, nor to guarantee access to their own justice or State justice, nor to create adequate public policies. This continues to be a problem and is one of the main challenges that needs addressing in order to achieve the realization of Indigenous Peoples' rights in our country. They reflect the structural circumstances and the political forces surrounding those circumstances, and that is where we are currently standing.⁴

The above may sound strange for those who are focused on the current institutional background, and the positive possibilities that it may suggest. After all, Indigenous Peoples today play an unusual part in the Brazilian political and administrative structure. I am referring to the creation of the Ministry of Indigenous Peoples (in Portuguese, MPI) last January within the scope of the Executive Branch. The "new Funai" is part of the Ministry and is now called National Indigenous Peoples Foundation.⁵

When analyzing both organs, it is possible to see there are Indigenous leaders, activists and intellectuals with undergraduate and graduate degrees, who come from different peoples and regions of the country. They hold managerial positions and are in charge of political decisions within the administration. Even though this is not new in the Andean America, in Brazil, it is unheard of. It has never been seen in the history of our Republic. It was the result of a particular political situation, coupled with the growth of Indigenous participation in Brazilian institutional politics during the last decade, which combined intra- and extra-institutional actions. The emergence of a group of Indigenous intellectuals educated in the best Brazilian universities was also a factor that contributed to this. It was their own effort that got them there, as well as specific public policies created to that end.⁶

The Ministry of Indigenous Peoples was created from scratch in early January 2023. On a daily basis, the main materials, techniques, and rules are being created and human resources are being hired. It is necessary to establish, revitalize, or reinforce formal and informal political connections with agents and agencies located inside and outside their direct institutional sphere, and at different levels (national, regional and local), which are interrelated.⁷

Without this, it will be difficult to create policies and carry out projects, or to face political forces that are against the institutional objectives and agreements favoring Indigenous Peoples. It will also be difficult to deal with the humanitarian and health crisis caused by illegal mining in Yanomami Indigenous land, which has been estimated to have caused the death of over 500 people in the last four years. It also degraded woods and polluted rivers, which cause some parts of the government and Brazilian people to act in support of the Yanomami and Ye'kwana people.⁸

4. Cf. Verдум (2021b, 2022c); Verдум & Vieira (2021).

5. Provisional Measure (in Portuguese, MP) no. 1,154, dated 01/01/2023, established the basic organization of the organs of the Executive Branch and the Ministries during the Lula da Silva administration. Section 17 of the MP mentions the *Ministerio dos Povos Indigenas* (MPI) as part of the ministerial structure of the new government; section 42 describes the powers of the MPI; and section 58 determines that the *Fundação Nacional do Índio* (Funai) will be called *Fundação Nacional dos Povos Indigenas* (Funai). (http://www.planalto.gov.br/ccivil_03/_Ato2023-2026/2023/Mpv/mpv1154.htm#:~:text=MEDIDA%20PROVIS%C3%A9RIA%20N%C2%BA%201.154%2C%20DE,da%20Rep%C3%ABlica%20e%20dos%20Minist%C3%A9rios).

6. In the meeting held on 02/17/2026 with the Minister of Education, Camilo Santana, the Minister of Indigenous Peoples, Sonia Guajajara, defended "the strategic and historical importance of the Indigenous school agenda with all its potential, complexity and challenges, highlighting that those accomplishments in basic and higher education created the technical and political conditions for the historical construction and creation of the current Ministry of Indigenous Peoples, Funai and Sesai, which are now run by Indigenous people" (FNEEI, 2003). According to the minutes of the meeting drafted by FNEEI, the Minister of Education mentioned the creation of the Special Secretary of Schooling that depends on the Ministry of Education and Culture, the creation of the first Indigenous University of Brazil, and the call for a Competitive Public Examination open for Indigenous professors to be hired in universities and educational establishments in the States and municipalities, among other measures. In order to get more information, read the Education indicator of the Indigenous Navigator. Also see Verдум (2021a, 2022a, 2022b); Verдум & De Paula (2020); Verдум, De Paula and Souza Lima (2022).

7. Decree no. 11,355, dated 01/01/2023, approved the Rules and the MPI's Positions and Duties Chart. The decree established the following topics to be within the duties of the new Ministry: (a) Indigenous policy; (b) acknowledgement, guarantee, and promotion of Indigenous Peoples' rights; (c) acknowledgement, demarcation, defense, exclusive enjoyment and handling of Indigenous lands and territories; (d) wellbeing of Indigenous Peoples; (e) protection of Indigenous Peoples living in voluntary isolation and initial contact; (f) international agreements and treaties, especially ILO Convention 169, related to Indigenous matters. More information at: <https://www.in.gov.br/en/web/dou/-/decreto-n-11.355-de-1-de-janeiro-de-2023-455351349>. To get more information about policies and actions by the MPI visit <https://twitter.com/mpvosindigenas>.

8. Cf. Hutukara Associação Yanomami & Associação Wanasseduume Ye'kwana. *Yanomami sob ataque: garimpo ilegal na Terra Indígena Yanomami e propostas para combatê-lo*. Boa Vista – RR, 2022. Available at: <https://acervo.socioambiental.org/acervo/documentos/yanomami-sob-ataque-garimpo-ilegal-na-terra-indigena-yanomami-e-propostas-para>. For more information about this situation in Brazil: BRASIL / DPU (2023), BRASIL / Ministério da Saúde (2023).

The new directors of Funai now face the challenge of “rebuilding” it from a material, technical, regulatory and human perspective after the four-year government led by Bolsonaro, which caused the organization to change its nature and purpose. The Bolsonaro administration turned Funai into an “anti-Indigenous foundation” and this situation was well-described in the report made by the Institute of Socioeconomic Studies (in Portuguese, Inesc) and the *Associação Indigenistas Associados* (INA) by mid-2022.⁹

Next, we will briefly comment on the key concept described in the report: self-determination. It will be considered both an analytic and political category.

9. The report analyzes the illegalities, omissions and indulgencies of the federal government, mainly of the governmental Indigenous organization, when dealing with the drafting of policies for the Indigenous demarcation and protection of lands and territories. Available at: https://www.inesc.org.br/wp-content/uploads/2022/07/Fundacao-anti-indigena_Inesc_INA.pdf For more information about Funai’s actions as of 01/01/2023, visit <https://www.gov.br/funai/pt-br>

SELF-DETERMINATION

In this report, Indigenous self-determination (or free determination) refers to the right of Indigenous groups (peoples and communities) to keep a certain degree of autonomy in their decision-making process when that decision overlaps with the authority of the State. It refers to the degree in which the State acknowledges that Indigenous Peoples are part of a separate and different nationality within the State's territory and structure. Nationalities should be understood as a right that should be respected and promoted within a political and economic system that embrace them and not rejects them due to its specificity.

In political practice, the Indigenous right to self-determination implies, for example, that governmental institutions should adopt, promote and implement adequate Consultation and Free, Prior and Informed Consent (CFPIC) processes in their relations with Indigenous Peoples and communities. This is related to the elaboration, implementation and evaluation of institutional policy and actions aimed at the protection and promotion of individual and collective Indigenous rights, as well as other public policies. It is also used in situations where at least one of the parties identifies that the Indigenous Peoples and their territories may be or are affected or impacted by infrastructure projects (such as roads, railroads and dams) or by planned or illegal extractive activities (such as mining at a small or large scale), among others.

The idea or the principle behind the free determination of Indigenous Peoples or communities as understood here is not limited to the previous consultation "tool". It means and it becomes effective with the everyday exercise of autonomy in the decision-making process. It has to do with the way sociopolitical and legal institutions of the peoples and communities work, with the power to choose their ways of life, their development priorities, and the use of the territory. From the State's perspective, it includes the acknowledgement of Indigenous territories, which should be demarcated, regularized and protected from invasions and illegal extraction of natural resources. This is where the strengthening of self-defense should be combined with social and territorial protection actions encouraged by the State.

Ultimately, self-determination and autonomy are objectives that are part of a continuous struggle faced by Indigenous Peoples and communities that take place at different levels both inside and outside governmental institutions, either locally, nationally or even internationally. They require systematic, continuous and articulated actions to deal with adverse sociocultural and political hegemonies, which means establishing social ties, changing the power forces dynamics and developing "new" ways of understanding subjectivity and subjectivation.

We should consider favorable contexts and circumstances – such as the ones that took place at the beginning of 2023 with the creation of the Ministry of Indigenous Peoples (MPI) – because Indigenous self-determination policy can deeply influence the State structures and practices inherited from Indigenous Peoples as they exist and as they are applied in Brazil.

Taking the above as a starting point, we will discuss some topics or dimensions of the right to self-determination of Indigenous Peoples and communities, taking as reference the data collected and analyzed on the Indigenous Navigator (IN). We will also consider what was our first systematic and comprehensive approach to the way Brazil applies international rules included in International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (C-69); in the United Nations Declaration on the Rights of Indigenous Peoples, 2007, as well as other relevant human rights documents.¹⁰

10. This information can be found at the Indigenous Navigator website at <https://Indigenousnavigator.org/>



ABOUT INDIGENOUS SELF-IDENTIFICATION

The Federal Constitution of 1988 was and still is the milestone that marked a change in the protective relationship of the State towards the Indigenous Peoples of the country. Then, the ILO Convention no. 169 was introduced, which is part of the Brazilian legal framework as of 2005. Together, they created the necessary conditions for individuals and groups to self-identify, self-declare and consider themselves “Indigenous”.

Since the beginning of the 1990s, the criteria and proceedings for the identification and self-identification as Indigenous began to be incorporated in different areas of the public sphere. Even though the practical application of this right has varied from institution to institution in the last 30 years, it is possible to say that there has been an increasing acceptance and rise in the number of institutional establishment that adopted them.

This happened because specific public policies were created and implemented that particularly targeted Indigenous Peoples, as a result of the actions and pressure of different actors and organizations (both Indigenous and non-Indigenous) on federal and state organs. For example, there were new policies that aimed at Indigenous health care, Indigenous education, scholarships to access higher education, Indigenous access to justice in case of conflicts, among others.¹¹

11. We will discuss the resolutions of the National Council of Justice (in Portuguese, CNJ) regarding this topic later on.

As part of this movement, we need to mention what happened in 1991, when the Brazilian Institute of Geography and Statistics (in Portuguese, IBGE) included the self-declaration and the category “Indigenous” as a color or race item in the form that collected data for the Demographic Census of that year. Ten years later, in the 2010 Demographic Census, the form added a new feature where those who identified as “Indigenous” could also indicate the people or ethnicity they identified with.

Based on the application of the self-identification procedure, it was possible to calculate that, in 2010, there were 305 Indigenous Peoples and 274 different Indigenous languages in the country. The 2010 Census also informed that most self-declared Indigenous individuals did not speak an Indigenous language (57 percent) and that most of them only spoke Portuguese (77 percent) or knew how to speak Portuguese as a second language. Among those Indigenous Peoples who then lived in Indigenous lands, most of them (57.3 percent) spoke, at least, an Indigenous language.¹²

The data obtained with the IBGE Demographic Census was of such importance for governmental public policies that, apart from being potentiated by a favorable political moment, it generated elements and gave way to new public policy initiative for Indigenous Peoples and communities.¹³

In August 2023, the IBGE presented preliminary data from the 2022 Demographic Census. It identified the existence of 1,693,535 indigenous people living in the country, an increase of approximately 88.82% in self-declaration records compared to the 2010 Census. The Northern Region concentrates most of this population, with more than 750,000 people. The two states with the highest number of indigenous people are Amazonas (with 490.9 thousand) and Bahia (with 229.1 thousand), which account for 42.51% of the total population. The municipalities with the highest number of indigenous people are Manaus (71.7 thousand), São Gabriel da Cachoeira (48.3 thousand) and Tabatinga (34.5 thousand), both located in the state of Amazonas.

On the other hand, the Bolsonaro administration showed that it is possible to experience setbacks as regards Indigenous rights, even temporarily. On 01/26/2021, Funai Resolution no. 4 was published in the Official Gazette (in Portuguese, DOU). It defined what was known as criteria of *heteroidentification*, together with a number of procedures to be applied if it was necessary to verify the truth or authenticity of a self-declaration of individual or collective Indigenous identity. This was created because, according to its supporters, there was not enough transparency in the definition and application of the Indigenous category, particularly, in those circumstances where fitting in said category would mean benefiting from the government’s public policies. In addition to establishing problematic categories, the resolution gave the organ the power to decide who is and who is not an Indigenous individual in the country. This was the most structured attempt by Bolsonaro to impose indigeneity criteria, guided by objectives that restricted and excluded the application of Indigenous Peoples’ individual and collective rights pursuant to the Federal Constitution of 1988 and the ILO Convention no. 169.¹⁴

12. The elaboration of the list was made with the help of technicians and researchers of the Brazilian Institute of Geography and Statistics (IBGE), the National Indigenous Peoples Foundation (Funai) and the *Grupo de Trabalho Demografia Indígena de la Associação Brasileira de Estudos Populacionais* (ABEP). Cf. Pagliaro, Azevedo & Santos (2005); Santos e Teixeira (2011); Campos e Estanislau (2015). Since 2012, the IBGE includes their own data and analysis regarding Indigenous Peoples on their institutional website (<https://indigenas.ibge.gov.br/>).

13. Cf. Santos & Teixeira (2011), Jannuzzi (2020)

14. Cf. Verdum (2022d).



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ACCESS TO STATE JUSTICE AND THEIR OWN JUSTICE

Section 231 of the Constitution of 1988 establishes that “Indians shall have their social organization, customs, languages, beliefs and traditions recognized”, and it is incumbent upon the Union to protect such rights and ensure their respect. While no specific technical term is used, nor there is an explicit reference to what is known as Indigenous Peoples’ “customary law or custom”, the aspects mentioned and recognized in section 231 can be understood as an acceptance by the Brazilian State of customary law or customs of the country’s Indigenous Peoples.¹⁵

Even though it is possible to identify some cases where the State Court applied the Indigenous legal system while deciding a case according to their customs (customary law), there is still a legal vacuum when it comes to establishing clear and harmonizing legislation for the State Justice to apply Indigenous law.¹⁶

As to adequate State justice (we will say it like this), there were two main formal developments in the legal arena. The first one occurred on 06/25/2019, when the National Council of Justice (CNJ) passed Resolution No. 287, which established procedures for the treatment of “Indigenous People” who are accused, on trial, convicted or deprived of their freedom. It also describes rules to guarantee their rights in the criminal realm of the Judicial Branch. In section 3, the Resolution establishes the process to recognize a person as “Indigenous” is self-declaration, which can be done at any point of the criminal proceedings or the detention hearing. Section 5 establishes that the judicial authority should guarantee the presence of an

15. Cf. Araújo et al (2006); Curi (2012); Verdum (2013), Brazil / *Ministério Público Federal* (2019).

16. About the necessary and key distinction between Indigenous law and State law, and between Indigenous law and indigenist law, see cf. Verdum (2013) and Eloy Amado (2015).

interpreter, preferably part of the same Indigenous community, in every stage of the proceedings where the Indigenous individual appears.¹⁷

With the purpose of evaluating the correlation between the conduct and the values of the community that individual belongs to, as well as identifying the possibility of applying Indigenous mechanisms of dispute resolution, Resolution No. 287 established the judge should ground his decision on two documents: (a) the opinion of the anthropologist witness expert; and (b) the result of the consultation with Indigenous communities.¹⁸

The second formal development was on 04/22/2022, when the CNJ passed Resolution No. 454, which sets out rules and procedures to effectively guarantee the Indigenous Peoples and communities' right to have access to justice. The text is based on the principles of self-identification of the peoples, interethnic and intercultural dialogue, Indigenous territoriality, acknowledgement of each people's social organization and customs regarding dispute resolution, prohibition to appoint guardians and, mainly, their right to self-determination, particularly applied to those peoples living in voluntary isolation.¹⁹

According to this Resolution (Section 10), "Indigenous Peoples, their communities and the organizations that advocate for their rights and interests are already legal persons even before appearing before the court". Indigenous Peoples, their communities and organizations "have autonomy to appoint an attorney or to be assisted by the Ombudsman's Office if applicable and if their culture and social organization allows it".

In section 12, the CNJ and the courts agree to prepare manuals and trainings for judges and public servants, especially, judicial officers, with the purpose of explaining how to communicate procedural acts to Indigenous communities and organizations, including the importance of Restorative Justice. Article 24 aims at sending a proposal to the National Judicial School for Formation and Development (Enfam) in order to include Resolution No. 454 and CNJ Resolutions No. 287/2019 and 299/2019 in the curricula of their admission course and in the Judges' continuous evaluation course while on their two-year assessment period while working for the Judicial Branch. These are two very important decisions that impact the education of current and future public legal professionals.

As good as the resolutions that were drafted and passed by the higher levels of the Judicial Branch may be, the reality is different when they have to be applied, specially where there is a history of conflicts that revolve around Indigenous lands and the resources that can be found there, which is affected and fueled by structural and institutional racism. According to the National Prison Department (in Portuguese, DEPEN), from January to July 2022, the total prison population was 654,704 people. The self-declared Indigenous population represents 0.91 percent of that total, where 5.195 are men and 163 are women. Most of them are imprisoned and invisibilized without knowing their fundamental Indigenous rights and procedural guarantees under C-169.²⁰

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17. Resolution No. 287 is available at <https://atos.cnj.jus.br/atos/detalhar/2959>. In order to help abide by the procedures established in the resolution, the CNJ drafted a Resolution Manual No. 287 setting rules for the courts and judges. The Manual is available at <https://www.cnj.jus.br/wp-content/uploads/2019/09/Manual-Resolu%C3%A7%C3%A3o-287-2019-CNJ.pdf>.
 18. Resolution Manual No. 287 recommends the consultation and the report to be separate but complimentary procedures (Chapter 4, subsection "a"), and they may take place during the proceedings. More information at: <https://sti.tjms.jus.br/confluence/pages/viewpage.action?pageId=170787046#:~:text=Resolu%C3%A7%C3%A3o%2DCNJ%20n%C2%BA%20287%2F2019%2C%20de%2025.6.2019,%C3%A2mbito%20criminal%20do%20Poder%20Judici%C3%A1rio>.
 19. Resolution No. 454 is available at <https://atos.cnj.jus.br/atos/detalhar/4514>.
 20. More information at <https://www.gov.br/depen/pt-br/servicos/sisdepen> – consultation conducted on 12/26/2022. As regards Resolution No. 287 and the challenges to abide by due legal process rules when there are self-declared Indigenous individuals affected, see Assunção & Jung (2019), APIB (2020), Alves (2021), Jucá (2021), Castillo & Moreira da Silva (2022), Hilgert (2022). Concerning the reasons why imprisonment affects and violates Indigenous Peoples who are invisibilized by the penitentiary system, see Eloy Amado (2020).



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RIGHT TO DEFEND THEIR RIGHTS

Regarding the acknowledgment of Indigenous Peoples as legal persons who are capable of defending their rights, litigating for them and finding solutions to rights violations, this right is relatively well-established and guaranteed, at least formally. Article 232 of the Constitution of 1988 guarantees legal standing to Indigenous peoples when it mentions that “Indigenous Peoples, their communities and organizations have standing under the law to sue to defend their rights and interests”.

In 2021, while deciding on the case entitled *Arguição de Descumprimento de Preceito Fundamental (ADPF) No. 709*, which is about the rights and protections granted to Indigenous Peoples in the context of the COVID-19 pandemic, Luís Roberto Barroso, Justice of the Supreme Federal Court (STF) asserted he had no doubts, given the circumstances, that *Articulação dos Povos Indígenas do Brasil* (in Portuguese, APIB) has legal standing to sue pursuant to section 232 of the Constitution of 1988.²¹

As seen before, in 2022 the CNJ established in Resolution No. 454 that Indigenous Peoples, their communities and organization may file a claim to defend their rights and interests without having to be declared a legal person beforehand, they have the autonomy to appoint an attorney or choose to be assisted by the Ombudsman’s Office if applicable and if their culture and social organization allows it.

Since 1998, the Brazilian State has established different ways to recognize and support Indigenous institutions; most times, it was very specific, limited in time and related to a particular public policy. The main purpose was to provide the means to participate in Indigenous organizations or associations while implementing concrete projects in the field, such as the handling of natural resources in Indigenous lands, or for the Indigenous organizations to act as a political mediator between local communities and bureaucratic instances that execute policies established by the State.

There is no specific and permanent policy that strengthens the institutional capabilities of the peoples, communities and organizations to defend their rights. It was uncommon for the Brazilian State to provide public funding if it was exclusively or mainly destined to the “institutional strengthening” of institutions aimed at representing Indigenous Peoples. For this reason, they depended on third parties when they needed to file a claim or act in their own interest or in defense of their rights.

21. About ADPF No. 709, see <https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=754033962>

OBLIGATION OF THE STATE TO CONDUCT CONSULTATION PROCESSES

There are two legal provisions that are related to the State requirement to consult Indigenous Peoples and communities before adopting or applying legislation or administrative rules that may affect them, or before passing a project that may affect their lands, territories or resources. One of them is the Federal Constitution of 1988, that in section 231, paragraph 3, establishes that “Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indigenous land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law”. The second one is Executive Order No. 5,051, dated 04/19/2004, which was passed by the President to incorporate ILO Convention 169 asserting that it “shall be executed and applied in whole” (section 1).

Convention 169 includes “consultation” and “consent” in article 6, but consultation is also mentioned in articles 15, 17, 22, 27 and 28. Despite being an essential tool, it has not been properly regulated in Brazil.

There is a legal vacuum as to basic references, which is extremely serious for Indigenous Peoples. Particularly, when the government and private businessmen intend to widen the exploitation areas where natural resources are obtained (small and large scale mineral extraction, extensive agriculture, etc.) and to design new support infrastructure (roads, waterways, railroads, hydroelectric power stations, etc.).

In the last two decades, when a venture or a State project affected Indigenous Peoples and communities as well as their territories, the government would use a procedural remedy called Suspension of Injunction and Anticipation of Guardianship (in Portuguese, SLAT) in order to suspend any decision ordering to conduct consultation with the affected Indigenous Peoples. In general, first instance decision to suspend environmental authorizations until the Free, Prior and Informed Consultation was conducted would be overturned in higher courts, which accepted the government’s arguments by understanding that those ventures were “strategic for the economic order of the country”.²²

Until now, March 2023, there is no official and formal position expressed by the Brazilian State (not from the Lula Administration either) regarding Indigenous consultation or prior consent protocols. In particular, it is not known whether these protocols are considered a legitimate right of Indigenous Peoples that should be taken into account when making political and administrative decisions that affect them. We hope the Ministry of Indigenous Peoples (MPI) can get the necessary structure to act proactively in the implementation of this fundamental right.

22. Cf. Garzón, Yamada & Oliveira (2016).

INDIGENOUS CONSULTATION AND CONSENT PROTOCOLS

The elaboration of Indigenous Consultation and Consent Protocols (ICCP) is a manifestation of the Indigenous desire to be sovereign and independent from the guardianship of the State, their will to self-determine and to have territorial autonomy. It is one of the consequences of Indigenous Peoples taking a leading role, which has already been verified in other dimension of Brazilian social, political and institutional life during the past two decades. However, it is still necessary to assess its actual effectiveness and the conditions necessary for the communities to resist pressure, harassment, strategies and tricks by the political and business sectors associated with mining and related to prospecting and infrastructure projects.

It is known that the ICCPs themselves, especially when there is asymmetry and unequal political force, do not guarantee that the government or the companies would respect the decisions of Indigenous Peoples and communities, or that they would even consider their decisions. More than that is needed. It is the case of the road BR-319 that connect Manaus and Porto Velho,²³ or the case of the electric transmission line that crosses the Waimiri-Atroati Indigenous Land (Roraima),²⁴ or even the case of the construction project of the Ferrogrão train that will unite the cities of Sinop in Mato Grosso with Itaituba, in Pará State,²⁵ and also the construction of the Belo Monte Hydroelectric Power Plant, in the Xingu River, in Pará.²⁶ In all four cases, the consultation and consent of the Indigenous communities were ignored or treated as a means of negotiation and manipulation.²⁷

While there is a significant number of Indigenous protocols related to Indigenous lands and territories, there is not a consultation protocol that can be used to make more general decisions: an Indigenous policy protocol, to make decisions related to legislative and administrative policies that would affect every Indigenous people in the country. For example, if a Bill pretends to “regulate” unilaterally the mining activity or the extensive agriculture within Indigenous lands.

How and when to conduct more general consultation processes in a sovereign way and not in a guardianship way? It is not an easy decision, particularly taking into account today's context where the agroindustry lobby is one of the most organized and has voting power in the National Congress. Apart from that, and because of that, we believe it is necessary and urgent to start paving the way. It is necessary to articulate a wider social and political relationship, that extends beyond Indigenous Peoples and organizations and their immediate allies. Other sectors and actors with agency should take part on the national political stage. If not done, we run the risk of getting the complete opposite result we were expecting. We hope the Ministry of Indigenous Peoples (MPI) can get the necessary structure to act proactively in the implementation of this fundamental right. There is much greed surrounding lands and resources found in those Indigenous Lands.

23. See Verdum e Vieira (2021).

24. See article by Gabriel Ferreira, *Indígenas Waimiri Atroari aceitam compensação para que obra do Linhão atravesse seu território*, published on the website of Amazônia Real, on 05/05/2022. Available at: <https://amazoniareal.com.br>

25. In August 2022, the Funai, the National Agency of Land Transportation (ANTT), the Secretaria Especial do Programa de Parcerias de Investimentos (SPPi) y the consortium of companies Estação da Luz Participações (EDPL) were considered defendants in the claim filed before the Itaituba Civil and Criminal Federal Court of Appeals, in Pará. More information in *Justicia decide que Ferrogrão solo puede ser discutido si se respetan los protocolos de consulta indígena*, article published on the website of the Federal Public Prosecutor's Office (in Portuguese, MPF) and available at: <https://www.mpf.mp.br/pa/sala-de-imprensa/noticias-pa/justica-decide-que-ferrograo-so-pode-ser-discutida-se-protocolos-indigenas-de-consulta-forem-respeitados>

26. On 09/01/2022, Alexandre de Moraes, Minister of the Supreme Federal Court (STF), acknowledged that the Xingu right to be heard was violated in the case of the construction of the Belo Monte Hydroelectric Power Plant (<https://www.mpf.mp.br/pa/sala-de-imprensa/noticias-pa/stf-reconhece-que-o-direito-de-consulta-previa-dos-povos-indigenas-afetados-por-belo-monte-foi-violado>).

27. For more information about the drafting of protocols and their results, visit the Amazon Cooperation Network (RCA) website (<https://rca.org.br/consulta-previa-e-protocolo/>) and the Observatório de Protocolos Autônomos website (<http://observatorio.direitosocioambiental.org/>).



Caravana das Originárias da Terra
(TI Tenetehara, August 2022).
CREDIT: EDVAN GUAJAJARA

RIGHT TO LAND, TERRITORY AND RESOURCES

The Constitution of 1988 enshrined the principle that “Indians” are the first ones and natural guardians of the land. This is the main reason behind their right, they were the first ones. It establishes that the lands traditionally occupied by “Indians” are property of the Union and that only the Union has the power to legislate about Indigenous Peoples.

The guidelines for the administrative process to demarcate Indigenous lands are currently defined in Act no. 6,001, dated 12/19/1973 (Bylaws of Indigenous Peoples) and Decree no. 1,775, dated 01/08/1996, they “establish the administrative procedure for the demarcation of Indigenous lands”. This pieces of legislation have a lower hierarchy than the Constitution and give Funai the role of taking the initiative, orienting and executing the demarcation of lands.

However, both the Act and the procedures established in the Decree have been questioned mainly by pressure groups and other groups whose (territorial and economic) interests are against the recognition of Indigenous territories. When Provisional Measure No. 1,154/2023 was published, there was another opportunity for political and procedural challenges. The Measure provides for the basic organization of the organs within the Executive Branch, the Presidency and the ministries, and it allowed the creation of the MPI. The National Indigenous Peoples Foundation (Funai) is now part of the Ministry of Indigenous Peoples (MPI), but Decree No. 1775 defines the Ministry of Justice as the organ that approves of the identification, delimitation and demarcation conducted and proposed by the Funai. We consider it important and necessary to establish procedural rules to regulate Indigenous lands as soon as possible.²⁸

28. See. Brasil / Ministério Público Federal (s/d), Mourão (2018) e Resende (2020).

Political-economic interest groups opposed to the realisation of Indigenous Peoples' land rights remain active, organised and hegemonic in the National Congress and in the corporate media.²⁹

Currently, the approximate area of land that belongs to Indigenous Peoples and that has been legally recognized and ratified by the President is 106,808,547 hectares, making a total of 487 Indigenous Lands. Additionally, 122 Indigenous Lands are in the process of being recognized, 48 have already been identified and 74 have a Court order that establishes the area and determines the physical demarcation.³⁰

Another situation that is problematic is the overlapping of the territorial borders of the Indigenous Lands (ILs) formally demarcated by the Brazilian State and two political and administrative units that are part of their basic structure: states and municipalities.

Additionally, Indigenous Lands are considered - in lieu of a better name - "special areas" and are classified by Brazilian environmental legislation as "protected areas" together with the conservation units that belong to the National System of Conservation Units of Nature (SNUC) and the lands that are still occupied by Quilombolas communities. According to Fany P. Ricardo and Silvia de M. Futada, as of 09/30/2018, there were 77 cases of territorial overlapping in the whole country: 61 Indigenous Lands and 57 Conservation Units, which totaled almost 11.4 million hectares, corresponding to 9.7 percent of the total area of the ILs within national territory. Most cases are located in Brazil's Legal Amazon (51), the rest are in the South-Southeast regions (19) and the Northeast region (07).³¹

While in some ILs the communities take control and administer their territories and resources therein, this is not the case in most for most of them. The creation of the Plans of Environmental and Territorial Management (PGTA) within the National Policy of Environmental and Territorial Management of Indigenous Lands (PNGATI) contributed towards the strengthening of their own managerial capabilities of Indigenous lands. But each IL does not have a management unit for each of them. They are incorporated and subordinated to the National Indigenous Peoples Foundation (Funai). There is a legal vacuum as to a basic and clear reference of Indigenous self-government of Indigenous Lands, which is recognized by the State and by the Indigenous Peoples within the country.

29. Lucas Ferrante, "Projetos de Lei minam metas ambientais do Brasil", Revista Cenarium Amazônia, 04 ago 2023. Cf. <https://revistacenarium.com.br/projetos-de-lei-minam-metas-ambientais-do-brasil/>

30. The figures refer to the situation on 05/03/2023. For more information and updated figures see https://pib.socioambiental.org/pt/Situa%C3%A7%C3%A3o_jur%C3%ADdica_das_TIs_no_Brasil_hoje

31. See Act no. No. 9,985, dated 07/18/2000, known as SNUC Act - *Sistema Nacional de Unidades de Conservação da Natureza* (<https://www.gov.br/mma/pt-br/assuntos/areasprotegidasecoturismo/sistema-nacional-de-unidades-de-conservacao-da-natureza-snuc>). The *Instituto Socioambiental* (ISA) has data and information on the Internet about the Conservation Units (UC) created in Brazil, including the number of cases of territorial overlapping with Indigenous Territory (<https://uc.socioambiental.org/pt-br>). For more information visit: https://pib.socioambiental.org/pt/Sobreposi%C3%A7%C3%B5es_em_n%C3%BAmeros

CONCLUSIONS

Showing data and insights during such a fleeting moment as the one we are living at in Brazil is risky, but it also has its benefits. It is risky because the upcoming events may discredit all the statements and records presented in this report. There are benefits because those statements and records may be used as reference when establishing guidelines, acts and defenses, for example, in public organizations within the three branches of power in Brazil.

While there seems there was progress in the administrative field, like the recent creation of the Ministry of Indigenous Peoples, in the last 30 years, internal legal resources had been created to incorporate acts, guidelines and principles derived from ILO Convention 169, the United Nations Declaration on the Rights of Indigenous Peoples, as well as other relevant human rights documents and what was provided for in the Brazilian Constitution of 1988. Indigenous self-identification is relatively accepted and consolidated in the public sphere; State justice has incorporated in two of its resolutions principles such as the self-identification of the peoples, the interethnic and intercultural dialogue, Indigenous territoriality, the acknowledgement of social organization and the particular way in which each Indigenous People deals with conflict resolution, the prohibition to appoint guardians and, mainly, their right to self-determination; Indigenous representatives are present and active since 2019 in Congress, playing the role of Indigenous political representation that had been vacant since 1986; and the Indigenous Peoples, communities and organizations have recognized their right to act in defense of their rights and interests, there is still much left to be done. One example would be that the State, all three Branches, has adopted the Indigenous Peoples and communities' right to be consulted adequately and to consider their decision to be binding.

It is necessary for the Indigenous policy of self-determination to shape those State structures and practices that still has indigenist characteristics as much as possible. Particularly now that right-wing sectors are stronger and more active, those are the ones that held important positions and where part of the decision-making process in 2019 and 2022 in the federal public administration.

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