GEMA TÓMAS MARTÍNEZ
JURACI MOURÃO LOPES

CONTEMPORARY CHALLENGES IN HUMAN RIGHTS

A TRANSATLANTIC DIALOGUE

Universidad de Deusto
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PROLOGUE

It is a pleasure for us to write the prologue of this book, which is the result of collaboration between the Law School of the University of Deusto (Bilbao, Basque Country, Spain) and the Law School of the Unichristus University in Fortaleza (Brazil). The collaboration came about in the middle of the Covid-19 pandemic, and we were able to lay the foundations for a joint effort whose first result is the book you hold in your hands. The contributions included in this volume were presented at the I Congress of the Students of the Master's Degree (LLM) in International Legal Studies of the Law School of the University of Deusto and the Students of the Master's Degree in Law of the Law School of the Unichristus University, which was held on May 12 and 13, 2021 in the online format. Those who were fortunate enough to attend this event could attest to the quality of the research and the relevance of the topics addressed. Following the central themes that are addressed in our respective Master's programs, there were three thematic axes of the Congress: the impact of new technologies on human rights, the situation of prisons from the perspective of human rights, and the advances that are being produced in the sphere of indigenous peoples' rights both in Brazil and abroad. Of all the papers presented, we carried a selection taking into consideration both the quality of the work presented and the relevance of the chosen theme. We are happy to present this work to you, the first stone of a collaboration between our universities that we hope will produce many more fruits like this one. Another example of our willingness to cooperate is that a Unichristus student has just started her Master's degree in International Legal Studies at the University of Deusto. We hope to continue taking steps to make university higher education an instrument of social transformation to create a juster, more humane, and more sustainable world.

Gema Tómas Martínez

Professor of Civil Law

Dean of the Deusto University Law School

Juraci Mourão Lopes

Professor of Constitutional Law

Director of the Master's Degree in Law at Unichristus University

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PROTECTION OF SOFTWARE UNDER INTELLECTUAL PROPERTY RIGHTS

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Abstract: This paper aims to show how software is compounded of many influences, as artificial intelligence, and is part of an utmost reality that requires awareness, knowledge, cooperation, integration, dedication, understanding, patience among the economic operators and time to help it grow secure and be comprehended under the intellectual property rights loop saving, under the intellectual property rights, a special space not easy of being designed.

Keywords: artificial intelligence, software, intellectual property, intellectual property rights, blockchain.

I. INTRODUCTION

The context of Artificial Intelligence (AI)

What the technological era demands is a further advancement of computer programs. Indeed, more than demandable, the evolutionary improvements are inevitable due to the development of AI. AI affects distinguished areas of life. New technologies (NT) develop at a dizzying pace not imaginable some years ago. It remains as an uncertain space not only for society but also for experts, scholars, scientifics, lawyers and engineers. Nevertheless, the latter groups coupled with society need to work on a common shared path to coexist smoothly. Moreover, AI must comply with the following statements: respect for the human beings´ autonomy, prevention from damages, equity, and explicability. That AI and its basis, through its principles,[1] must be based on the respect of people´s thoughts prioritizing their independence without any interference; must contribute to improve the living conflicts which occur worldwide, not to aggravate them though; and, must be avoided any type of discrimination and inequality of

1 PLAZA PENADÉS, J. *Protección y cuestiones legales de la Inteligencia Artificial.* Aranzadi, 2019. P.3.

opportunities connected with an enhancement of distribution of resources. While AI promotes the creation of novel computer programs, current legal tools must be enhanced Intellectual Property Rights (IPRs) which would execute the protection. However, the juridical framework does not take advantage of such velocity because it could not pace as technologies do.[2] Consequently, it is found as a flaw along this path. An approximate perspective of the upcoming is as follows: on the one side, Intellectual Property (IP) constitutes the protection of brain creation as intellectual ideas which in the meantime are basically boost by AI; and on the other side, considering that computer programs are inside this non-stop growing industry just mentioned, it is a must to couple these two main tools.

It is thought by the AI community that AI emerged at the Dartmouth conference in 1956.[3] What happens with AI is that there is no identification worldwide of a juridical consensual definition. However, there are some notions, such as considering AI systems those which address a smart behavior,[4] or those who behave artificially as the human beings do. AI itself has multiple expressions and depending on its required end given, its functionality could be displayed differently. For instance, it is compounded by specific ways of acting as "supervised or machine learning" that implies to feed the machine with data to learn from it to produce the so-called "deep learning" in which the machine will learn through predictive models.[5] Indeed, machine learning embraces deep learning, multi-task learning and neural networks.[6] Furthermore, AI could be useful for big data in reaching the goal of organizing large amount of data; or data mining to find patterns.[7]

2 It is also an opinion of Carlos Muñoz Fernández on the MUÑOZ FERNÁNDEZ, C. "Google v. Oracle: When innovation overwhelmed Copyright Law". Lucentinus. Available at: https://www.lvcentinvs.es/2021/04/07/google-v-oracle-when-innovation-overwhelmed-copyright- law/ (Last accessed: May 18th, 2021).

3 RECH, J., and ALTHOFF, K.D. "Artificial Intelligence and Software Engineering: Status and Future Trends", DBLP, 18. Available at: https://www.researchgate.net/publication/220633840_Artificial_Intelligence_and_Software_Engineering_Status_and_Future_Trends?enrichId=rgreq-ed68a917daaf7f6c58651317c7df3aa0-XXX&enrichSource=Y292ZXJQYWdlOzIyMDYzMzg0MDtBUzoxMDQwOTU5NzczMTIyNjNAMTQwMTgyOTgyMzY2OA%3D%3D&el=1_x_2&_esc=publicationCoverPdf. P.2. (Last accessed: June 11th, 2021).

4 PLAZA PENADÉS, J. *Op. cit.* P. 12.

5 CERRILLO, A. and PEGUERA, M., *Retos jurídicos de la inteligencia artificial.* Primera edición. Editorial Aranzadi, 2020. P. 147.

6 *Ibid.* P. 208.

7 PLAZA PENADÉS, J. *Op. cit*. P. 7.

AI is creating a new challenge regarding IP in three areas: to what extent should the IP embraces AI, the functional application of technologies to such IP and the increasing data management.[8] The above mentioned are just a few examples of AI displays.

Consequently, innovation is the bridge between AI and IPR. What AI creates is the development of innovation by several ways, while it is IPR the tools which protect such innovation.

II. WHY TO PROTECT SOFTWARE?

It is convenient, in approaching the question "Why to protect?", to take into consideration some advantages of protecting software which were thought as focal points. Firstly, the investment in the development of software is quite relevant as financial expenditure. NT required sufficient liquid solvency to promote changes and improvements in the computer programs industry. The world is facing a reality that is changing deliriously fast. In so doing, undertakings must be prepared, in monetary terms, to keep track of such a launching. Secondly, as the era of technologies with AI is powerful, it is more likely to have future developments in software industries than in other ones.[9] Thirdly, as the previous notes reflect the stage before software is tangible as an asset to sell, once it exists, capitalism orders to trade. Protection is an incentive to comply with the disclosure that trade involves. This is strongly important for the users and exploitation terms licenses,[10] for instance. The more protection, the more intended dissemination by the producers in a proper manner, which also incentives the creativity and the growth of New Industrializing Economies (NIEs) and Medium Economies (MEs) whereby the protection of computer programs would constitute one of the basis for commerce. This protection must not be identical for all the countries if it is intended to attend to the idea of respecting the individualities of human beings, and their cultural roots in which the marketplace is based on.

Notwithstanding the contrary, a global principle must guide

8 *Ibid*. P. 242.

9 WORLD INTELLECTUAL PROPERTY ORGANIZATION. "Monthly Review of the World Intellectual Property Organization", WIPO. 1978. Available at: https://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1978_01.pdf. P. 7. (Last accessed: June 10th, 2021).

10 TAYLOR WESSING, "Things you need to know about licensing intellectual property rights". 2014. Available at: https://www.taylorwessing.com/download/article_dos_and_donts_licensing.html (Last accessed: June 9th, 2021).

the rules. The lack of harmonization could hamper the economy and the legitimate interests involved taking into consideration the existence of multiple levels of developments around the world. For instance, it is crystal clear when analyzing the case of exportations of computer programs. The standpoint is that non-developed countries do not have large industries about technologies and consequently, they do not spend much financial resources in AI mechanisms. Therefore, if a country, normally the developing ones, or MIEs, has not very well protected computer programs in its legislation, not for a reason of idleness but for a matter of getting acquainted with such technologies, it remains and provokes the protection of software as unnecessary. Probably such financial sources of this country are not dependent on computer development and such country does not need to regulate software. But, such reason constitutes a disincentive for the developed countries where the software protection is truly rewarding. Considering, for instance, the applying "equal national treatment" international World Trade Organization (WTO) principle, found on the Agreements on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreements) in Article 3,[11] the non-nationals citizens are protected as if they were national's members of the other countries, which in software-IPR-terms, the notorious impact is that the non-nationals are protected as if they were national's members of developing countries and they would not be as well protected as they are in their national territories. So, albeit the no need of regulating software for developing economies is felt as a vantage, this could end in a disadvantage for those developed countries economic operators who develop the software and invest time and funding.[12] All the Treaties, part of the WTO, need to be followed and complied by the totality of the WTO countries which are currently 143 out of 195 worldwide countries. The developing economies that were part of the WTO were given a period of transition time to adjust to the WTO principles, included the equal national treatment.[13]

11 WORLD TRADE ORGANIZATION. "Agreement on trade-related aspects of intellectual property rights". WTO. Available at: https://www.wto.org/english/docs_e/legal_e/27-trips.pdf. P.4. (Last accessed: June 5th, 2021).

12 MARÍA CORREA, C. "The legal protection of software-implications for Latecomer Strategies in Newly Industrialising Economies and Middle-income economies". OECD Development centre Working Papers, No 26, Publishing Paris. https://doi.org/10.1787/658251434128. Available at: https://www.oecdilibrary.org/docserver/658251434128.pdf?expires=1621352648&id=id&accname=guest&checksum=A-5F55B1D 5267B7E83E5F99C6221C1D34. P.19.

13 WORLD TRADE ORGANIZATION. "Frequently asked questions about TRIPS

Lastly, during the whole life of computer programs procedure, software could suffer damage by possible thefts of the source code, piracy, non-licensing or reverse engineering, among others. It means that it has a vulnerable side that deserves to be protected on behalf not only of the main developer or owner but also of the public interest. At the first stage, the source code that is private, if not Open-Source Code (OSC) whose protection will be by licensing, needs to be protected from internal misuse and misappropriation. This is done by initial contracts and non-disclosure agreements (NDA) by protecting the knowledge of the source code as sensitive information or confidential information. Therefore, the risks are within the companies if they do not protect the exchange of confidential information among the staff or developers. At the second stage, once it is executable, there is the risk of being damage by reverse engineering, which implies the possibility of the engineers to guess the source code, or of cracking the licenses. Somehow, by trying mechanisms of understanding the usage of software, it is possible for hackers to violate the license. For instance, if it is guessed that the software would keep running until some specific date, the license could be cracked by changing the settings in the embedded computer and stablishing another date in the calendar. At the third stage, when the software is running embedded in hardware, it is required to secure the environment by securing the personal computer both on premises where it runs, and by securing the deployment on the cloud.

Several and distinguishable measures need to be ensured if the intention is to protect software. Indeed, besides the need for harmonization among the worldwide countries in computer programs protection, it is also required the respect of the countries´ individualities and its status of development when creating a fair legal technological space.

III. ROOTS OF SOFTWARE

The roots of software remain within its historical background and within its legal evolution. Software is the new raw material in such develop NT framework and is increasing its market share. It was Japan, Brazil and Argentina which were the pioneers of establishing a software legal

(trade-related aspects of intellectual property rights) in the WTO". WTO. Available at: https://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm (Last accessed: June 5th, 2021).

regulation.[14] It had a revenue of an estimated US$48 billion[15] in 1987 while its contribution to the Gross Domestic Product (GDP) until 2007 has been growing up to 35% in some of the Organization for Economic Cooperation and Development (OECD) countries as Sweden.[16]

The implication of the international institutions in regulation of software and therefore copyright is key as it could be inferred by the effective progress deemed after the measures set by such organisms as explained on its reviewing documents. In other words, the World Intellectual Organization Property (WIPO) in its monthly review in 1993[17] established some mechanisms which were carried out by some different programs for developing countries in the field of copyright which by that time software was in the attempt of flourishing. There were many implications of WIPO helping non-developed economies as follows regarding Africa, Asia, Latin America and the Caribbean.

A specific program for Africa and countries thereof such as Côte d´Ivoire, Gambia, Malawi, Mauritius and Namibia to which the International Bureau gave drafts of law about regulation on this copyright sector with issues such as fees and collective administration in the case of Malawi, by commenting its own laws for Côte d´Ivoire or by pieces of advising for collective administrative rights in Namibia.[18]

For Asia and the Pacific, the WIPO did set training courses, seminars and meetings. The 1992 WIPO sent a draft to Oman, due to its own petition, about law on copyright as a type of training legislation. The WIPO National Symposium on Intellectual Property Law Teaching and Research in Manila gathered 54 participants from governments departments, offices of Senator in Philippines and legal and technical institutes; while the 1992 WIPO Intercountry consultation on Intellectual Property and Trade in Manila was organized by the United Nations (UN) and was attended by 38

14 *Ibid.* P. 17.

15 *Ibid.* P. 17.

16 ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). "Innovation in the
software sector", OECD. 2009. Available at: https://www.oecd.org/sti/ind/44131881.pdf, P.9. (Last accessed: May 22th, 2021).

17 WORLD INTELLECTUAL PROPERTY ORGANIZATION. "Monthly Review of the World Intellectual Property Organization", WIPO. 1993. Available at: https://www.wipo.int/edocs/pubdocs/en/copyright/120/wipo_pub_120_1993_01.pdf. Pp. 19-21. (Last accessed: June 10th, 2021).

18 *Ibid.* P.20.

participants from IP administration and trade development coming from Bangladesh, China, Fiji, India, Indonesia, Malaysia, the Philippines, the Republic of Korea, Sri Lanka, Thailand and Vietnam.[19]

Lastly, for the Latin America and the Caribbean, the WIPO Regional Seminar on Copyright and neighboring rights for Judges in Panamá did gather 35 judges from Costa-Rica, and 4 judges from El Salvador, Guatemala, Nicaragua and Panamá. Besides, other countries such as Sweden and Portugal did set meetings at the WIPO forums under the motivation of cooperation with such developing countries regarding copyright laws.[20]

The history of software is linked to the history of hardware. Software regulation appeared when it was treated as a separate good of hardware with its main properties and specificities, possibility of commercialization and use,[21] as well as its vulnerabilities. Nevertheless, whether it seems hardware is left behind software, due to the improvement of the technological techniques, sometimes the demand of industry obliges to undertakings to combine hardware and software to make AI workable.

Even though the differences between the developing countries and the non-developing countries exist, all of them have developed software according to its possibilities and still they do. It is not as thought-provoking for the developed countries as it is for the developing ones owing to the lack of resources, impossibility of mobilization of qualified personal or low capital investment. Although, this is aligned with the principle of equal national treatment mentioned, sometimes when it is believed a situation is counter-effective for the NIEs and MIEs, it would not be. Lack of resources affects more to hardware improvement instead of software development, despite what it was stated in advance,[22] the non-developed countries focuses its attention on software instead of hardware which provokes the expansion of software in NIEs and MIEs.[23] All of a sudden, the lack of progress and resources had had a positive result once in life.

19 *Ibid.* P.20.

20 *Ibid.* P.21.

21 *Ibid.* P.17.

22 Set forth in Chapter "Why to protect Software?" of the present study paper: "That when non-nationals are protected as if they were national's members of developing countries would not be as well protected as they are in their national territories. So, although the no need of regulating software for developing economies is felt as a vantage, this could end in an advantage for those developed countries who develop the software and invest time and funding."

23 MARIA CORREA, C. *Op.cit.* P.17.

IV. FIRST APPROACH TO SOFTWARE

Software development is part of new technologies framework and, software as a term, could be defined as "a type of readable instructions by a machine in binary code". The creation of software has its own stages within the so-called System Development Life Cycle (SDLC),[24] in which it is analyzed the necessities it was created for. During this SDLC, by researching on the evolution of software that each day grows faster due to AI, it could be protected during its lifespan by several IPRs. Software, in its variable expressions, could bring on board copyrights, patents, trademarks, industrial designs, databases, and trade secrets;[25] most likely occurs via copyright, patents, trade secrets, and via strategy.[26] Software is the "gold" in such a developing NT framework in which AI contributes to promote its development.

Consequently, the protection par excellence of software components is copyright. The three main components of software such as the source code, the object code and the interface user are the most valuable assets of software in its creation while the functionality or the ideas remain behind such components as an abstract value. What is protectable by IPR on software not only are the underlying innovation and implemented inventions but also such manifesting source code, such object code and such interface user. Given the variable stages on its lifetime, whereas the source or the object code and the interface user are protectable by copyright; related copies and adaptations also though;[27] nor software-implemented inventions[28] nor its

24 MISHRA A., and DUBEY D., "A comparative study of different software development Life Cycle Models", *International Journal of Advance Research in Computer science and Management Studies*, Vol. 1, Issue 5, 2013. Available at: https://www.researchgate.net/profile/Apoorva-Mishra/publication/289526047_A_Comparative_Study_of_Different_Software_Development_Life_Cycle_Models_in_Different_Scenarios/links/59c00417458515e9cfd549a1/A-Comparative-Study-of-Different-Software-Development-Life-Cycle-Models-in-Different-Scenarios.pdf. Pp. 64-69. (Last accessed: May 28th, 2021).

25 *Ibid.*

26 COURSERA. "Protecting business Innovations Via Strategy". Coursera. https://www.coursera.org/lecture/protect-business-innovations-strategy/1-1-course-week-1-%20overview-RwYJ5 (Last accessed: April 2nd, 2021).

27 MARIA CORREA, C. *Op. cit.* P.18.

28 SANTACROCE J. *Patenting of Computer-implemented Inventions: The view of the EPO.* European Patent Office, 2014. Available at: http://www.oepm.es/export/sites/oepm/comun/documentos_relacionados/Ponencias/70_Ponencia_2.pdf. P.4. (Last accessed: February 21st, 2021).

functionality nor its ideas are protected by copyright. Even though there is an exclusion of programs for computers for being protected by patents, those ideas or functionalities of such programs for computers that contain any technical component are protectable by patents. Despite the difficulties that patents offer when applying its legal protection, it seems patents wide the possibility of solving the gaps that copyright law could not embrace.[29] The crux is to observe when such changes happen into the software to establish which type of path of protection must be followed.

Moreover, the other outcome of computer programs is that what is protectable in computer programs is the "expression of the idea" but not the "idea" itself which could bring endless but fair discussions when going into the details. A truly clear example of what expression in computer programs copyrighted work means could be expressed by the case of J.K. Rowling, author of Harry Potter. When she wrote about a teenage wizard in a magic school, the idea itself was not protectable by copyright, but it was the expression of such idea. What is meant by the idea is that it is not preventable from being used by other authors the idea of a teenage wizard in a magic school, because J.K. Rowling could not own the idea. Imagining the plot, or even the words themselves, could have an owner, it would create no possibility of free speech and free thought without committing an infringement of the rights of the owner. Therefore, for a logical matter just how the author expresses the ideas by the dialogue, the characters, specific wordings, or the like, is protected as the expression of the idea.[30]

Examining the remaining IPRs, trademarks will oversee safeguarding the logo or a word which complies with the identification of software. Trade designs could protect the graphical user interfaces. Trade secrets oversees the confidentiality of the source code that avoids copying such information being helped by NDA. Lastly, Database rights, which is an exclusive European tool, will protect the outputs of the software procedure[31] alike the massive data-sets, although not individually, that AI

29 EUROPEAN PATENT OFFICE and CHINA NATIONAL INTELLECTUAL PROPERTY
ADMINISTRATION. "Comparative study on computer implemented inventions/software related inventions. EPO and CNIPA. 2019. Available at: https://www.epo.org/news-events/news/2019/20191112.html (Last accessed: February 28th, 2021).

30 EDMUND WANG, T. "The line between copyright and the First Amendment and why its vagueness my further free speech interests", *Journal of Constitution Law,* Vol.13.5, P.7.

31 HELPDESK. "IPR management in software development". European Comission Helpdesk. Available at: https://docplayer.net/814799-Fact-sheet-ipr-management-in-soft-

works with. Notwithstanding the foregoing, no sooner will the debate under the remaining IPRs as a tool to protect software be finished, it does foster a new beginning for software protection with the existing regulation, despite of new suggested solutions worldwide such as the creation of IP based copyright protection algorithm.[32]

V. ARTIFICIAL INTELLIGENCE

Intellectual Property-Block´s licensing

Having agreed the implications and impacts of AI within software industry on the foregoing, it is wanted to remark the importance of licensing under such framework whereby AI and software are interconnected. Not only based on its dichotomy as relationship but also regarding the ownership. These points could be addressed setting the example of the Horizon 2020 (H2020) Projects since AI is truly developed by the R&I programs.[33]

In the context of these mentioned Projects, the functionality of the system is to work by work packages (WPs) divided accordingly to the tasks assigned, and for the partners to work among themselves cooperatively. This collaboration will create results relating to software promote by AI means that encourages the innovation framework whereby the Action evolves. The focus is not on the percentages of any joint-owner will have on such results, because it could be established by pro-rata basis in a joint-ownership agreement. What is the noteworthy takeaway is the access to some previous software that is needed to create a new result. This has to do with the derivative works facts and the access to such previous software. There are situations in which the access to some results, being software, must be helped by licensing even if they are protected by IPRs. If the licensing system did not exist or did not apply in software IP and AI sector, it would be a

ware-development.html European Patent Office, *Hardware and Software,* Available at: https://www.epo.org/news-events/in-focus/ict/hardware-and-software.html (Last accessed: February 24th, 2021). P.3.

32 JING N., Liu Q., and SUGUMARE V., *A blockchain-base code copyright management system*, Information Processing and Management 58, 2021. https://doi.org/10.1016/j.ipm.2021.102518.P.6.

33 Regulated by the COUNCIL DECISION of 3 December 2013 establishing the specific programme implementing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decisions 2006/971/EC, 2006/972/EC, 2006/973/EC, 2006/974/EC and 2006/975/EC (Text with EEA relevance) (2013/743/EU). Available at: https://ec.europa.eu/programmes/horizon2020/h2020-sections. (Last accessed: June 11th, 2021).

burden as the so-called "IP blocks"[34] for competition law, for the essential reasoning embraced above. The refusal of licensing must become an utmost burden for competitors and within these Projects, it could turn out a cap for development and innovation and be against public interest.

It is necessary to keep in mind the difference between a licensing agreement and an assignment. The "de iure" facts and the subjects, who are involved in, vary. By the assignment, there are the assignor and the assignee; whereas by the licensing agreements, the licensor and the licensee are who star such agreement. The facts are that by the assignment there is a transfer of the ownership of the IPRs from the assignor to the assignee; whereas by a license, it is meant a permission for the licensee to use the IPRs.[35] So, in the foregoing situations whereby the IP- blocks harm the development, is due to the lack of licensing. If the licensing does not occur, there is no use of the IPRs. Licensing is enough for such use for boosting enhancements of AI and software, being not demandable an assignment of the IPRs. It could happen though, if the rightsholders desire it.

In the same order of things, considering that there is no oeuvre without author,[36] there are some situations whereby it could be inferred some problematic of determining the ownership of the software developed by AI. If a software is developed within such Project Action under R&I programs, who owns the software? The results which are created or developed during the implementation of the Action do belong to the employer, either to the university or to the undertaking. The provision in the Project Consortium Agreement (PCA) is as follows in Article 8.1[37]:

> "Results shall be owned by the Party whose employee(s) generated such Results, or on whose behalf such Results have been generated by a Subcontractor."

Although there exists the possibility of agreeing differently, it means that the ownership will never belong automatically to the employee

34 FEDERAL TRADE COMMISSION. "Antitrust guidelines for the licensing of Intellectual Property." *Op. cit.*P. 5.

35 TAYLOR WESSING, *Op. cit.*

36 CERRILLO I MARTÍNEZ, A. and PEGUERA POCH, M. *Op. cit.* P.216.

37 ECSEL JOINT UNDERTAKING. Private Consortium Agreement. European Union. Available at: https://www.kdt-ju.europa.eu/useful-information#main-title. (Last accessed: May 28th, 2021).

during his job in such H2020 Projects, since it will be for the employer, either the university or the undertaking. Is this fair enough as a rule though? Quite interesting the establishment of such a general rule that at first sight seems faithless. It is backed up by the Directive 2009/24/EC of the European Parliament and of the Council of 23 April on the legal protection of computer programs in its Article 2.3[38] which establishes that employers are the rightsholders of the economic rights, unless otherwise stated in an agreement, what is well-known such practice in business industries:

"Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract."

Notwithstanding the foregoing, it is noteworthy the current exemption of Sweden for academic environment. Sweden grants the "professor´s privilege" that means the absolute right of the academics to fully own the IP produced by the research, also within such Projects. The practical effect of the professor's privilege is based on giving all royalty-free to one party, in this case to the professor, without any balance with the university. Although it seems a big step forward, Norway, where it was also implemented in alignment with Sweden, enacted a law to reform this situation to remove such privilege[39] to align with the remaining European customs. The debate should still be on the table as the employee rights seem to be at stake.

Technological approximation by blockchain

Blockchain might have the power of solving some of the problems mentioned previously. Blockchain, as a type of ledger, was popularized by Satoshi Nakamoto in 2008 through the cryptocurrency Bitcoin (Nakamoto 2008).[40] Blockchain is a chain of blocks that works by nodes which perform

38 EUROPEAN UNION. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs. Official Journal OJ L 111, 5.5.2009. Pp. 16-22. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0024 (Last accessed: July 28th, 2021).

39 HANS HVIDE, B. "University innovation and the `professor´s privilege`". Voxeu. 2016. Available at: https://voxeu.org/article/university-innovation-and-professor-s-privilege (Last accessed: May 20th, 2021).

40 WILLIAN CONG, L., and HE, Z. Blockchain disprution and smart contracts. *The review of financial studies,* Volume 32, Issue 5, 2019- Pp. 1754-1797. P.1755. https://doi.org/10.1093/rfs/hhz007

the maintenance of the blockchain network. The blocks do not have the possibility of being changed once they have been created, due to the tamper-resistance nature of blockchain working by consensus algorithm.[41] In the following lines there are some mentions that would affect positively the industry of software and the IPRs that could be brought into the blockchain panoramic, thereby, some random situations in which blockchain could affect IPRs sector are presented.

Firstly, in relation with the automatization of the machines, as there are some machines in the legal sector that are created to implement the law automatically, or to help the lawyers in their practice it could have an impact on the authorship rights. Such machines, due to the automatization, could delete automatically content of internet based on the wrong or right detected ownership.[42] Secondly, the transparency and accountability way of the ledger is well- known. Owing to the decentralized chain of blocks, an IPR could be introduced into the blocks chain before it has been granted by the IP Office, which means, it affects the authorship in preventing from the others of filling an application of such asset by making public the identity of the developer. Not only the latter, but also, blockchain could contribute to protect the ownership of a software developer previous any IP application is filed as it is deeming in the blockchain-based IP copyright protection algorithm idea.[43] Thirdly, as intermediaries have been removed from the transactions because is blockchain who leads them, blockchain becomes more transparent and more secure when avoiding plagiarism. How? Blockchain, as well as protects the first author who fills the idea on the decentralized blocks chain regarding his IP, also covers the possibility of protecting the source code files by copyright identification.[44] Furthermore, the removal of intermediaries has to do with the decentralization and has an affection to copyright. As third parties like authorities are removed of being intermediaries when processing the application of new IP files, the originality of copyright is not supervised by them, so it is supervised by the nodes in the blockchain, which avoids the subjective perspective of human beings, and, it increases the supervision. Fourthly, blockchain opens a new way of contracting by the smart contracts relying on trustworthy systems

41 *Ibid.*

42 CERRILLO I MARTÍNEZ, A. and PEGUERA POCH, M. *Op. cit.* P. 147.

43 JING N., Liu Q., and SUGUMARE V., *Op. cit*. P. 6.

44 *Ibid.* P. 10.

by the consensus principle.[45] These contracts permit to go beyond the mere transactions and contributes to pay the developers when completing their tasks upon the acceptance of such contracts and contributes to certificate empirical data.[46] Consequently, blockchain sets secure storage of IP by improving the proof of authorship, contributing to documented protection of trade secrets, establishing a prior state-of-art, promoting safe sharing of confidential data, maintaining documentation of the usage of trademarks, evidences of transfers and sales and IP licensing as yet.

As well, once some piece of copyright protection has been recorded on the blockchain becomes automatically credible and reliable. The nodes ensure the authenticity and reliability of copyright authentication during two stages: before the introduction of the piece of information of the copyrighted work and afterward. In advance, because the originality of the code documents is verified by the miner node based on the automatic program code of similarity, and onwards because the storage is not made on a cloud server or database, instead is recording into the blockchain that in general terms becomes more secure. However, it is needed to beware of the piece of information that is included due to its tamper-resistance nature since the information cannot be modified or deleted once it is on the blockchain.

Moreover, this disruptive technology which is a chain of decentralized numbered blocks that work unstoppable conjunctly affects to the market. For instance, one of the approximations and affections to competition law that could be expressed is that there is no needed of a permission to enter as a block as such in blockchain, therefore it means there is no entry barrier into the blockchain market. As among the blocks there is a link construed by a consensus algorithm, any person could build a block elsewhere worldwide with such consensus algorithm. In so doing, blockchain impacts on the anti-competitive behavior of agents due to the facts that on the one side, there are no barriers of entrance and on the other side, the prices of the products of one company are not obvious for the other incumbents since it does not reflect the theft of a market-share.[47] However, there might offer a supervision on collusion practices. It is truly right that

45 WILLIAN CONG, L., and HE, Z. *Op. cit.* P. 1758.

46 MARCHESI M., "Why blockchain is important for software developers, and why software engineering is important for blockchain software (Keynote)," 2018 *International Workshop on Blockchain Oriented Software Engineering (IWBOSE*). 2018. Pp. 21 10.1109/IWBOSE.2018.8327564.

47 WILLIAN CONG, L., and HE, Z. *Op. cit.* P.1774.

one seller could not be aware of the incumbents´ quotes, yet through their own consumers´ movements could infer the other actions inside the market committing an antitrust behavior.[48]

Blockchain is offering just a brief piece of the wide panoramic that AI compounds, but it infers how important is the impact in IPRs, but also in life. Blockchain is a technology that could affect lives leaving an utmost fingerprint, from IP sector to antitrust law, involving and requiring a cooperative work conjunctively between the engineers, lawyers and governments. Moreover, it offers an insight of the new opportunities to which mankind could facilitate the existence and could deal with daily obligations since it proves how industries, undertakings, universities, or economic operators, in general terms, would be the most beneficiaries in IPRs by taking advantage of such technologies aside from archaic risks. Besides, society is demanding for a non-contaminable technology[49] in an "industrial 4.0" era in which new technologies are the main stars.

VI. SINGULAR APPROACH TO SOFTWARE PANORAMIC

Up to now, it was referred to the history, ideas, concepts, expressions, issues, or curiosities that software faces. As a last step, to broad the scope of computer programs´ insight, it is tried to offer another vision of the challenges with the help of one philosophical reflection that still could adjust the perspective and the legal status-quo.

A sui generis creation of Software?

After having studied the legal framework of copyright about software, it is not considered as necessary a sui generis creation, since the problems that have been showed through the wording of this investigation would not seem to be resolved by a specific creation of software regulation. At the beginning of this research that was the main idea, though. However, as the knowledge in the subject gets powerful, it is understood as reasonable and acceptable the non-creation of a specific legal regulation for computer programs considering the current legal framework and the context with AI. The other way around, the issues about computer programs would be transferred to another legal conversation when discussing for a new protection, to another space, but they still remain as the same issues, because

48 *Ibid.* P.1776.

49 DELTON B. C., *Utility of the blockchain for climate mitigation*, Center for Regenerative Community Solutions, New Jersey, USA, 2018. 10.31585/jbba-1-1-(6)2018.

as it was anticipated the legal operators are not yet prepared for such a fight with AI, the bidirectional work among the operators, either juridical as lawyers or technical as engineers, is not as quick as NT develops, so the dispute about a regulation from scratch is not worthy today in a sense. The legal side needs to reach deeper the points of NTs, as its standpoint, before putting it in practice by the legislator.

Notwithstanding the foregoing, it would be interesting to address some specific changes in the law about the differentiation between the "expression of the idea" and the "idea". Would it still be needed in the future such a differentiation? Is it fair for developers? These two concepts are divided in the attempt of adjusting to patents with the requirements of novelty, innovative and technical; and to "literary works" when it does make sense to not preventing the remaining authors or writers from having the right to write the idea about an adolescent wizard in a magic school, but hardest to adjust it to software code. The impression is that the nature of computer programs is intentionally adjusted to the demands of other assets just to fit into the IPRs that protect such assets. Maybe, if software protection is undressed of such notions which were successfully and intentionally added to it just for its adjustment to the current legal framework, the reality would present a new nature of computer programs not been aware before that requires and demands a unique protection. Respecting its unique nature, the source code and the object code would not be oscillated between the expression of the idea or the idea itself; moreover, these latter concepts would constitute a solely one which would avoid, for instance, the time- consuming problematics, as one of its trouble situations, when filling an application to another institution. Or even if they would save the difference, at least try not to depend on other IPRs requirements to make them protectable; IPRs, indeed, which are not meant specifically to apply to software.

Other problematic still challenging, is the piracy, as the act of modifying or restructuring slightly the computer program. Piracy is one of the drawbacks that suffers software at the same level that others author´s creation suffer. Although, to copy a computer program either of its object code or its source code is quick and inexpensive.[50] It is difficult to strike a balance between the possibility of copyrighting a work and make it publicly available. Software is protected in order to incentivize the inventions,

50 ROOT, H. Copyright infringement of computer programs: a modification of the substantial similarity test". *University of Minnesota Law School*. Vol. 68. 1503, 1984. Available at: https://scholarship.law.umn.edu/mlr/1503. Pp. 5

by protecting the "unproductive use of a protected work (copying the expression) but allow the economically and artistically beneficial use"[51] which means to draw the theoretical line between the infringement and the legality. When allowing the foregoing by copying, leaving aside the details of copying, piracy comes into practice somehow. However, this line does become blurred in practice.

Following the case law system in the United States, judgements show which the arguments are when determining a copy of the expression, and therefore an infringement of the copyright law or the copy of an idea, non-infringement result of copyright. The so-called "substantial similarity test" could be used to examine such an infringement, they prevent from using it when either the infringement is so obvious or would not be successful to computer programs though. The test is about comparing the points which could match in "general aesthetic similarities" to consider whether it is a copy or not. As a tool it is used an ordinary observer in general terms, instead of the vision of an expert; although it turns into some difficult practices since the users who could be the observers are not usually watching the object code, as the theatergoers.[52] The conclusion is that it does not exist an ordinary observer for computer programs. Moreover, when the computer program is fixed in object code whose expression is in 0´s and 1´s is tricky to get the observer´s general feeling. However, it is preferable to obtain a non-expert view to get an intuitive idea of similarities. It depends on the cases whether to vary this expertise. On the other hand, the "iterative" test in the United States, the key point is to check the similarities and the possibility of accessing to the copyright work examining is a reproduction of the copyrighted work or not.[53]

The piracy thing involves unrewarded creative works, producers of works, loss of revenues by governments. Piracy must do more with points that were forgotten along the path, such as raising awareness of those citizens that are not working or involved in the engineering field who are not aware of the big spectrum of possibilities to jeopardize software. And they are not who pirate the software yet most of them are those who use the piracy work. It is not easy to ask for some responsibility to them if they are not educated on the problematics in advance. Instead of making them full of legal rules that are not understandable from their non- engineering minds,

51 *Ibid.* P. 13.

52 It is meant that the theatergoers are who observe the similarities during the performances in order to determine if there is a copy. See ROOT, H. *Op. cit*. Pp. 23-24.

53 ROOT, H. *Op. cit*. P. 33.

what is understood to need is to face a threshold that acts as a wall to limit the progressive reduction of creative inputs by educating minds.

Concluding, what is meant by changes is not only meaning the possibility of creating a sui generis protection anticipated in advance, but also, in the case the current legislation is kept, who should address the changes on copyright law about software? Legislative power or judicial power?[54] Depending on what systems is studied, whether the civil law system or the Anglo- Saxon system, the response could vary. For those countries that belong to the civil law system are rather in favor of elaborating legislative policies of copyright on the basis of its validity-law concept by codification whereas the Anglo-Saxon countries must validate the judgments as a manner to create law on copyright. Despite the exposed differences pointed out by these two high-tied systems, it does not seem feasible to let the issue just to the judges to tailor this reality by executing their power. The reason is because the consequences would embrace a wide, variable and diverse panoramic starred at the non-consensus on the items.[55] As it is anticipated, the fact that there is no one specific protection for computer programs and the protection is divided, it turns into a more vulnerable and dependable one.

VII. CONCLUSION

This studio by the Chapters I, II, III and IV had the intention of representing several faces of software applications. To make the reader conscious of how the concerns, questions, problematic, protection, expression and composition were in the past and how they are in the present. Raising awareness between the users, developers and governments worldwide is a must since it affects to anyone in such a both globalized and technological world. During the lifetime of software, it could occur a harm at different levels. Software is developed by the source code, the object code and the interface, which by its compilation becomes executable and then, ready to be deployed in a hardware. The damage to these elements is so easy-happening owing to the fragility of evidencing the copy of the source code, either for the millions of products within the marketplace in which software, for the time-consuming or for the big expenditure for small companies. In the same order of things, the sociological evolution of software varies within

54 GIBLIN, R. *What if we could reimagine copyright?* (K. Weatherall, Ed.) Australia: Australian National University Press. 2017. 10.22459/WIWCRC.01.2017.

55 *Ibid.*

the NIEs countries and the MIEs from its usage to the acknowledge of hardware, as part of the software lifetime and its evolution. Some details as the followings are established: the impact of AI in software reality, who the pioneers were; where it is created, developed and enhanced from; evolution of it; origins; interdependence of other appliances as hardware; impact on the worldwide countries; what is compounded of; how protectable are its elements and the problematic of its protection.

By Chapter V, it is assessed the impact and relation to the application of AI, IP and software. In such implementation of interoperability, on the one hand, it is highlightable that there are frameworks in which AI plays a major role regarding IPRs in which licensing becomes totally necessary. Otherwise, it would be considered as IP-blocks. On the other hand, the same occurs with the difficulty of the discussion encountered when the ownership, in a framework where AI is the main element to develop software, whether it belongs to the employer instead of to the employee. As nowadays belongs to the employer, this is thought as a debate that should be an ongoing one in order to protect the rights of the researchers when working with AI and software. In this same line, it would dignify the protection of computer programs.

In the same Chapter V, it is found the special relation between competition and blockchain. Considering the connection between blockchain and copyright, it is highlightable the increasing effectiveness that blockchain has addressed in relation to software when being protected by copyright. The perceptible advantages could be felt on the accountability, transparency and enforcement such platform offers. By deleting content of the internet automatically, by protecting the ownership before the application is submitted or granted, by removing third parties as intermediaries or by introducing new smart contracts. In this sense, when it comes to ensure the owner of such a right is much more accessible and guiding by the information provided by blockchain technologies than old-fashionable ways of protection. Although, bearing in mind that it is a trustworthy system in which confidence through the users is really required.

By Chapter VI, it is concluded that there are other displays of software approached from philosophical perspectives such as the sui generis creation idea. In the protection of software remains deeply an idea to create an own regulation of software from scratch is not believed as the solution of the software improvement nowadays. In the future, it is foreseen to create a sui generis regulation yet not currently, since the pace of NT and AI is much rapid than the pace of computer programs are developed. The creation of

a new regulation is a big deal, and the legislator is not enough prepared for such a challenge. So, the solution is to collect as many pieces of knowledge as legal operators could and transform the existing regulation to enhance the reality of software.

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THE RULE OF TECHNOLOGY: ADM AS CONSTITUTIVE OF HUMAN BEHAVIOR THE RULE OF LAW VS. THE RULE OF TECHNOLOGY

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Data is part of our everyday lives. Data and technology have proven to be very powerful tools that are making it possible to access many different things from knowledge to jobs to online shops. Data is power nowadays which means that is a top priority for governments, corporations, and other actors. Today's information revolution is affecting every single aspect of our lives, both as individuals and as society. New Technologies (NTs) are putting at stake not just the different social contracts worldwide but also the law that governs and formalizes them.

New Technologies cover a huge spectrum of technological advances. However, in this paper, I will just focus on one part of it: Artificial Intelligence (AI). More precisely, in a subpart of AI called Automated Decision-Making (ADM) through which, an algorithm makes decisions that affect individuals and societies and create a huge challenge for both ethics and the law. According to Mittelstast et al. ADM algorithms "make generally reliable decisions based upon complex rules that challenge or confound human capacities for action and comprehension, however, those decisions are subjective and not necessarily correct"[1]

Thus, this kind of algorithm not just processes information, it also produces knowledge that directly affects human behavior. This leads to a shift in which the law is no longer the only regulator of society, but it appears a new actor: technology, that creates and sometimes imposes rules that regulate human conduct.[2] I will focus on this paper in ADM as a regulator and normative order itself and the implications it could have for governance. We are used to think that technology is rational, as it reaches decisions through numeric and mathematical means that are conceived to

1 Felzmann, Heike; Fosch-Villaronga, Eduard; Lutz, Christoph; Tamò-Larrieux, Aurelia (2020): "Towards Transparency by Design for Artificial Intelligence" in Science and Engineering Ethics 26: 3333-3361.

2 Pagallo, Ugo; Bayamhoglu, Emre; Cuijpers, Colette; Durante, Massimo; Padua Lima, Marcelo; Magrani, Eduardo; Steffen Guise Rosina, Mônica; Tripathy, Sunita; Weill, Rivka (2015): "New Technologies and Law: Global Insights on the Legal Impacts of Technology, Law as Meta-Technology and Techno Regulation". Law Schools Global League.

be impartial. However, we can not forget that algorithms are human-made, they are like a manual in charge of some task that a human being has created for it. Therefore, biases can be part of that mathematical process way before than the AI system gets to a decision.[3]

The way we interact with technology and the unprecedent levels of interconnectivity are challenging the most basic principles of the law such as transparency or accountability. Take the example of an ADM algorithm that makes a decision that discriminates a person based on gender. The law does not consider AI as the discriminator, tampering basic legal security principles such the allocation of responsibility or the compensation of unjust damages.[4] Let's dive a little deeper into one of the basic tenants of democracy, transparency, as an example of how the opacity of AI is affecting the rule of law as we know it. Burrell[5] identifies three forms of opacity in AI:

1. Intentional secrecy, AI systems will hide data that is protected by laws such as privacy or data protection laws.
2. Technical illiteracy. This form of opacity is probably the easiest to link with AI. AI systems involve complex data and technical process that are not easy to understand.
3. Finally, there is a kind of opacity that Burrell relates specifically to machine learning systems – like ADM - because it is not only about complex data but about the huge amounts of data that these systems process and are constantly fed with.

Understanding this three types of opacity is important for the question I am posing in this paper. But before I get into it, I would like to highlight that ADM can be as discriminating as humans. At the end of the day, the data used to predict behavior – despite being born on scientific knowledge and objective facts – is taken from the society that it belongs to. Technology is not neutral; it has biases inherent to the sources from where the data is taken.[6] Moreover, machine learning algorithms reach decisions

3 Eguíluz Castañeda, Josu Andoni (2020): Desafíos y retos que plantean las decisiones automatizadas y los perfilados para los derechos fundamentales.

4 Pagallo, Ugo; Bayamhoglu, Emre; Cuijpers, Colette; Durante, Massimo; Padua Lima, Marcelo; Magrani, Eduardo; Steffen Guise Rosina, Mônica; Tripathy, Sunita; Weill, Rivka (2015): "New Technologies and Law: Global Insights on the Legal Impacts of Technology, Law as Meta-Technology and Techno Regulation". Law Schools Global League.

5 Burrell, Jena (2016): "How the machine "thinks": Understanding opacity in machine learning algorithms". Big Data Society.

6 Bayamlıoğlu, Emre; Leenes, Ronald (2018): "The 'rule of law' implications of data-driven decision- making: a techno-regulatory perspective, Law, Innovation and Technolo-

through a very complex process that involves high-dimensionality data and complex code, and that makes it difficult for an average human being to understand why that decision has been taken and, consequently, to contest it. AI systems are usually dynamic and customizable which makes it easier to reach more effective decisions, but that means that they are constantly taking in new data; thus, they also become more complex to understand and make sense of. AI systems are opaque and not-neutral. Just to make it very clear, they are fed with data that belongs to certain society and its inherent biases. Problem is that those biases will most likely be masked by the complexity and opacity that characterize these AI systems. [7] In words of Zalnierute et al. "The transparency needed for the rule of law may decrease over time as machine learning systems become more complex, because humans reason different to machines, they cannot always interpret the interaction among data and algorithms even if suitable trained".[8]

However, in this paper, the question goes beyond what challenges do NTs pose to traditional legal systems and its principles, but on the consequences of ADM. I will from now on focus on the understanding of the law as meta-technology. This means that technology not only creates norms that directly affect human conduct, but it also regulates the systems that are starting to govern society.[9] For instance, if I am discriminated or negatively affected by the decision of an algorithm, and I realize it, I could claim that that automated decision goes against one the most basic principles of democracy that has been developed and regulated under many treaties: the principle of non-discrimination. It is expressly prohibited under the rule of law not to give equal treatment or group irrespective of their characteristics and there is a branch law that regulates discrimination and offer legal remedies to those that have been affected by it. It is true though that those legal remedies are not always as useful for algorithmic discrimination -unequal treatment based on the decision-making process of an algorithm- as it is not very clear which kind of institution holds the jurisdiction nor if AI or the ADM system

gy", 10:2, 295-313.

7 Osterlund, Carsten; Jarrahi, Mohammad-Hussein; Willis, Matthew; Boyd, Karen; Wolf, Christine T. (2020): Artificial Intelligence and the world of work, a co-constitutive relationship.

8 Zalnieriute, Monika; Bennett Moses, Lyria; Williams, George. 2019. The Rule of Law and Automation of Government Decision-Making. Modern Law Review 82(3)

9 Bayamlıoğlu, Emre; Leenes, Ronald (2018): "The 'rule of law' implications of data-driven decision- making: a techno-regulatory perspective, Law, Innovation and Technology", 10:2, 295-313.

could be considered as the discriminator. However, that is another debate.

Going back to the question posed in this paper: It is not about what to do when you have been discriminated by an algorithm but what if don't even realize that you are being discriminated? we might not even make use of our legal remedies – as useful or useless they might be - because we simply don't know that we are being discriminated in the first place.

This could happen for instance if we do not know that there is a job advertisement, we do not know is not being showed to us, or if we don't know that we are being showed a higher prize for a product, because an algorithm has predicted that we are likely to buy it anyways. Ultimately, ADM outcomes can shape human conduct to the point that it can ensure compliance by eliminating certain courses of action, while the person affected by that decision might not even be aware of the existence of an ADM process behind it.[10]

Thus, technology becomes the controller and not only the regulator putting at risk not only principles such as fairness and non-discrimination but other very fundamental others like free-will or autonomy. If non-compliance is impossible by default, technology would have gone beyond traditional legal systems and it would no longer be about what should/should not be done but about what can/cannot be done.[11] An example of this could be limiting your screen time by default to a certain extent of time and not having the option to reversing that decision, even if you want to. Or not being able to drive your car because it has detected that you have been drinking alcohol and it will not let you start the engine.

In the contemporary legal discourse, we can also find norms that are about what can/cannot be done. They are called constitutive norms and they regulate actions that have been created by human beings. The same way ADM does, this kind of norms can also eliminate certain behaviors by eliminating some options. For instance, the prohibition of same-sex marriage, you are not going to get married if there is a law that does not allow it, but you could still drive your car drunk even if it is illegal. Then, what is the difference between technology and the law as constitutors of our behavior? The capacity to adapt to the systems they regulate.

Legal normativity regulates both the relationship between the state

10 Ibid.

11 Pagallo, Ugo; Bayamhoglu, Emre; Cuijpers, Colette; Durante, Massimo; Padua Lima, Marcelo; Magrani, Eduardo; Steffen Guise Rosina, Mônica; Tripathy, Sunita; Weill, Rivka (2015): "New Technologies and Law: Global Insights on the Legal Impacts of Technology, Law as Meta-Technology and Techno Regulation". Law Schools Global League, 23.

authority and its citizens and between citizens among themselves. Therefore, the constitutive effect of legal normativity will always be subject to political power and ethical inputs. It is, precisely, that flexibility what has facilitated the maintenance of a legal system capable to meet the demand for certainty, justice and effectiveness in a constantly changing context.[12] An important procedural dimension of the rule of law is the effective capability to contest its decisions. It provides a safeguard, somehow a form of self-regulation where the law maker is also subject to the rules of its own creation avoiding abuse of power and other authoritarian practices.[13]

On its behalf, technological normativity regulates the relationship between devices and citizens. However, those devices have norms themselves and they can either invite to obey them or enforce its obedience by ruling out non-compliance.[14] It could be said that ADM legitimizes the use of algorithms to direct human action by embedding norms in technological devices[15] and authoritarian practices could be legitimized merely because citizens don't know about other options. Technology does not necessarily dismiss choice, but it is not subject to the plasticity towards a changing environment. Human autonomy is not necessarily omitted, flexibility and adaptability are.[16] Therefore, the checks and balances that characterize the rule of law are neglected.[17] Emerging AI systems are more fluid than those of previous generations, as they are constantly fed with data from they are likely to reach more precise decisions, however, they are also narrowing the amount and the type of information one individual is shown just based on their prior interactions[18] which will automatically exclude other type of

12 Hildebrandt, Mireille (2008): "Legal and Technological Normativity: More (and less) than twin sisters". Techne, Vol, 12 Iss.3.

13 Bayamlıoğlu, Emre; Leenes, Ronald (2018): "The 'rule of law' implications of data-driven decision- making: a techno-regulatory perspective" in Law, Innovation and Technology, 10:2, 295-313.

14 Hildebrandt, Mireille (2008): "Legal and Technological Normativity: More (and less) than twin sisters". Techne, Vol, 12 Iss.3.

15 Bayamlıoğlu, Emre; Leenes, Ronald (2018): "The 'rule of law' implications of data-driven decision- making: a techno-regulatory perspective" in Law, Innovation and Technology, 10:2, 295-313.

16 Hildebrandt, Mireille (2008): "Legal and Technological Normativity: More (and less) than twin sisters". Techne, Vol, 12 Iss.3.

17 Bayamlıoğlu, Emre; Leenes, Ronald (2018): "The 'rule of law' implications of data-driven decision- making: a techno-regulatory perspective" in Law, Innovation and Technology, 10:2, 295-313.

18 Osterlund, Carsten; Jarrahi, Mohammad-Hussein; Willis, Matthew; Boyd, Karen; Wolf,

information,

Going back to the example of driving a car when you are drunk, technology ruling out choice might seem like a positive development. It would be using technological means to achieve what legal means cannot achieve, an understanding of both of them as interchangeably tools to reach certain policy objectives. However, the enforcement of norms of technology by eliminating alternative choices of action would also mean eliminating human autonomy and free-will, it would simply lead to a scenario in which one would not commit a crime just because it is not possible to do it. Does it make then the constitutive effect of technology an actual positive development, that might lead to a safer world?[19] Or, in the contrary, it is rather a negative one as it might eliminate self-determination? I guess that the question then, as many times happens with technological advances, is not whether it is good or bad in the strict meaning of those words, but if there exists a middle ground.

According to Mireille Hildebrandt (2008), the way to deal with this conflict between determinism and voluntarism is acknowledging the normative impact of technology and assessing it at a political and legal level. She defends that the introduction of new devices and technological infrastructures should be brought under the regime of democracy and the rule of law. She talks about applying the concept of État de droit to technology. This concept is understood as an instrument for the implementation of government politics but also for the protection of citizens against arbitrary ruling and dominant forces. If that was to be applied to NTs it would mean that its powers could be contested in a court of law, sustaining then the rule of law over the rule of technology.[20]

Affirmation that she reaffirmed two years later in her work with Koops (2010) in which they also added a new requirement for technology to become ad hoc regulatory power: it should be subject to democratic legitimacy, which translates in the persons that will enjoy or suffer the consequences of socio-technical devices and infrastructures co-determining the way in which those artifacts will be included in their daily lives.

Osterlund et al. claim that we need to ask ourselves what kind of bodies (local, national, international…) should claim jurisdiction over

Christine T. (2020): Artificial Intelligence and the world of work, a co-constitutive relationship.

19 Hildebrandt, Mireille (2008): "Legal and Technological Normativity: More (and less) than twin sisters". Techne, Vol, 12 Iss.3.

20 Ibid.

AI decisions.[21] However, for most people AI is uncharted territory as it is hard to understand even for their own designers, even more when we are talking about a machine learning system that is receiving new information all the time. This poses a significant challenge to democracy. Democracy entails citizen participation and taking it seriously would mean developing evaluation mechanisms so that technology is subject to public scrutiny[22] and that appropriate bodies are accountable for AI decisions. Hildebrandt advocates for a collaborative work between politicians, lawyers, scientist, and engineers in order to present technology effectively to the public that will be affected by it. On the other hand, while posing great challenges to basic principles of democracy such as transparency or accountability, the use of AI could be a tool for democracy too ;automated and, therefore, controlled procedures could help ensure consistency, which will in the end turn into certainty when one is managing one's legal or administrative affairs.[23]

Going more in detail into transparency, Felzmann, Heike; Fosch-Villaronga, Eduard; Lutz, Christoph; Tamò-Larrieux, Aurelia (2020), also advocate for the study of automated decision-making systems in a critical and holistic perspective to mitigate its potential adverse impacts. However, they go a step further transparency and submitting this kind of artifact to public scrutiny and make reference to the importance of taking into account the legal aspects, practices, places, culture of the society where ADM systems will be used. They call for the practical implementation of this technology considering the social structures and the cultural meanings its decisions are going to have in that specific society.

They emphasize the importance of understanding transparency as two-way street in which it is imperative to consider its relative meaning, i.e., as a relation between agent and recipient. In other words, information should not only be disclosed but it has to be considered how that information is going to be received and interpreted by the affected person or community. For transparency to be effective it has to be adapted to the recipients needs and capabilities. Always keeping in mind that when transparency becomes

21 Osterlund, Carsten; Jarrahi, Mohammad-Hussein; Willis, Matthew; Boyd, Karen; Wolf, Christine T. (2020): Artificial Intelligence and the world of work, a co-constitutive relationship

22 Hildebrandt, Mireille; Koop, Bert-Jaap; Jaquet-Chiffelle, David-Olivier (2010): "Bridging the Accountability Gap: Rights for New Entities in the Information Society?" in Tilburg University Legal Studies Working Paper Series, No 017/2010. July, 2010

23 Zalnieriute, Monika; Bennett Moses, Lyria; Williams, George. 2019. The Rule of Law and Automation of Government Decision-Making. Modern Law Review 82(3)

dangerous or potentially aggravating of vulnerable groups disadvantageous situations, it must be contended with individuals' rights to privacy.[24] In words of Zalneierjute et al. "different societies can endorse the rule of law while disagreeing about what it entails"[25], it is a ubiquitous, yet elusive concept. Transparency and AI go hand to hand, AI could once again become a very powerful tool to enhance transparency while at the same time doing just the opposite for its inherent opacity.

These scholars call for acknowledging the role of technology as proliferating normative power, and thus to increase active anticipation through a collaborative work between multiple disciplines to include technology with law and empower citizens to interact with the upcoming society defined by the increased of technical devices.

We are living a time in which machines actively take part in the production of knowledge and can open questions about current basic tenets of the law, even about human dignity and autonomy. There is no one single way in which technology will affect society, therefore, if we are to protect ourselves to the potential negative effects of these new socio-technical arrangements, that for instance ADM can produce, we need to anticipate and create the legal regulatory frameworks that will protect the basic tenants of democracy. Multidisciplinary teams are, as the scholars mentioned in this paper uphold, an important part of this new kind of governance that aims to protect the rule of law while adapting to technological innovations.

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25 Zalnieriute, Monika; Bennett Moses, Lyria; Williams, George. 2019. The Rule of Law and Automation of Government Decision-Making. Modern Law Review 82(3)

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TRENDS OF IMPACTS OF THE NEW TECHNOLOGICAL ERA ON THE LABOR MARKET AND THE ECONOMY

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Abstract: This article aims to conduct a study about the possible impacts that the paradigmatic changes of the new technological context of the 21st century may cause on the economy and the labor market. The discussions are based, initially, on the concern of some researchers about a possible reduction in the number of jobs and an increasing number of people who give up looking for a place in the job market. Besides this, other problems may arise, such as a reduction in salaries, growth in inequality - through the polarization of jobs. All of this can impact the economy, for example, through the reduction of the consumer market or in state spending on welfare assistance. The general objective of this research is to address the effects of the Fourth Industrial Revolution (Industry 4.0) on human rights, the labor market, and the possible economic challenges to be faced in the near future. Its importance lies in the fact that the context of the 21st century is undergoing paradigmatic changes with potential direct impacts in various political, economic, social, and academic areas. The methodology involved bibliographic, documentary, and statistical historical-comparative research. We conclude that, although predicting futuristic situations is very difficult, it is considered to be a necessary exercise in times of great change. Anticipating problems should also be part of the strategic planning of nations, because if the pessimistic view of technology in the labor market happens, countries could already be prepared to reduce problems, avoiding greater socioeconomic losses.
Keywords: Fourth Industrial Revolution; New Technologies of the 21st Century; Labor Market; Economic Impact Trends.

I. INTRODUCTION

Contemporary technological changes are taking place progressively and at high speed. In this context, labor relations tend to suffer direct consequences, either by the possibility of substitution of human labor by artificial items, or by the creation of other activities, which would demand from workers the urgent acquisition of new skills or labor capacities.

This futurological issue must be analyzed on top of trends observed through the historical-comparative development of the data collected and associated social factors. However, because it is difficult to ascertain certainty, the impact of AI and robotics on jobs has divided opinions into two opposing ways of thinking: one optimistic and one pessimistic.

The first view does not deny that many jobs will become fully replaceable or heavily impacted by new technology, but believes in improving overall social-economic well-being by creating other types of far more humane activities (OBEROSN, 2019) . This theory builds on the three past revolutions, arguing that the fear of technological replacement has also occurred before, but there has always been the ability of the market to develop alternative occupations (OBEROSN, 2019) .

Those who think this way maintain that fears of a job crisis are exaggerated, because capitalism is constantly adapting. The idea is that "while in the past many jobs have disappeared, the productivity gains promoted by technological innovation have resulted in the creation of other opportunities for workers" (OBEROSN, 2019, p. 9).

On the other hand, those who disagree with this viewpoint, consider the new moment peculiar and therefore it should be treated differently. The rapid evolution of robots and "smart" software increasingly replace workers, not only in industries, but also in services (OBEROSN, 2019). The fear is that jobs created will not be able to replace those lost or that workers will not be able to develop skills fast enough to keep up with the accelerating process of constant evolutions (SCHWAB, 2016).

This paper will analyze the consequential trends of a scenario in which technology is evolving in such a way as to be able to perform more and more activities satisfactorily and autonomously. The importance of this study lies in the need to foresee the risk of the emergence of complex problems that require urgent solutions. If this is not discussed in advance, society may face serious damages, such as an even more substantial increase in mass unemployment, which, potentially, would also strongly affect the economy (in principle by reducing consumption).

The general objective of this research is to address the effects of

the Fourth Industrial Revolution (Industry 4.0) on human rights, the labor market, and the possible economic challenges that will soon be faced. Its importance lies in the fact that the context of the 21st century is undergoing paradigmatic changes with potential direct impacts in various political, economic, social, and academic areas.

The research methodology consists of a bibliographical (books, scientific articles and legislation), documental and statistical historical-comparative survey, whose databases are elaborated by official state institutions and, therefore, accredited and socially sanctioned, such as IBGE, the United States Bureau of Labor Statistics (BLS) and the Federal Reserve Bank of St. Louis (FRED), as well as other specific databases in the area of Labor and Employment.

II. TRENDS OF IMPACTS OF THE NEW TECHNOLOGICAL ERA ON THE LABOR MARKET AND THE ECONOMY

The positive contribution that technology makes to the economy is the increase in production capacity. However, the enrichment added by technological progress may not benefit everyone in society, for there is the possibility that opportunities for good jobs will become scarcer and that the income earned will be distributed even more unequally.

Declining Job Creation and Long-Term Unemployment Growth

As automation evolved in past centuries, some activities ceased to exist, while others took their place to the same or a greater extent. However, the 21st century tends toward a very different reality, as the constant development of robotic technology and artificial intelligence comes to dominate increasingly human skills.

For this conclusion to be effectively verified, it is important to analyze some graphs and evolutionary indexes that, in the case of this work, will be taken from official U.S. repositories. The U.S. Bureau of Labor Statistics (BLS) [1]and the Federal Reserve Bank of St. Louis (FRED) [2]present data surveys and studies on various economic issues involving the labor

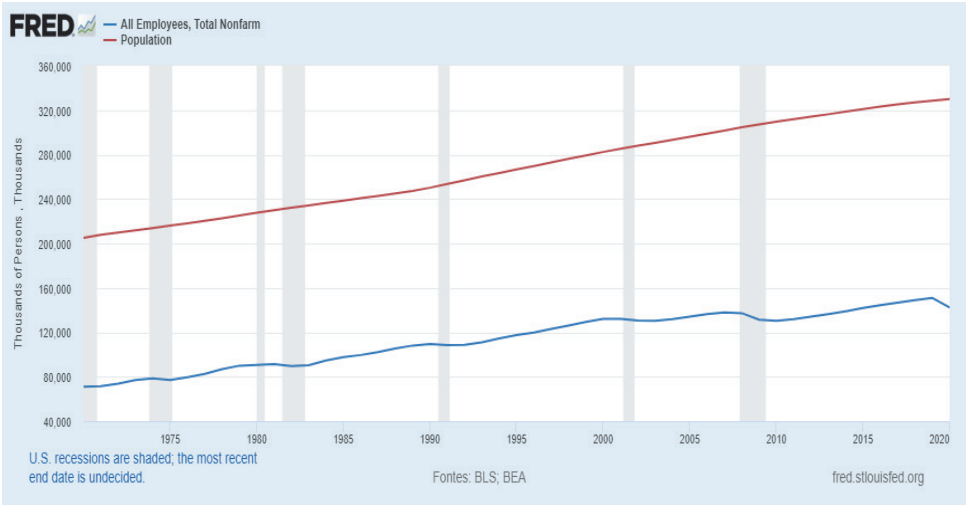
1 The US Bureau of Labor Statistics is the primary U.S. government statistical agency that collects, processes, analyzes, and disseminates statistical data essential for economic impact studies with a labor focus. For example, it conducts research on issues such as: "how much families need to earn in order to enjoy a decent standard of living" (JOHNSON; ROGERS, 2001).

2 It is one of 12 regional "Reserve Banks" that, together with the Board of Governors in Washington, DC, constitute the central bank of the United States.

market in that country and that can help in the present research.

A graph from FRED's website shows, for example, the relationship between the total number of the American population (top line), economically active or not, and the number of people working in the country (bottom line). It shows that, especially since the year 2000, the gap between the two lines has grown and continues as a trend until today.

Figure 1: Comparison of Population and Workers in the USA



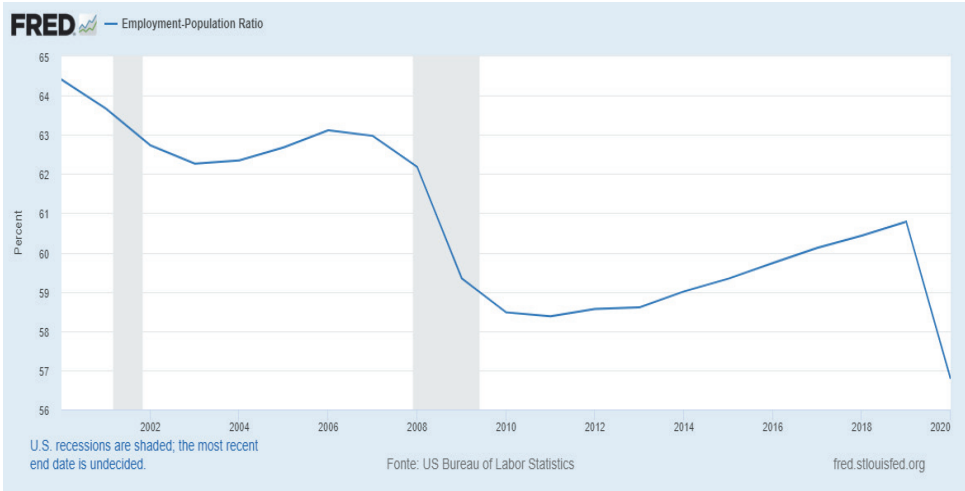
SOURCE: FRED, [20--]

This means that, although there is an increase in the occupational part, it no longer accompanies the population evolution as it used to. There is a significant gap between these two factors that deserves special attention, especially when analyzed together with other information.

The existence of a substitution of labor by technology may be one of the reasons that would explain this dynamic of the new century, because, despite more people in the country, production and services are meeting the demand, even with reduced levels of employment. It is possible that the result of the difference between the creation and extinction of activities is not resulting in a positive balance.

According to M. FORD (2019), after the 2008 U.S. recession, for example, the ratio of U.S. population to existing job opportunities in the country has declined sharply. Analysis of the period from 2000 to the present shows exactly this negative trend:

Figure 2: U.S. Labor-to-Population Ratio Percentage



SOURCE: FRED, [20--]

This means that proportionally more people are unemployed in the United States. The advantage of analyzing this model graph (rather than the unemployment curve) is that here the reality shown is more comprehensive, also encompassing people who are not looking for a job. It shows that many U.S. citizens may be facing a new reality: giving up the search for a return to the labor market.

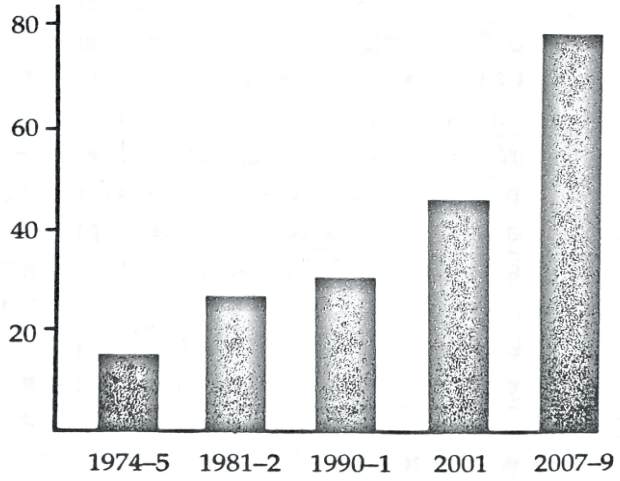
The economic downturn is not the only reason for low job opportunities. Financial crises do affect labor availability and may even be the cause of declines in available job rates, but they alone do not explain why the negative trend in unemployment still continues long after they end (FORD, 2019).

What is interesting is to identify that even after periods of recession in the economy, the labor market does not react in the same way as before. It has been found that the number of time needed for the labor force to react to times of crisis is increasing[3]. In the United States, after 2008, it took more

3 This is a phenomenon known as the "jobless recovery." According to JAIMOVICH and SIU (2012, p. 4) "despite expansions in other measures of economic activity (such as GDPR and real gross domestic income) after the downturn, aggregate per capita employment continued to decline for many months. In 1991, employment continued to fall for 17 months past the depression before recovering; employment does not reach its pre-recession level until five years later, in 1996. In 2001, employment falls for 23 months, past the trough, before reversing; it does not return to its pre-recession level until the subsequent recession. After the Great Recession of 2009, employment takes 23 months to begin recovery. Thus, jobless recovery is a phenomenon that characterizes

than 80 months for labor levels to effectively react, quite different from 1974, when the reaction happened in less than 20 months (FORD, 2019):

Figure 3: Recession in the United States: number of months it took for the market to react after the crisis (measured from the beginning of the recession)



SOURCE: FORD, 2019, p. 72

What would best explain the confrontation of all these negative factors reported so far is a prediction made by J. KEYNES in 1933. He stated that "the number of discoveries of new means for economizing in the use of labor tends to exceed the rate of appearance of new ways of using it" (KEYNES, 2010, p. 325).

The market, after periods of crisis, finds new ways to produce with more technology and less spending on workers. This conclusion is reinforced precisely by the assessment of the growth of those who give up looking for jobs.

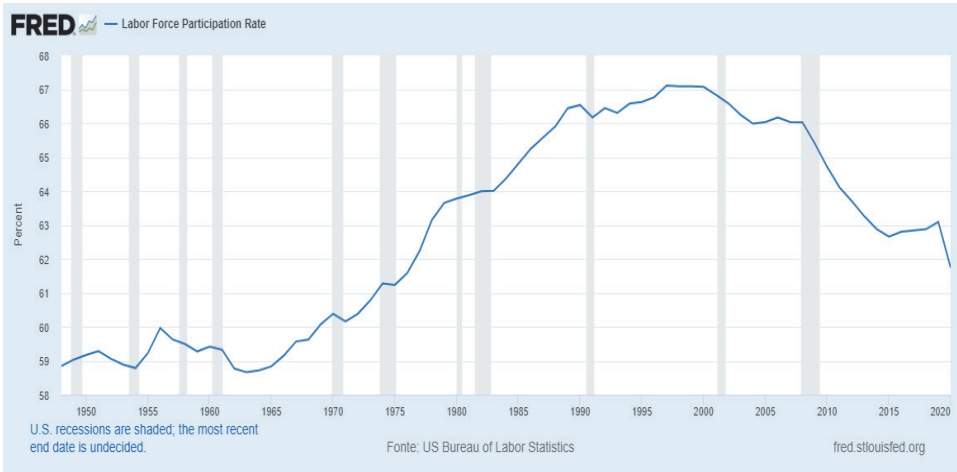
The index that directly examines the reality of dropouts [4]looks at the level of labor force participation in the economy. The lower this participation level, the greater the amount of discouraged workers who have given up trying to return to the market.

recent recessions."

4 Who cares for what these people are going through, for the violence of the tears they have suffered? Who represents the extent of the drama that affects them? Few people in total, because the conviction is widespread that this is an inevitable case, that we must go through the course of "modernization," whatever the subjective price. This specifies the submission of the human being to economic logic (LINHART, 2002, p. 11).

From the beginning of the 21st century, the rate of the US labor force began to fall sharply. Compared to the percentage in the year 2000, there has been an approximate 6% reduction:

Figure 4: Labor Force Participation Rate



SOURCE: FRED, [20--]

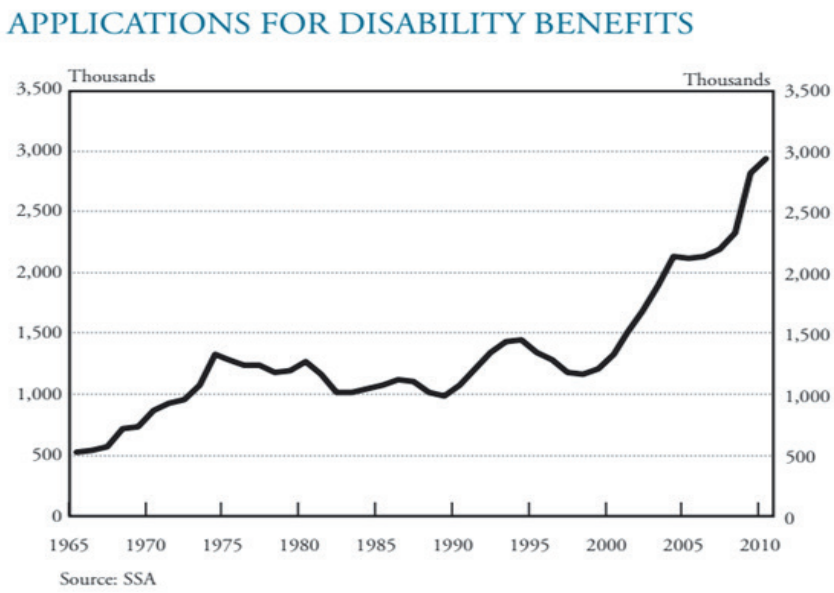
The growth in the number of dropouts is a reality that should not be ignored, as it has perceptibly worsened since the beginning of the century. This shows that there is a negative trend for the coming years, regardless of moments of crisis. Therefore, the unemployment rate may even improve, but this certainly does not mean that more activities have been created, because there is the possibility that the labor force is decreasing and those excluded from the labor market are increasing.

A study presented by M. O'BRIEN (2013) demonstrated something that corroborates this idea of potential aggravation. He found that long-term unemployment generates social stigma and, especially after 6 months, the chances of a replacement are minimal, regardless of the applicant's qualifications and resume (O'BRIEN, 2013). Thus, a vicious cycle of new quitters occurs (like a "snowball"), because those considered redundant[5] do not get more space in the market and simply stop looking.

The problem then just changes context: it goes from being a labor to a welfare concern. Another indication of the shrinking labor force in the U.S. has been found to be an increase in demand for U.S. welfare programs. The number of applications for disability benefits in the country doubled between 2000 and 2011:

5 This designation means people who are in surplus to the labor market, so they are considered unserviceable and thus are sidelined; excluded.

Figure 5: Enrollment in the US Social Security Disability Program



SOURCE: VAN ZANDWEGHE, 2012 , p. 29

This benefit is intended to provide a safety net for disabling injuries, yet there is a suspicion that the increase in demand for it is for a different reason. Redundant people are thought to be looking for something to permanently replace the income lost through lack of work. There is no historical fact of outbreaks of occupational disease or accidents capable of justifying the vertical increase in disability program enrollment after the turn of the new century (FORD, 2019).

The Market is Down for Labor and Overheated for Corporations

Unemployment will not be the only problematic factor possibly facing the Age of the Fourth Industrial Revolution. Many people may also suffer from lower household incomes, which could cause imbalances in the more direct and immediate consumer market. This, however, is not yet a concern for large corporations.

Income inequality has grown in recent decades, driven mainly by dynamics such as the widening gap between the value of productivity and remuneration and the distributional trend of the share of national income leaning increasingly to the side of capital (MISHEL, 2012). The concentration of income, despite being a reality that has always existed,

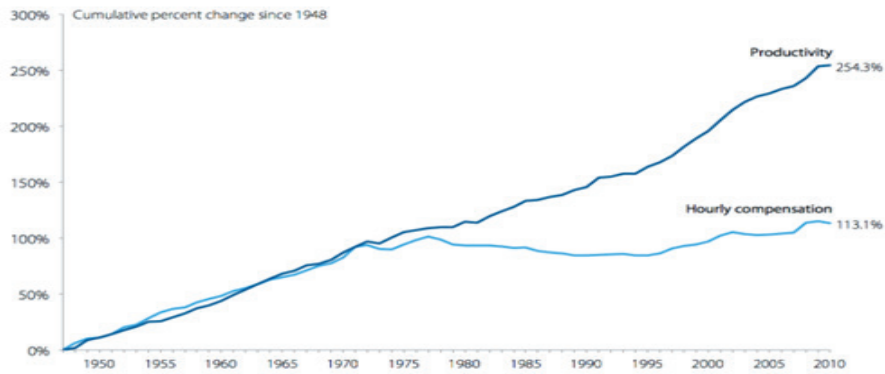
has worsened considerably since 1970[6] and brings with it several social and economic problems.

Some people look at income inequality and shrug their shoulders. What if this person wins and that person loses? What matters, they argue, is not how the pie is divided, but the size of the pie. That argument is fundamentally wrong. An economy in which most citizens are getting worse year after year - an economy like that of the United States - is unlikely to perform well in the long run. There are several reasons for this (STIGLITZ, 2011, n.p.).

For a long time, productivity[7] and compensation were balanced ratios. From 1948 to 1973, workers' earnings were proportional to what was produced (MISHEL, 2012), so at that time it made more sense to call wages a consideration.

After this period, slowly the percentage of productivity outpaced that of hourly assessed wages. M. FORD (2019, p. 61) argues that the widening of this gap represents the "degree to which the fruits of economy-wide innovation are now being almost entirely credited to entrepreneurs and investors, rather than to workers."

Figure 6: Growth of Real Hourly Pay for Production/Non-Supervisory Workers and Productivity



Nota: A remuneração por hora é de trabalhadores de produção / não-supervisores no setor privado e a produtividade é para a economia total.

Fonte: Análise do autor de dados não publicados da economia total do Bureau of Labor Statistics, do programa Labour Productivity and Costs e do Bureau of Economic Analysis, National Income and Product Accounts, séries de dados públicos

6 The digital newspaper The Economist (2012) published an article in which it noted exactly this growing movement of inequality between the rich and other people. Confirming the news, Emmanuel Saez (2013, p. 1) wrote that in the period from 2009 to 2012, "the richest 1 percent of people took 95% of all total income gains.

7 "Productivity is the amount of output per unit of effort. In particular, labor productivity can be measured as output per worker or output per hour worked" (BRYNJOLFSSON; MCAFEE, 2014, p. 39) .

SOURCE: MISHEL, 2012

Here are some clarifications: the wage data used above were collected from workers in the private production sector with non-management activities. As for the amounts, according to the BLS site, the salaries were updated by the Consumer Price Index (CPI), while the productivity data are adjusted by the GDP deflator (a measure of inflation).

Some economists[8] maintain that the gap between productivity and wages is a passing phenomenon and, for this reason, they do not recognize it as a problem. For them, market variations gradually return to equilibrium when recessions end. However, the graph above shows a different reality, as there is a tendency for these two factors to grow even after crises.

In fact, the rule is that most jobs are devalued economically after each recession and remain so, because that is when the market discovers the evolutionary potential of technology and its substitute success. Rehiring becomes unnecessary and, as a result, a way to save money. In comparison with productivity, the average American family income suffered a kind of stagnation right after the 1970s, and even fell after the first years of the 21st century.

If we look at the last decade and focus on the economically active population, the real median income fell from $60,746 to $55,821. This is the first decade that we have seen average income decline since the numbers were first gathered. Average gross value has also fallen in the last decade when adjusted for inflation, another first (BRYNJOLFSSON; MCAFEE, 2014, p. 42).

When the subject moves to a specific analysis of the income of the youngest, the situation becomes even more discrepant, especially if the level of professional education is taken into consideration. The income of Americans who have only a bachelor's degree, for example, "declined by almost 15% between 2000 and 2010," demonstrating that, currently, they are also in a situation of underemployment, something unthinkable in the last century (FORD, 2019, p.77).

All this is reflected in the indices of the National Income: an

8 Among these economists are J. TAYLOR and A. WEERAPANA (2012, p. 344) and R. FRANK and B. BERNANKE (2007, p. 596 and 597). They believe that an increase in production efficiency that reduces the price of one good will increase real income and therefore demand for other goods will also grow. AGHION and HOWITT (1994) say that technological progress generates two competing effects on employment: first, the substitution effect destroys some activities, requiring workers to reallocate their labor supply; and second, as more firms enter sectors where productivity is relatively high, it raises employment in those sectors.

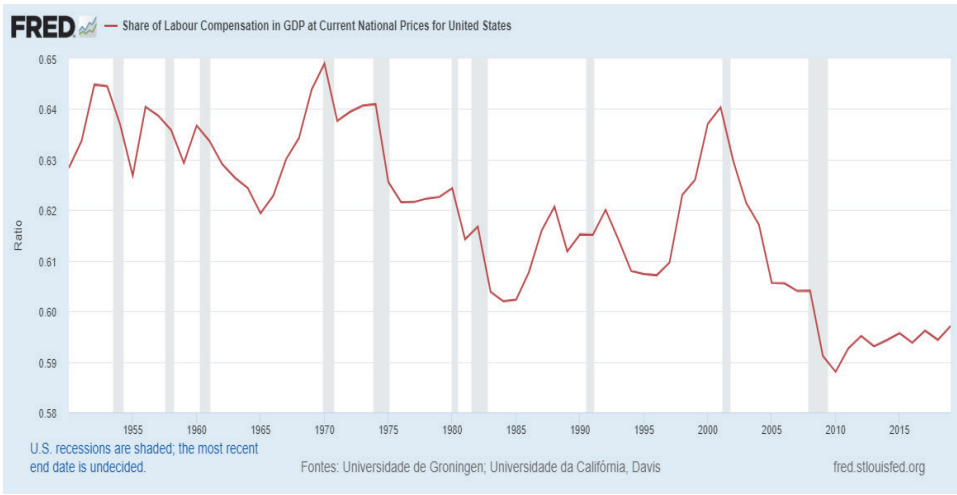
indicator used to evaluate the socioeconomic conditions of a country, measuring productivity and the purchasing power of the population. The evaluation of the National Income, involves:

Both that which goes into the hands of individuals in the form of compensation for labor provided (wages, salaries, etc.) or capital employed (interest, dividends, rents, etc.) and that other part which remains in the form of collective property in the power of corporations (LEITE JR., 1947, p. 96).

At the beginning of the last century, an economic principle known as "Bowley's Law" emerged, based on an observation made by the British economist and statistician Arthur Bowley. This researcher was able to demonstrate, at that time, that "the fraction of national income going to labor and capital remained relatively constant, at least over the course of long periods" (FORD, 2019, p.64).

However, this reality undergoes major transformations starting in the 1970s. The income credited to labor [9]starts to fall, despite the increase in profit and GDP, a fact that worsened even more after the 2000s. The chart below shows, in proportional ratios, how much of the U.S. GDP went to labor's share over the years:

Figure 6: Labor Compensation Share of GDP at Current National Prices for the US



9 The Institute for Applied Economic Research (IPEA) explains that "the labor income share indicates how much of the national income is absorbed by all those who perform the most diverse paid labor activities" (IPEA, 2012, p. 3).

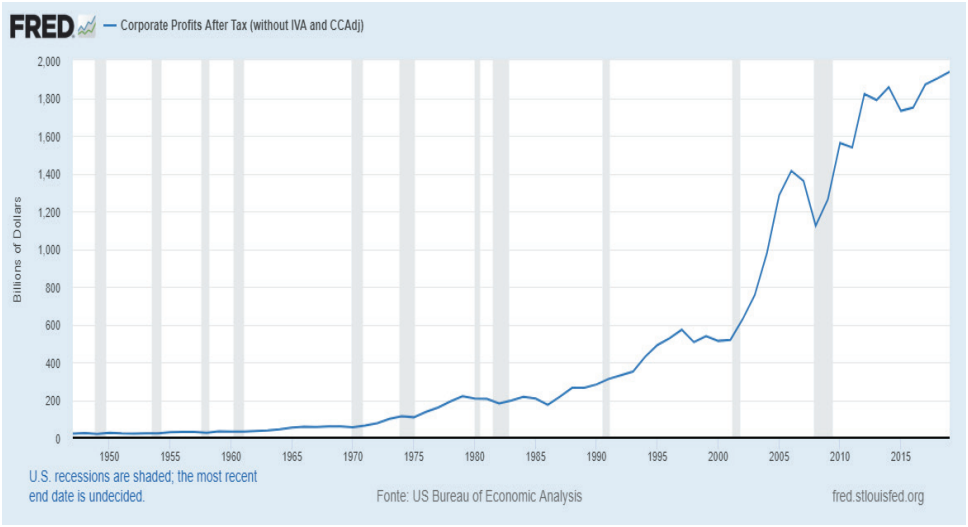
SOURCE: FRED, [20--]

While in 2001, 64% of the national income in the United States was credited to workers, in 2019 it became 59% (thus a 5% drop). By way of comparison, in the case of Brazil, this percentage is set at a level of 57% of the 2019 Brazilian GDP (GEOFRED, [20--]).

And the most worrisome factor is that this graph covers all active people who receive compensation, including, important and well-paid executives, celebrities, CEOs, etc. (LEITE JR., 1947). If it showed only the income share of ordinary workers, the drop would possibly be even greater.

However, in contrast to the millions of workers (who remain unemployed or submit to reduced wages), S. THURM (2012) reported that the reaction power of corporations grows each time a recession ends. There is growing evidence that capital has taken a larger share of GDP in recent years[10].

Figure 7: Corporate Profits in the US (After Taxes)



SOURCE: FRED, [20--]

With each crisis, large companies need to undergo restructuring, mainly by cutting expenses deeply, without forgetting to invest in production, so that they can reach a more solid financial situation. When the economy

10 "Profits as a share of GDP are the highest in fifty years. Meanwhile, pay to any and all labor, including wages and benefits, is the lowest in fifty years. Capital is getting a bigger piece of the pie, relative to labor" (BRYNJOLFSSON; MCAFEE, 2014, p. 58). In the view of L. KARABARBOUNIS and B. NEIMAN (2013, p.1), all this is due to "efficiency gains in capital-producing sectors, attributed to advances in information technology and the computer age.

starts growing again, corporations remain leaner but productive, which helps them "outperform the rest of the economy and obtain a larger share of the country's revenue" (THURM, 2012, n.p.).

The significance of all the information so far is quite simple: the relationship that existed at the beginning of the last century between changes in GDP and jobs weakened "as technology became more widespread and stronger" (BRYNJOLFSSON; MCAFEE, 2014, p. 47) . GDP recovered, corporate profits grew, but jobs and median household income did not keep up.

Both manufacturing and service sectors are trimming their payrolls and increasing their capital investments to become globally competitive in the high-tech world of the 21st century. The reengineering revolution is paying off (RIFKIN, 2004, p. 166).

In fact, there is a logical consequence: if technology becomes capable of decreasing the relative importance of human labor, the owners of these advanced machines or software will be able to retain an even larger share of the income in their power. The "owners of capital" tend to be a very small group compared to the rest of the population, so inevitably financial inequality will only tend to increase, bringing with it various other social imbalances[11].

The Polarization of Jobs and Growing Inequality

Labor market polarization is an economic trend that mainly means the disappearance of middle-skill activities. In other words, it refers to the increasing propensity of occupations with either very high or very low wages. And before good expectations arise on the part about high pay, it must be said that this will be an opportunity for the few.

Consider first the phenomenon of labor polarization. Acemoglu

11 "There are at least four reasons why inequality is crushing our recovery. The most immediate is that our middle class is too weak to sustain the consumer spending that has historically driven our economic growth. [...]. Second, is the hollowing out of the middle class since the 1970s, a phenomenon interrupted only briefly in the 1990s, meaning that it cannot invest in its future by educating itself and opening or improving businesses. Third, is that the weakness of the middle class decreases tax revenues, especially since those at the top are very adept at avoiding taxes and getting Washington to give them tax breaks. [...]. Low tax revenues mean that the government cannot make the vital investments in infrastructure, education, research, and health care that are crucial to restoring long-term economic strength. Fourth, is that inequality is associated with more frequent and severe economic boom and bust cycles that make our economy more volatile and vulnerable" (STIGLITZ, 2013, n.p.).

(1999), Autor et al. (2006), Goos and Manning (2007), and Gooset al. (2009) (among others) document that employment is becoming concentrated in the tail of the occupational skill distribution. This process has accelerated since the 1980s as per capita employment in medium-skill jobs disappears (JAIMOVICH; SIU, 2012, p. 2).

Of all the jobs threatened with extinction, those deteriorating the most are the services known to sustain the middle class. And as observable as this situation is, it is difficult to know its causes precisely[12], but the operational strength of the data leads researchers to think that the progress of "smart" technology is also behind it.

The explanation stems from the perception about the consequences of continuous automation on "routine" intermediate-skill tasks. Among the activities considered repetitive are some cognitive services (such as accounting, administrative work, etc.) and medium-level production. A good part of the common labor burdens will be involved in this concept, since it includes any work that can be well delimited, enough to be performed by a computer program (AUTHOR et. al, 2003, p. 1283).

In many cases, the basic tasks of these occupations follow precise and well-understood procedures. Consequently, as computer and communication technologies improve in quality and decrease in price, these routine tasks are increasingly encoded in computer software and performed by machines [...] (AUTHOR, 2010, p.4).

Following the increasing choice of automation of codifiable functionalities, there is an increasing demand for non-routine tasks in which workers have an advantage over the machine. There would then remain two main categories: abstract tasks, which require "problem solving, intuition, and persuasion," and manual tasks, which require "situational adaptabilities, personal interactions, and visual and linguistic recognition" (AUTHOR, 2010, p.4 and 5).

It can be seen that the market is left with activities with extremely opposite professional skills and, therefore, polarized. In the former, the ideal workers usually have high levels of higher education and analytical skills and, therefore, receive the highest salaries; in the latter, they involve people physically fit or only able to communicate, without requiring a formal education, getting modest salaries (AUTHOR, 2010, p. 5).

Men and women who only a few years ago were taking home

12 "The main contributors to the polarization of employment are the automation of routine work and, to a lesser extent, the international integration of labor markets through trade and, more recently, labor outsourcing" (AUTHOR, 2010, p.2 - free translation).

annual salaries of over $30,000 considered themselves fortunate to find jobs as janitors or security guards for $5 an hour. For them and their families, the post-World War II dream of becoming part of the middle class was over (RIFKIN, 2004, P. 166).

In addition to the reasons for the polarization of labor revolving around the types of occupations (whether routine or non-routine), there is a growing trend toward part-time or on-demand contracting ("gig economy") in the United States. Usually, when it is publicized that there is an increase in labor opportunities [13], it is referring to one of these two service contract formats, which are cheaper.

The companies that are hiring tend to be in sectors that cannot increase sales as easily without adding workers. These sectors generally pay lower wages. Last year, lower-wage sectors such as retail, restaurants, hotels, and temporary-help agencies accounted for more than 40 percent of job growth. Many of these jobs are part-time; the proportion of Americans working part-time, which increased during the recession, showed little improvement and is trending upward for most of this year (CASSELMAN , 2013).

Part-time jobs are those, as a rule, held for less than 30 hours a week. They are known to have a lot of flexibility, but they lose out to full-time jobs (up to 40 hours a week) in important respects. In addition to higher pay, many full-time jobs provide extra benefits not available to part-time hires, such as health, dental, vision, and life insurance; paid leave for federal holidays; sick leave; vacation and sometimes day care and other benefits (CULVER [20--]).

The proliferation of smartphones has caused a restructuring in commerce, changing the way consumers and service providers relate to each other, all through digital platforms. Workers enter into contractual agreements with on-demand companies (such as Uber and Ifood) and customers request their services through apps.

However, it is not yet possible to know the true scope of this new sector, as no large-scale official data has been able to deal with the complexity of this reality. For example, it is being difficult to ascertain whether the activity is primary or secondary for each person, and it is also not known

13 "Government figures on unemployment are often misleading, masking the true extent of the unemployment crisis. For example, in August 1993, the US federal government announced that almost 1,230,000 jobs had been created in the United States in the first half of 1993. But what they did not say was that 728,000 of those jobs - almost 60 percent - were part-time, and that most of them were in the low-paying service sector" (RIFKIN, 2004, p. 167).

how to classify this type of work in BLS statistical tables (DONOVAN et. al. , 2016).

In any case, the main labor characteristics reported to this industry are based on: per-unit compensation for services rendered, with the respective percentage retained for the intermediating technology company; the absence of minimum labor protections; and the precarious nature of the contractual relationship. These factors have been perceived with great concern by some U.S. congressmen, as there is the potential for this to impact the livelihoods of large groups of workers nationwide (DONOVAN et. al. , 2016).

The types of activities available under this business model vary widely. In the U.S., in addition to the already known functions of drivers and food delivery drivers, platforms that provide personal and domestic services (TaskRabbit and Handy), commercial activities (Freelancer and Upwork) and even medical care (Heal and Pager), among other examples, are widely operating in the country (HARRIS; KRUEGER, 2015).

In 2019, the New York Times carried a story about the digital job marketplace run by Amazon: Mechanical Turk. Operating since 2005, the site provides specific tasks[14] that people can do in exchange for a penny or less. In one specific case shown in the news story, a worker on the platform, after eight hours of activities, managed to earn $7.83 (NEWMAN, 2019). The problem occurs when the lack of better opportunities "pushes" many workers into activities like this, making it their main option.

The circumstances and trends exposed explain why social inequality is growing so much. And on an intuitive level, most people recognize that inequality is socially corrosive, either through self-perception or self-awareness.

Moreover, its detrimental effects are similar everywhere and do not only affect the poor; it has the capacity to affect the vast majority of the population. Problems such as violence, mental illness, and obesity, are just a few cases that can be aggravated by the extent of social[15] status inequality

14 "It works like this: Employers, known as requesters, post batches of what are called Human Intelligence Tasks, or HITs, on Mechanical Turk's website. A task might be transcribing an invoice, participating in a study, or labeling photos to train an artificial intelligence program. (Occasionally, a photo will show something disturbing, such as a beheading). Self-employed workers, known informally as turkers, rush to pick up and do the tasks [...]. Most of them pay a penny or less" (NEWMAN, 2019, n.p.).

15 Inequality breeds social tension: "feelings of superiority and inferiority increase, status becomes an essential part of the judgment we make of each other, and we all become more neurotic about the image we pass off and the impressions we create" (WILKINSON; PICKETT, 2015, p. 19).

(WILKINSON; PICKETT, 2015).

There can no longer be any serious doubt that countries with large income inequality between rich and poor are also more likely to have greater social and economic problems than more egalitarian societies. As we get new research results, the picture becomes too coherent not to be essentially correct. One wonders if those who still doubt this information are aware of the breadth and depth of the evidence (WILKINSON; PICKETT, 2015, p. 15).

As technological development has advanced, one realizes that there are those who gain from it and those who feel its negative effects. This is what is known as the "winners" and the "losers". Technology has this power to transform the market into something advantageous not only for those who own it, but also for those who can stand out or be "the best" in their category.

If the technology exists for a single vendor to replicate its services, the top quality provider may take most or all of the market. The second-best provider may be almost as good, but will nevertheless receive only a small share of the profit (BRYNJOLFSSON; MCAFEE, 2014, p. 55)

Supercompanies such as Amazon in the retail market, Google in Internet search activities, Facebook in the field of social networks, Tencent in the area of games, and so on, are examples of this. The politics of "all or nothing" or "winners take almost everything" then emerges, thus making few individuals enjoy the greatest rewards (BRYNJOLFSSON; MCAFEE, 2014, p. 54).

Naturally, the technological oligopoly will maximize social and economic inequalities not only within their territories. The political influence of the countries with the greatest capacity to absorb new technologies over the other less developed countries will, in the future, lead to problems that will be difficult to solve. The deepening of these inequalities may even worsen the economic situation in developing regions.

As trade barriers come down and international oligopolies emerge, regional trade suffers a great loss, and money goes to foreign countries and is concentrated there. In a game where the winner takes all, it becomes difficult to compete, and even more desperate political measures can be taken, such as loss of human rights and deregulation of social and labor protections.

However, an ideological, economic, and political order directed toward the devaluation of labor presents itself as the antagonistic path to social development. According to A. SEN (2010, p. 29), political and civil liberties are indispensable and there would be no need to justify them, even

indirectly, about their effects on the economy.

III. CONCLUSION

All these trends follow a line based on a kind of scientific reasoning, but of course there are those who think differently. Some believe that workers displaced by technology will find new jobs and the future will hold a new era of prosperity.

It turns out that professional relocation will not be a reality for all people. Human redundancy may reach unsustainable levels, and the increase in inequality will affect everyone in a variety of ways, such as generating the growth of violence, changing and impoverishing the social landscape, provoking health crises and, as a result, causing health chaos, etc.

Therefore, as more people lose space in society and are deprived of basic elements of their social and human rights, such as decent work and a minimum income, more imbalance is generated. However, since community life is made up of an interconnected chain of events, it is hard to assume that a large mass of redundancies will not be able to affect, in a very negative way, everyone in some sphere.

All these technological dynamics, which substitute or devalue human labor, tend to have a transforming impact on society with very worrying contours. It is possible that major problems will arise, which will become challenges that, sooner or later, not only the economy but also States will have to face.

Therefore, although predicting future situations is very difficult, especially when economic systems are involved, it is considered a necessary exercise in times of great change. Anticipating problems should also be part of the strategic planning of nations, because if the pessimistic view of technology in the labor market happens, countries could already be prepared to reduce problems, avoiding greater socioeconomic losses.

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REMOTE EDUCATION FROM THE HUMAN RIGHT'S VIEW TO UNIVERSAL ACCESS TO THE INTERNET DURING CORONAVIRUS PANDEMIC (COVID-19)

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Abstract: The central theme of this article is the discussion of the universalization of network access under the aegis of human rights, especially in the context of emergency remote education implemented during the pandemic caused by the new coronavirus. The centrality of the problem is justified due to insufficient legislative treatment and public measures with little effectiveness that aim to expand the access to the network for vulnerable individuals, more specifically in the field of remote education. The research was built from a quali-quantitative approach, presenting a brief theoretical discussion about the universalization of network access and its framework as a Human Right and the analysis of statistical data, obtained from official sources. The work has the purpose of pointing out discuss and analyze the measures implemented by the government in the amplification of remote learning at public educational institutions, through the extension of access to the internet and technologies by the most vulnerable populations. At the end of the research, it was possible to see that the legislative initiatives have not been able to deal effectively with social inequalities, especially regarding the accessibility to fixed broadband *internet* network, mobile broadband and, much less, the availability of technologies that enable democratic access to the network. All this shows that emergency remote education has served the purpose of making social inequality clearer and, in the field of education, of further aggravating the condition of vulnerability of a class of individuals already marginalized due to lack of resources. The universalization of access to the net, therefore, is not to be confused with, nor restricted to, access to the *Internet*. It must be understood in a more complex context, taking into account socioeconomic and technical variables, such as the lack of financial resources to acquire technologies that allow access to the universal network, the technical insufficiency to handle technological devices, the lack of *Internet* service provision in regions with a low percentage of economic

development (peripheral areas, for example), among other factors..

Keywords: Universalization of Access. Emergency Remote Learning. Human Rights, New Technologies.

I. INTRODUCTION

The pandemic caused by the new coronavirus in the year 2020 has caused governments in all countries to adopt measures restricting movement and social interaction. Among these is the *lockdown*. The restriction under the respective denomination has prohibited the operation of numerous establishments, among which are educational institutions, the subject of this paper.

With the inability of educational institutions to operate, teachers and students have been forced to continue the pedagogical calendar by remote means, thus availing themselves of the so-called remote teaching. Unlike Distance Learning (DE), remote learning emerged in an emergency context, therefore, without any planning.

The urgency of the implementation of emergency remote learning has brought up debates about the universalization of access, since socioeconomic inequalities, in this pandemic scenario, have gained emphasis in face of the obstacles faced by educational institutions in continuing with the pedagogical calendar, especially public entities. The criticism of emergency remote education is as much due to the lack of logistics as to the difficulty in reaching out widely.

In this context, the debates around the human right to universal access to the *internet* and its relationship with the right to education are recovered. Especially in Brazil, where, with the advent of Law 12,965/2014, known as Marco Civil da Internet, the democratization of internet access is now considered a fundamental right.

Moreover, based on the assumption that the universalization of access is not restricted to the *Internet,* being a complex phenomenon, the mere normative provision of the democratization of access as a fundamental right is not enough to address the problem. Thus, the need for the elaboration of some normative devices is pointed out, with the purpose of expanding access to technologies that allow economically disadvantaged individuals to reach virtual networks.

In this sense, this research will also address the aforementioned legal provisions that were drafted with the purpose of making this human right possible. Among the existing legislations, the study will address the

National Broadband Plan (PNBL) (Decree 7.175/2010, revoked by Decree 9.612/2018), the One Computer per Student Program (PROUCA) (Law 12.249/2010) and, finally, the most recent One Computer per Student National Policy (Bill 2.945/2019).

Starting from the question-problem: How and to what extent the Brazilian government can mitigate the obstacles faced by the realization of the fundamental right to democratization of Internet access, especially with regard to emergency remote education implemented in the context of the pandemic by the new coronavirus in public institutions?

The present work is based on the following general objective: To discuss and analyze the measures implemented by the government in the amplification of remote learning in public educational institutions, through the extension of access to the internet and to technologies for the most vulnerable populations.

The specific objectives are translated into three actions: Analyze the Brazilian scenario regarding the universalization of access, especially regarding emergency remote education; point out and discuss about the measures to amplify the human right to universal internet access and remote education.

Concerned with deepening and understanding the battles fought over the universalization of access from the standpoint of the Universal Convention on Human Rights and the Civil Rights Framework of the *Internet*, we will start from a qualitative approach of the reality in which the *Internet* is presented as the protagonist.

Using the hypothetical-deductive method, the construction of this research will observe the implementation of measures that seek to expand access to the *Internet* and related technologies. Since these are fundamental elements that allow individuals to have access to the information society and, therefore, to achieve the universalization of access as a human right and a fundamental right.

Regarding data collection, the research will be qualitative, based on bibliographic sources whose data come from works written by classical doctrinaire and legal philosophers, as well as from normative devices that deal with *Internet* access and technology policies. It will also be quantitative. Therefore, it will be based on statistical data obtained from official sources, with the purpose of pointing out the reach and repercussions of the measures implemented by the Brazilian government in the expansion of *Internet* access and, therefore, of remote learning.

The present article will be developed from the differentiation of

the remote learning modality from Distance Education (DE), taking into consideration the emergency context in which the former was implanted. Next, the problem of access to technology and of "digital illiteracy", the main factors hindering universal access, will be addressed. Consequently, an analysis and understanding of human rights will be made from the perspective of universal access to the web. Finally, the Brazilian legislations that were elaborated with the purpose of providing a widening of access to the net will be highlighted, pointing out their weaknesses and possible solutions to the avenued problem.

II. DISTANCE LEARNING *VERSUS* REMOTE CLASSES

Education is one of the human rights enshrined in the Universal Declaration of Human Rights. Considered by Amartya Sen[1] as an enabler of the development of the human personality and of fundamental freedoms, since it lends itself to fostering the evolution of individuals' capacities, being, for such, directly linked to the economic development of each nation.

The discussion about the promotion of education emerges nowadays as something urgent in view of the pandemic caused by the new coronavirus, whose main prevention mechanism is social isolation. Guided by the World Health Organization (WHO), the countries had to adopt strict isolation measures in order to contain the virus proliferation, which led, among other situations, to the conversion of face-to-face teaching to the emergency remote teaching modality.

Despite the existence of distance learning, the model hastily implemented by the federated entities and private institutions does not have the same structure. The Ministry of Education defines distance learning [2]as "a form of education in which students and teachers are physically or temporarily separated and, therefore, the use of information and communication technologies is required. Remote education, conceived in an emergency and transitory situation, can be conceptualized as:

1 SEN, Amartya. **Development as Freedom**. Translation by Laura Teixeira Motta. São Paulo: Companhia das Letras, 2010.

2 MINISTRY OF EDUCATION. **What is distance education?** MEC Portal [site], Frequently Asked Questions, distance education, [201?]. Disponível em: http://portal.mec.gov.br/escola-de-gestores-da-educacao-basica/355-perguntas-frequentes-911936531/educacao-a-distancia-1651636927/12823-o-que-e-educacao-a-distancia#:~:text=Educa%C3%A7%C3%A3o%20a%20dist%C3%A2ncia%20%C3%A9%20a,tecnologias%20de%20informa%C3%A7%C3%A3o%20e%20comunica%C3%A7%C3%A3o. Accessed on: 19 feb. 2021.

> [...] a modality that only assumes the geographical distance between teachers and students, offered synchronously at the same times that the subject classes would occur in the face-to-face model, thus maintaining a school routine in a virtual environment. The educational institutions deal with remote teaching in the most varied ways, making the necessary adaptations in order for the content planning to be fulfilled, as well as its workload. The technology used in remote classes is smaller than in DE, with the use of free communication and interaction applications and services, such as Zoom, Google Meet or Google Classroom, which, besides live transmissions, allows the availability of recordings and complementary[3] activities .

It can be observed, therefore, that while EaD teaching has a complex structure, similar to physical classrooms, called Virtual Learning Environment (VLE), where teaching materials and discussion forums between students and teachers are made available, remote emergency teaching has a more simplistic and even precarious structure.

One can point out that the main difference between one type of remote learning and another is the purpose and context in which they were conceived. While DE was conceived with the purpose of providing convenience and facilitating access to education for a certain educational and professional niche, remote learning was conceived in a situation of compulsory social isolation and, therefore, without any prior

planning. This meant that this teaching method had neither adequate pedagogical planning nor appropriate operational support, and was limited to the use of technologies that allow classes to be held and content to be transmitted synchronously and asynchronously.

Another point worth mentioning that has acted as an obstacle to the implementation of remote learning is the lack of universal access to technologies. As we will see, part of the population does not have technological devices or even the internet, elements that are indispensable to remote learning.

Considering that such technologies do not reach a considerable

3 BARROS, Patrícia Marcondes de; COELHO, Bianca; CAMARGO, Heloísa; LÉLIS, Inês Caroline; KLOSTER JUNIOR, Marcelo. Transition didactics: teacher training and emergency remote teaching in pandemic times. **Revista Dito Efeito**, Curitiba, v. 11, n. 19, p. 48-57, jul./dez. 2020, p. 51.

portion of the population, a reality in many countries, the United Nations (UN)[4], in 2011, recognized universal access to the internet as a human right, to highlight the relevance of active participation of all individuals in the information society.

Therefore, in the face of the implementation of a totally remote education, it is necessary to debate the human right to universal access to the net and its consequent reception and implementation in the Brazilian territory as a fundamental right to the democratization of internet access

III. THE THECNOLOGY PROBLEM

According to a survey conducted by the Anísio Teixeira National Institute for Educational Studies and Research (INEP)[5], the number of young people enrolled in the public education network is higher than those studying in private institutions. The survey, conducted in 2018[6] , reveals that early childhood education has 72.29% of students in the public network and 27.71% in the private; elementary school, with 81.19% in the public network and 18.81% in the private; high school 84.7% in the public and 12.1% in the private. This logic is only reversed in higher education, where the percentage of students enrolled in private institutions is 83.1% and 16.9% in public[7] ones.

Starting from this reality of Brazilian education and taking

4 UNITED NATIONS ORGANIZATION. **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue**. UN [website], Human Rights Council Seventeenth session, Agenda item 3, 16 may. 2011. Available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf. Accessed on: 16 Mar. 2021.

5 INSTITUTO NACIONAL DE ESTUDOS E PESQUISAS EDUCACIONAIS ANÍSIO TEIXEIRA. **Technical summary:** census of basic education 2018. Brasília-DF: INEP, 2019. Available at: http://portal.inep.gov.br/informacao-da-publicacao/-/asset_publisher/6JYIsGMAMkW1/document/id/6386080. Accessed on: 19 feb. 2021.

6 INSTITUTO NACIONAL DE ESTUDOS E PESQUISAS EDUCACIONAIS ANÍSIO TEIXEIRA. **Technical summary:** census of basic education 2018. Brasília-DF: INEP, 2019. Available at: http://portal.inep.gov.br/informacao-da-publicacao/-/asset_publisher/6JYIsGMAMkW1/document/id/6386080. Accessed on: 19 feb. 2021.

7 INSTITUTO NACIONAL DE ESTUDOS E PESQUISAS EDUCACIONAIS ANÍSIO TEIXEIRA. **Technical summary:** census of higher education 2018. Brasília-DF: INEP, MEC, 2020. Available at: http://portal.inep.gov.br/informacao-da-publicacao/-/asset_publisher/6JYIsGMAMkW1/document/id/6960488. Accessed on: 19 feb. 2021.

into consideration the necessary implementation of remote teaching in all educational institutions in order to comply with the social isolation measures foreseen in Law 13.979/2020, it is necessary to analyze the scenario of *Internet* access.

In 2018, a survey conducted by the Brazilian Institute of Geography and Statistics [8]indicated that 79.1% of Brazilian households had *internet* access, while 20.9%

remained without access. The percentage of 20.9% corresponds to 14,991 households. Among the main reasons that prevented these households from being connected to the network were the high cost of the service (25.05%), lack of knowledge (23.4%), the service not being available in the home area (10.9%), and the high cost of the electronic equipment needed to access the *Internet* (5%).

From the data pointed out above, it is possible to deduce that the obstacle to universal access is directly related to the population's lack of financial resources, as well as to the geography of social inequality.

Socioeconomic inequality is a relevant factor when discussing remote access, since the availability of *Internet* service, fixed or mobile, depends on the local economic geography. Private sectors do not tend to invest in locations with a large percentage of low-income population, because they believe that they will not have immediate financial advantages proportional to the investment for the provision of the respective service[9].

The universalization of access is, therefore, a central issue in the following discussion, especially with regard to individuals belonging to the public education network and in the face of the remote emergency education scenario implemented in the context of the new coronavirus pandemic.

Besides the lack of resources to acquire technological devices that allow access to the universal net, another factor emerges as an obstacle to the democratization of *Internet* use. It is what can be called "digital illiteracy".

8 BRAZILIAN INSTITUTE OF GEOGRAPHY AND STATISTICS. **Continuous PNAD:** Internet and television access and possession of cell phone for personal use 2018. [S.l.]: IBGE, 2020, ISBN 978-85-240-4527-1. Available at: https://biblioteca.ibge.gov.br/visualizacao/livros/liv101705_informativo.pdf. Accessed on: 21 Feb. 2021.

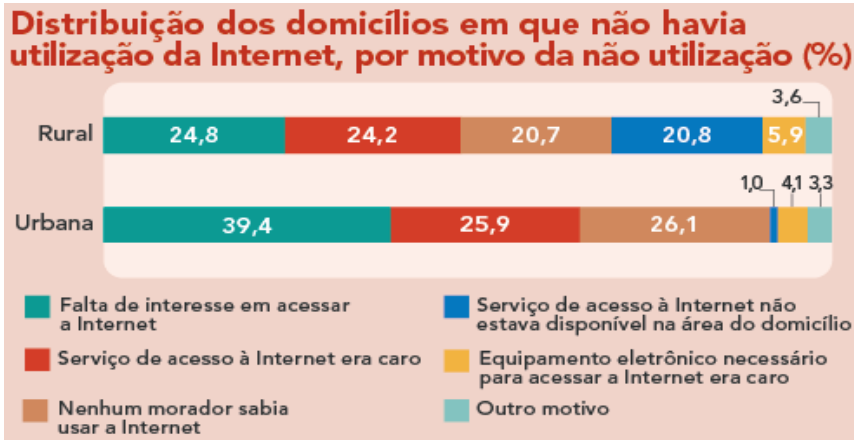
9 GONÇALVES, Lucas Henrique. **The universalization of the internet:** the evolution of Brazil in the global panorama. 2018. 185fl. Dissertation (Master in Public Policy), Federal University of Parana, Curitiba-PR, 2018. Available at: https://acervodigital.ufpr.br/bitstream/handle/1884/55201/R%20-%20D%20-%20LUCAS%20HENRIQUE%20GONCALVES.pdf?sequence=1&isAllowed=y. Accessed on: 21 Feb. 2021.

According to Mioduser, Nachmias, and Forkosh-Baruch[10], new technologies demand certain intellectual competencies, which they call "new literacies". For these authors, for an adequate use of these technologies, users must be able to understand, produce and process the information present in cyberspace, as well as to locate, decode, use and/or pass on content located in cyberspace. Communication skills (written, verbal and visual), therefore, go beyond the meaning of traditional literacy, since the individual must understand the system's tools and then manage them for a particular purpose.

Understanding "digital literacy" is of utmost relevance in the context of remote learning, since the virtual field is used with an educational purpose, demanding from the individual a visual, written, and verbal perception. These elements comprise the entire learning process.

Another factor that emerges as an obstacle and is directly linked to the financial situation of a certain portion of society is the unavailability of *internet* service in certain regions. This can be seen in the following graph:

Graph 1 - Percentage of households that do not have internet access in the year 2018



Fonte: PNAD contínua[11].

10 MIODUSER, David; NACHMIAS, Rafi; FORKOSH-BARUCH, Alona. New literacies for the knowledge society. *In*: VOOGT, J; KNEZEK, G. (Eds.). **International Handbook of Information Technology in Primary and Secondary Education**. New York: Springer, 2008. Available at: https://www.tau.ac.il/education/muse/. Accessed on: 15 Jan. 2021.

11 INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. **PNAD contínua:** Acesso à Internet e à televisão e posse de telefone móvel celular para uso pessoal 2018. [S.l.]: IBGE, 2020, p. 7. ISBN 978-85-240-4527-1. Disponível em: https://biblioteca.ibge.gov.br/visualizacao/livros/liv101705_informativo.

From the graph above, it is possible to deduce that the use of the *Internet* encounters numerous obstacles. One can observe that individuals lack technical knowledge, that is, they are "digitally illiterate", since they are not able to handle the equipment needed to access the net. Furthermore, it is important to highlight the lack of service available in the residential area of these people. This corroborates the statement that socioeconomic inequality is a relevant factor when dealing with the universalization of access, since the availability of fixed or mobile *Internet* access service to all citizens depends on the local economic geography. This leads to the conclusion that private sectors do not tend to invest in locations with a large percentage of low-income population, since the financial return may not correspond to that expected by the companies offering the service[12].

Finally, regarding the non-use of the *Internet* due to other factors, we can suggest the use of outdated devices that make it impossible to access certain platforms, the lack of electric power supply itself, which must be very common in rural areas, the insufficient amount of devices in a single residence capable of serving all users, among other factors that can be correlated to the economic and technical insufficiency of the population.

IV. HUMAN RIGHT'S VIEW TO UNIVERSAL INTERNET ACCESS

The intensification of social relations worldwide, through a dialectical process of information exchange, was made possible by the phenomenon of globalization[13] . In this sense, one can define such process as a "set of social relations that translate into the intensification of transnational interactions, whether they are interstate practices, global capitalist practices, or social practices"[14] .

From the exposure made of the idea of both authors, it can be

pdf. Acesso em: 21 fev. 2021.

12 GONÇALVES, Lucas Henrique. **The universalization of the internet:** the evolution of Brazil in the global panorama. 2018. 185fl. Dissertation (Master in Public Policy), Federal University of Parana, Curitiba-PR, 2018. Available at: https://acervodigital.ufpr.br/bitstream/handle/1884/55201/R%20-%20D%20-%20LUCAS%20HENRIQUE%20GONCALVES.pdf?sequence=1&isAllowed=y. Accessed on: 21 Feb. 2021.

13 GIDDENS, Anthony. **The consequences of modernity**. Translation by Raul Fiker. São Paulo: UNESP Publisher, 1991.

14 SANTOS, Boaventura de Sousa. The processes of globalization. *In*: SANTOS, Boaventura de Sousa (org.). **Globalization:** fatality or utopia? 2. ed. Porto: Afrontamento, 2002, cap. 1, p. 90.

inferred that the key point of globalization, besides the global reach, has been the volume and immediacy of information transmitted and received. However, despite being a phenomenon of global repercussion, this does not reach the countries in a homogeneous way[15]. Bumping up against the reality of each territory, globalization permeates the reality of these nation-states in a unique way. Besides the differentiated influence in each national reality, such phenomenon has also contributed to the increase of socioeconomic inequalities[16].

In addition to globalization, it is worth noting that, accompanying this whole movement of internationalization of economic, social, political and cultural relations, there is the advancement of technologies and, in particular, communication networks. Among the technological creations, one can mention the *Internet*. We are witnessing, therefore, a kind of virtualization of reality. Conceived by Pierre Lévy[17] as a way to detach from reality and glimpse a universe of opportunities, the *Internet* emerges today as a pressing need, especially under the democratic aegis, as will be seen below.

In 2011, the United Nations Organization [18], highlighting the relevance of expanding access to the network and the consequent active participation of citizens around the globe, used the term "universal access to the *Internet*" to highlight the relevance of active participation of all individuals in the informational society, thus considering it as a human right in the drafting of the Resolution (A/HRC/ 17/27).

This resolution deals with the promotion, protection and enjoyment of human rights on the *Internet*. More specifically, it deals with the relationship between the Internet and education in Title V, n. 62, p. 17, stating that access to information through the Internet expands educational

15 CASTELLS, Manuel. **The network society.** Translation by Roneide Venancio Majer with the collaboration of Klauss Brandini Gerhardt. São Paulo: Paz e Terra, 1999, v. 1.

16 BEZERRA, Stéfani Clara da Silva. **Army of *Burnout* employees:** the new generation of 21st century workers. 2020. 123fl. Dissertation (Master in Process and Right to Development) - Christus University Center, Fortaleza-CE, 2020.

17 LÉVY, Pierre. **What is virtual?** Translation by Paulo Neves. 2. ed. São Paulo: Editora 34, 2011.

18 UNITED NATIONS ORGANIZATION. **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue**. UN [website], Human Rights Council Seventeenth session, Agenda item 3, 16 may. 2011. Available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf. Accessed on: 16 Mar. 2021.

opportunities, while making them accessible, even globally[19]. Here is the wording of the provision:

> V. Access to the Internet and the necessary infrastructure [...]
> 62. The Special Rapporteur is thus concerned that without Internet access, which facilitates economic development and the enjoyment of a range of human rights, marginalized groups and developing States remain trapped in a disadvantaged situation, thereby perpetuating inequality both within and between States. […] Moreover, the Internet is an important educational tool, as it provides access to a vast and expanding source of knowledge, supplements or transforms traditional forms of schooling, and makes, through "open access" initiatives, previously unaffordable scholarly research available to people in developing States[20].

In this sense, it is seen as an indispensable tool for the promotion of the right to education, while emphasizing the necessary approach and treatment of digital literacy and digital exclusion, which, as seen, are two relevant factors in the implementation of a policy of universal access.

Nowadays, according to Éllida N. Guedes[21] , the dynamics of the social, cultural, technological, political, and economic evolutionary process has worked as a vector for reconfiguring, resizing, and refunctionalizing the public space. Thus, it is understood that technology, associated with the most diverse areas of society, provides a new face to the democratic public space.

19 UNITED NATIONS ORGANIZATION. **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue**. UN [website], Human Rights Council Seventeenth session, Agenda item 3, 16 may. 2011. Available at: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf. Accessed on: 16 Mar. 2021.

20 ORGANIZAÇÃO DAS NAÇÕES UNIDAS. **Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue**. ONU [site], Human Rights Council Seventeenth session, Agenda item 3, 16 may. 2011. Disponível em: https://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf. Acesso em: 16 mar. 2021.

21 GUEDES, Éllida Neiva. Contemporary public space: plurality of voices and interests. **Online library of communication sciences**, 2010. ISSN: 1646-3137. Available at: http://www.bocc.ubi.pt/pag/guedes-ellida-espaco-publico-contemporaneo.pdf. Accessed on: 16 mar. 2021.

In contrast, Dominique Wolton[22] does not believe that technology can provide democratic access to the masses, since it does not guarantee universal access. This conception corroborates the data collected by IBGE and IPEA.

The insertion of *Internet* access as a human right by the UN aims to mitigate this reality. Starting from the axiological burden linked to human rights and, therefore, from its broad scope and universality, the categorization of a right in the list of human rights ensures its full enjoyment[23]. Therefore, its vindication by any individual regardless of his or her social, political, economic, cultural, religious, etc. situation.

However, it is necessary to point out that their inclusion in the list of human rights cannot necessarily invalidate the sovereignty of individual states. Admitting that the spread of the *Internet* and related technologies are intrinsically related to globalization and, consequently, to the so-called hegemonic discourse[24], the "supranormativity" of human rights cannot override the local legal system of each nation[25]. It is necessary, therefore, when facing the implementation and consequent fulfillment of the universal access agenda, to have the agreement and acceptance of this agenda within the legal-normative framework of each state.

V. A UNIVERSALIZAÇÃO DO ACESSO SOB A ÓTICA DA LEGISLAÇÃO BRASILEIRA

In the case of Brazil, the reception of the human right to *internet* access, under the aegis of a fundamental right, was glimpsed in Law n. 12,965/2014, known as Marco Civil da *Internet,* where the art. 7 of

22 WOLTON, Dominique. **Internet, and then?:** a critical theory of new media. Porto Alegre: Sulina Publishing House, 2021.

23 CORTINA, Adela. Concepto de derechos humanos y problemas actuales. **Derechos y Libertades: revista del Instituto Bartolomé de las Casas**, Seville, p. 38-45, feb./oct. 1993. Available at: https://e-archivo.uc3m.es/bitstream/handle/10016/1427/DL-1993-I-1-ConceptoDerechosHumanos.pdf?sequence=4&isAllowed=y. Accessed on: 16 mar. 2021.

24 SANTOS, Boaventura de Sousa. The processes of globalization. *In*: SANTOS, Boaventura de Sousa (org.). **Globalization:** fatality or utopia? 2. ed. Porto: Afrontamento, 2002, cap. 1.

25 PAULA, Víctor Augusto Lima de. **The access to the internet as an optimizing instrument of Fundamental Rights**. 2014. 147fl. Dissertation (Master of Laws) - University of Fortaleza, Fortaleza-CE, 2014. Available at: http://www.repositoriobib.ufc.br/000019/00001999.pdf. Accessed on: 16 Mar. 2021.

that legal diploma treats it as essential to the exercise of citizenship[26] . This normatization of the right to the *internet*, from the perspective of Fundamental Rights by Paulo Bonavides[27] , fulfills the two formal criteria for its characterization, namely, its nomination and/or specification in the constitutional instrument and the designation of high *status of* guarantee or security by the Constitution.

The democratization of access, therefore, seeks to guarantee the fundamental right inserted in art. 1, II, of the Federal Constitution. Starting from the assumption that, in the context of remote education, the social isolation measures imposed to combat and prevent COVID-19 make network access an immediate necessity, it is necessary to point out and discuss what actions have been attempted by the Brazilian government in this regard.

Although the UN stipulation of the right to universal *internet* access dates back to 2011, the first Brazilian efforts to expand access began in 2010 with the National Broadband Plan (PNBL) (Decree 7.175/2010). Through such a policy, the government intended to correct operational failures linked to the provision of the service by private institutions[28] . However, the PNBL was heavily criticized because it did not aim to universalize access, but to provide a better infrastructure to companies that, in turn, were not obliged to expand their networks to all locations[29]. This, as seen in previous lines, directly affects those regions with a low financial contribution.

For not fulfilling this purpose, Decree 7,175/2010 was repealed by Decree 9,612/2018, which also failed to meet the desired goal, which is to expand access to the network for those households in economically

26 BRAZIL. **law n. 12.965, of April 23, 2014**. Establishes principles, guarantees, rights and duties for Internet use in Brazil. Brasília, DF: Presidency of the Republic, [2021]. Available at: http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2014/lei/l12965.htm. Accessed on: 15 mar. 2021.

27 BONAVIDES, Paulo. **Curso de Direito Constitucional.** 30 ed. São Paulo: Malheiros Editores, 2015.

28 BRAZIL. **Decree no. 7,175, of May 12, 2010**. Establishes the Programa Nacional de Banda Larga - PNBL (National Broadband Program); provides for the reassignment of commissioned positions; amends Annex II to Decree no 6,188, of August 17, 2007; amends and adds provisions to Decree no 6,948, of August 25, 2009; and makes other provisions. Brasília, DF: Presidency of the Republic, [2021]. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Decreto/D7175.htm. Accessed on: 15 mar. 2021.

29 GETULIO VARGAS FOUNDATION. **Internet policy report:** Brazil 2011. São Paulo: Comitê Gestor da Internet no Brasil, 2012. Available at: https://www.cgi.br/media/docs/publicacoes/1/relatorio-politicas-internet-pt.pdf. Accessed on: 16 mar. 2021.

disadvantaged conditions. On the contrary, it supplanted the inequalities of broadband access by mobile broadband access[30]. The problem, therefore, persisted.

Also in 2010, the "One Computer per Student Program" (PROUCA) was conceived, through art. 6 of Law 12.249, of June 11, 201[31]regulated by Decree 7.243, of July 26, 2010[32]. However, despite the promising proposal, it should be noted that the program, while leaving aside the old goal of improving the quality of education through technology, is silent about access to the world wide web (*internet*).

In the midst of the pandemic (COVID-19), this program was resubmitted to the House of Representatives with Bill 2,945, of May 27, 2019, aiming to create the "One Computer per Student National Policy" with the purpose of ensuring the supply of computers, programs (*software*) and technical assistance in schools in the public education network, including those for people with disabilities[33] .

Although the bill's justification speaks of the importance of connecting to the international network, emphasizing that part of society, for economic reasons, cannot have this access, it remains silent on how this access can be made economically feasible. It can be observed that, even in the face of fundamental guarantees, the right to the *internet is* still far from universalization.

The inefficiency of the PNBL, of PROUCA and the normative silence of the "One Computer per Student National Policy" regarding its execution, added to the remote teaching modality, denotes an even

30 BRAZIL. **decree n. 9,612, of December 17, 2018**. Dispõe sobre políticas públicas de telecomunicações. Brasília, DF: Presidency of the Republic, [2021]. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2018/Decreto/D9612.htm. Accessed on: 12 mar. 2021.

31 BRAZIL. **Law no. 12.249, of June 11, 2010**. Creates the One Computer per Student Program - PROUCA and creates the Special Regime for Acquisition of Computers for Educational Use - RECOMPE. Brasília, DF: Presidency of the Republic, [2021]. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Lei/L12249.htm. Accessed on: 12 jan. 2021.

32 **Decree No. 7243 of July 26, 2010**. Regulamenta o Programa Um Computador por Aluno - PROUCA e o Regime Especial de Aquisição de Computadores para uso Educacional - RECOMPE. Brasília, DF: Presidency of the Republic, [2021]. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2007-2010/2010/Decreto/D7243.htm. Accessed on: 12 Jan. 2021.

33 BRAZIL. **bill n. 2.945, of May 27, 2019**. Institui a Política Nacional Um Computador por Aluno. Available at: https://www.camara.leg.br/proposicoesWeb/fichadetramitacao? idProposicao=2253926#. Accessed on: 13 Jan. 2021.

more serious deficiency: the compromising of education in the context of the pandemic by the new coronavirus. Since the main channel for the transmission of teaching and learning is the *Internet*, the non-availability of a wide network and technological devices that enable its use compromises Brazilian education, especially public education.

In order to mitigate these difficulties, the Ministry of Education (MEC), with the help of the non-profit civil organization All for Education, has undertaken efforts to guide public school networks to diversify the channels of educational content transmission. To this end, it has developed the following strategies: the gradual return to school activities, since at the beginning of the implementation of social isolation measures students were without classes; the standardization of the school year, corresponding to a reduced workload so as not to compromise or delay the school period; the establishment of minimum parameters in order to measure and certify the learning process; the elaboration of strategies to mitigate the heterogeneous condition of access, based on the analysis of the technologies that are more accessible and common to students; the encouragement of distance learning by other means and not only by remote teaching; the centralization of the role of the teacher[34].

In addition to these "operational" challenges, there are also obstacles to overcome in terms of the personal relationship between students, schools, and schools and families. The federal entities must deal with the emotional impact of students and professionals in the face of the storms experienced by the COVID-19 pandemic. Among the measures, it is worth mentioning the fight against school dropout and evasion, the compliance with the workload required by law, the creation and maintenance of a communication channel between the educational institution and the parents, the institutionalization of policies for learning recovery, the articulation between the local institutions that impact educational policy, and making technology a continuous ally[35].

It is observed, therefore, that remote education, from the perspective

34 CRUZ, Priscila; BORGES, João Marcelo; NOGUEIRA FILHO, Olavo (coords.). **Distance learning in basic education facing the pandemic of COVID-19**. [S.l.]: Todos pela educação, 2020. Available at: https://www.todospelaeducacao.org.br/_uploads/_posts/425.pdf?1730332266=&utm_source=conteudo-nota&utm_medium=hiperlink-download. Accessed on: 16 mar. 2021.

35 CRUZ, Priscila; BORGES, João Marcelo; NOGUEIRA FILHO, Olavo (coords.). **Distance learning in basic education facing the pandemic of COVID-19**. [S.l.]: Todos pela educação, 2020. Available at: https://www.todospelaeducacao.org.br/_uploads/_posts/425.pdf?1730332266=&utm_source=conteudo-nota&utm_medium=hiperlink-download. Accessed on: 16 Mar. 2021.

of human rights in the context of the covid-19 pandemic, must go beyond the mere implementation of technological mechanisms that enable the transmission of classes in synchronous or asynchronous format. Internet accessibility must comply with the fundamental right of universal access, since this, nowadays, makes up an area of contemporary democracy.

VI. CONCLUTIONS

For all the above, it appears that remote learning is not to be confused with Distance Learning (DL), when it does not have a Virtual Learning Environment (VLE). Moreover, it should be mentioned that the former was conceived in an atypical situation (pandemic caused by the new coronavirus), which led to its conception on an emergency basis. Thus, its structure is disorganized and fragile, as it relies on "borrowed" virtual platforms, synchronous and asynchronous classes, and an abbreviated pedagogical schedule. In contrast to DL, which was a planned remote teaching modality and, therefore, has its own organized structure and an appropriate pedagogical schedule.

Another point worth mentioning, as seen throughout this paper, is that emergency remote education cannot be limited to technologies that require the use of the *Internet*. Based on the fact that a large percentage of Brazilian households do not have access to the Internet, limiting remote education to virtual access hinders the achievement of the human right to education and, therefore, the universalization of access in its broadest sense. Therefore, the concentration of remote education in the virtual sphere serves the role of further aggravating socioeconomic inequalities by ignoring the financial reality and the technical hyposufficiency of countless Brazilian households.

Although the right to universal access to the internet has been elevated to the category of Human Rights by the UN, its classification as such cannot be superimposed on the legal-normative sovereignty of all nations, since it is up to them to receive such right within their national legal system. In the case of Brazil, the right to democratization of Internet access was received under the mantle of fundamental right, implying, therefore, its pursuit as a minimum guarantee to Brazilian citizens, even more so in the current scenario of remote education.

Even in the face of the Brazilian government's efforts to enable broadband access, especially through the National Broadband Plan (created by Decree 7.175/2010 which was revoked by Decree 9.612/2018), through PROUCA, and through the "One Computer per Student National Policy",

the universalization of internet access was not contemplated, nor the democratization of access to the network. The legislative initiatives did not take care to mitigate social inequalities regarding accessibility to fixed broadband, mobile broadband, or the availability of technologies that enable democratic access to the network.

Given the difficulty in expanding access to the Internet and to technologies, remote teaching, especially connected to public institutions, cannot be understood exclusively as the transmission of educational content through online platforms. Schools must make use of other mechanisms that, despite not allowing a continuous and simultaneous flow of learning, can contribute to the propagation of educational content to those students who are more economically vulnerable. To this end, they can use radio broadcasting, television programs, sending educational material to students' homes, and the availability of synchronous and asynchronous classes on virtual platforms.

The social isolation measures implemented to prevent and combat the spread of the new coronavirus have served to demonstrate the fragility of the educational system, especially when it comes to the use of technology. The establishment of emergency remote education has served to put on the agenda the democratization of access to the Internet network, especially as a fundamental right assigned to every Brazilian citizen.

Thus, when conceiving remote education in the context of the pandemic caused by the new coronavirus, it is necessary to take into account the complex Brazilian reality, especially from the standpoint of universal access to the network. This right, as we have seen, cannot be limited to the *Internet,* because there are many other factors that prevent its use. These elements include economic factors (lack of resources to purchase technological devices, unavailability of the service in certain areas marked by financial vulnerability), technical factors (understood as the lack of knowledge to properly handle this equipment, better known as "digital illiteracy") and, finally, the lack of electricity in some locations, which would make both access to the *Internet* and the acquisition of cell phones and computers unfeasible.

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PRIVACY AND COVID-19: PROTECTION OF THE ELECTRONIC BODY OF THE PERSON, FROM STEFANO RODOTÀ'S POINT OF VIEW

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Abstract: COVID-19, a disease that arose in China, has brutally afflicted the whole world, being a health crisis that has caused deaths, anguish and pain. In addition to the impacts on health, the pandemic had intense repercussions on people's daily lives, causing incalculable social and economic problems. Unemployment, informal workers without income and significant changes in the world of work and in the economy made up the scenario, demanding urgent measures, under penalty of economic chaos. Sanitary measures have ended up damaging civil rights, affecting the sensitivity of citizens' sensitive data. The role reserved for the privacy of people in the context of major public calamities as a pandemic is questioned, especially when sensitive data are used to formulate government policies. The work intends to demonstrate, following the theoretical formulation of S. RODOTÀ on the protection of the electronic body of the person, that, even in the context of COVID-19, the formulation of public policies should not, under the justification of fear of contagion or haste in seek solutions to the health crisis, achieve fundamental rights of the person, such as citizens' privacy. Finally, the work aims to shed light on the false dilemma: right to health or right to privacy? It will be shown that this type of questioning contains a limited view on fundamental rights, showing a high authoritarianism.

Keywords: Privacy; Electronic Body; Covid-19; Surveillance; Data Protection; Stefano Rodotà.

I. INTRODUCTION

The author S. Rodotá, in his book El Derecho a Tener Derechos, proposes the concept of the electronic body of the human person. For the Italian author "In the dynamics of social relationships and also in the perception of oneself, the true reality is that defined by the set of information that affects us,

organized electronically. This is the body that places us in the world" [1].

This concept is very important in this period in which the world is going through a unique moment: an epidemic crisis, unprecedented in recent history, caused by the so-called new Coronavirus (Sars-CoV-2).

This is because governments around the world, under the guise of preserving the health of their fellow citizens, have invested unreasonably on the privacy rights of the same, harming the aforementioned electronic body. It is feared that mass surveillance systems will be implemented and will last beyond the pandemic period, in a clear affront to the concept of "person", also proposed by S. RODOTÀ.

This is what this work is about: the clash between personality rights, specifically the right to privacy, and the surveillance imposed by governments, as a rule, of an authoritarian nature.

II. OBJECTIVES

As a general objective, the research intends to demonstrate that the democratic regime elevates the human being to the epicenter of the legal system (CRFB, art. 3, I), and there are no reasons that justify the disregard for fundamental rights such as privacy, honor, secrecy of correspondence, among others, even in times of health crisis. On the contrary, it is argued that the framework of fundamental rights should safeguard such rights.

Starting from such scenario and assumptions, the study aims to achieve the following specific objectives: (i) conceptualize person, electronic body and privacy, in the wake of the teachings of S. RODOTÀ, showing correlations between such concepts; (ii) set the social, political and economic scenario arising from the pandemic, exposing the new technologies used for monitoring the contagion of the disease. We will try to briefly expose this theme in the global context, focusing, afterwards, on the national reality; (iii) answer the following question: to what extent the use of monitoring through information and communication technologies infringes the fundamental right of human privacy; and (iv) demonstrate that, even in the context of COVID-19, the exercise of fundamental rights must be preserved. In other words, this paper intends to shed light on the false dilemma: do we choose the right to health or the right to privacy? It will be shown that this type of questioning contains a limited view of fundamental rights, denoting a high degree of authoritarianism.

1 RODOTÀ, Stefano. (2014). *El derecho a tener derechos*. Madrid: Editorial Trotta, p. 150.

III. METHODOLOGY

The methodology used in the research was based on the following aspects: (i) research in journalistic articles, given the very current nature of the issues addressed; (ii) bibliographic research, seeking, in the best doctrine, theoretical foundations about the topic under investigation; and (iii) documentary research, analyzing Federal Supreme Court rulings on the issue.

IV. ELECTRONIC BODY AND PRIVACY IN THE INFORMATION SOCIETY

The article begins by situating the research in what has been called the 4th industrial revolution or revolution 4.0, which has been characterized by the intense use of new technologies in production processes, as well as by the advent of a significant change in the means of communication, led by the advent of social networks and computer applications.

As S. RODOTÀ would say, in a poetic way, "the conflict between the old and the new world returns, one that shines with colors of nostalgia; the other, the bearer of a process that seems to want to say goodbye to the human for good[2].

In this same context, some thinkers prefer to refer to the information society as the one that succeeded the post-industrial period.

For Professor M. EHRHARDT JÚNIOR, the information society is "an environment where the temporal and physical immediacy of access to information, given the extreme functionality and speed of the technological means used, provides what we may call the virtual elimination of distances. Furthermore, it presents as characteristics of this society "democratization, that is, the cheapening of access to the Internet, and consequently, the equalization of opportunities for potential users, especially for those who are underprivileged[3].

It is a world "composed of a submersion in the so-called cyberspace, characterized by being a dimension in which communication is performed in the worldwide interconnection of computers, changing the idea of border, freedom and information" [4].

2 RODOTÀ, Stefano. (2011). Freedom and rights: brief instructions for the human being of the future. Revista *Instituto Humanitas Unisinos online*, online.

3 EHRHARDT JÚNIOR , Marcos; SILVA, Gabriela B. P. (2010). *Information society and the law in the digital age*, online, p. 4.

4 CARVALHO, Alexander P. N. de; SOUSA, Raphaella P. A. de. (2019). The influence of digital psychopolitics in virtual contracting and its reflexes on the increase of consumer vulnerability. *Revista de Direito do Consumidor*, Editora Revista dos Tribunais, Ano 28,

This context emphasizes the individual's personal data, which is understandable since, in the information society, "we are our data"[5] . In this vein, the former professor of Civil Law at the Italian university La Sapienza emphasizes that the human body already belongs "to the global dimension" and that "the information that concerns us, and that represents our identity for all those who use it electronically, is spread in a growing number of databases in the most diverse places in the world" [6].

S. RODOTÀ prescribes that this constant capture of personal data by the so-called Big Data ends up having repercussions in the formation of a person's identity, which becomes the result of what others "type", "view" and "store" about him. This process causes the human being to face "an unstable identity, at the mercy of other people's moods, prejudices or interests of those who collect, maintain or disclose personal data," creating "a situation of dependence that determines the construction of an 'external' identity with forms that reduce the person's power of control[7].

On the subject, everyone knows about people who live in function of the publications, comments and "likes" on social networks, creating a parallel universe that often contributes to the erosion of their personal values and their own personality. Unfortunately, this idealized life, many times, does not correspond to the challenges of reality, generating frustration and suffering.

Following in the footsteps of Z. BAUMAN, A. CARVALHO and R. SOUSA state that "those who cannot act according to the induced desires are presented every day to the dazzled gaze of those who can"[8]. This is the "commodification of the human being, a process that transforms people into consumer goods.

In truth, paradoxically:

> [...] what scares us is not so much the possibility of betrayal or violation of privacy, but the opposite, the

n. 123, May-June/2019.

5 RODOTÀ, Stefano. (2014). *El derecho a tener derechos*. Madrid: Editorial Trotta, p. 150.

6 RODOTÀ, Stefano. (2003). *Stefano Rodotà Lecture*. Online. Available at: http://www.rio.rj.gov.br/dlstatic/10112/151613/DLFE-4314.pdf/GlobalizacaoeoDireito.pdf Accessed on: 28/6/2020, online.

7 RODOTÀ, Stefano. (2014). *El derecho a tener derechos*. Madrid: Editorial Trotta, p. 163.

8 CARVALHO, Alexander P. N. de; SOUSA, Raphaella P. A. de. (2019). The influence of digital psychopolitics in virtual contracting and its reflexes on the increase of consumer vulnerability. *Revista de Direito do Consumidor*, Editora Revista dos Tribunais, Ano 28, n. 123, May-June/2019.

> closing of the exits. The area of privacy becomes a place of incarceration, the owner of the private space being condemned and sentenced to suffer atoning for his or her own mistakes; forced into a condition marked by the absence of listeners eager to extract and remove the secrets that hide behind the trenches of privacy, to display them publicly and make them the common property of all, that all wish to share[9].

The study points out that in the context of the fight against terrorism, S. RODOTÀ summarized his concerns regarding the unrestrained exposure of personal data: "[...] from the 'scrutinized' person, through video cameras and biometric techniques, one can move to a 'modified' person through the insertion of 'smart' chips and tags, in a context that increasingly clearly individualizes us as networked persons [...]" [10].

In fact, "personal data are transformed into an important commercial asset for the world's major technology companies, with the clear objective of obtaining capital, as well as others that are not so clear at the moment" [11].

The article notes that the impact of technology on human life brings with it a concern for freedom, which is not pleased with any form of manipulation and control. On this subject, cite again S. RODOTÀ:

> Although it can be said that the body is beginning to be a "nano-bio-info-neuro" machine, because of the concentration on it of instruments offered by these various technologies, it is necessary to distinguish between what can contribute to its empowerment and what makes possible increasingly intense controls; between decisions that are exhausted in the sphere of the interested party and those that have an impact on the lives of others; between offers that expand the power to make free and informed

9 BAUMAN, Zygmunt; LYON, David. (2004). *Liquid surveillance*. 1st ed. [S.l.]: Zahar - Kindle Archive, l. 427.

10 RODOTÀ, Stefano. (2004). Transformations of the Body (Translation by Maria Celina Bodin de Moraes). *RTDC*, v. 19, p. 92 - 107, p. 95.

11 REQUIÃO, Maurício. (2020). Covid-19 and personal data protection: the before, the now and the after - Kindle Archive. In: BAHIA, S. J. C. (coord.). *Fundamental Rights and Duties in Times of Coronavirus*. 1st ed. São Paulo: Editora IASP, l. 8990.

> choices and those that have an impact on the person, turning him into a gadget [12].

Based on the teachings of Bying-Chul Han, Alexander Perazo and Raphaella Prado report the existence of a domination of the individual, "in a scenario where the illusion of freedom is predominant and unlimited communication represents a silent control and an absolute surveillance that spontaneously gains strength without exerting any constraint, this mechanism being called digital psychopolitics" [13].

The study shows that S. RODOTÀ is very concerned about the undue capture and manipulation of data, making reference to the Snowden case, citing the worldwide reaction to the private messages monitoring scheme carried out by the United States. He points out that, on that occasion, the privacy and protection of the person's data had been honored, which had died "precisely to legitimize any collection of personal information, reducing people to the role of obliged suppliers of data considered necessary for the functioning of the market and of totalizing control mechanisms" [14].

Thus, the protection of the person's data is an essential aspect of the legal system, it being certain that "the unity of the person can only be reconstituted by extending to the electronic body the system of guarantees designed for the physical body" [15]. S. RODOTÀ even proposes that the protection of personal data be considered a fundamental right, separate from the right to privacy[16].

In the same sense, in a recent article, C. KELLER and D. DONEDA state that the "right to data protection comprises, as one of its main elements, the establishment of instruments aimed at reducing the risk to citizens that the processing of their data may cause". They add that, for this purpose, it must be "prevented that personal data is processed without there being a consistent and grounded objective" and even when there is a grounded

12 RODOTÀ, Stefano. (2011). Freedom and rights: brief instructions for the human being of the future. Revista *Instituto Humanitas Unisinos online*, online.

13 CARVALHO, Alexander P. N. de; SOUSA, Raphaella P. A. de. (2019). The influence of digital psychopolitics in virtual contracting and its reflexes on the increase of consumer vulnerability. *Revista de Direito do Consumidor*, Editora Revista dos Tribunais, Ano 28, n. 123, May-June/2019.

14 RODOTÀ, Stefano. (2013a). The rights revolution, from Malala to Datagate. *Instituto Humanitas Unisinos online*, online.

15 RODOTÀ, Stefano. (2004). Transformations of the Body (Translation by Maria Celina Bodin de Moraes). *RTDC*, v. 19, p. 92 - 107, p. 106.

16 RODOTÀ, Stefano. (2014). *El derecho a tener derechos*. Madrid: Editorial Trotta, p. 151.

objective, "this processing must be reduced to the minimum necessary for its objective to be achieved, in addition to being proportional to the interests and rights involved" [17].

The research highlights, regarding the concept of privacy, interesting to note that the classical notion of "being left alone" has lost strength, and the concept has come to gravitate on the "possibility of each one controlling the information that concerns him/her" . Thus, the idea of privacy, in the most current context, is linked, among other aspects, to "the possibility of individuals and groups to control the exercise of powers based on the availability of information, thus contributing to establish more appropriate socio-political balances" [18].

In an excellent book, dedicated "to the memory of S. RODOTÀ, D. DONEDA talks about information society and privacy:

> [...] the protection of privacy in the information society, starting with the protection of personal data, advances over terrains previously unavailable and induces us to think of it as an element that, more than guaranteeing isolation or tranquility, serves to provide the individual with the necessary means to construct and consolidate his own private sphere, within a paradigm of life in relationship and under the sign of solidarity [...] [19].

The study highlights that the advent of computerized systems has highlighted the necessary security of the respective data. In this sense, Europe, since the seventies, has been trying to regulate, through legislation, issues related to the control of personal data and the preservation of individuals' privacy. Unfortunately, the scope of the present work does not allow us to go deeper into the theme.

The research notes that the pandemic surprised Brazilian managers,

17 KELLER, Clara I.; DONEDA, Danilo. (2020). Aiming at fake news and hitting surveillance: user identification as a failed strategy to combat disinformation. *Jota online*, online.

18 RODOTÀ, Stefano. (2008). *Life in the surveillance society*: *privacy today*: Part I (Technology and Rights). Renovar, p. 26.

19 DONEDA, Danilo. (2019). *From privacy to personal data protection*: elements of the formation of the *general data protection law*. 1. ed. in e-book. São Paulo: Thompson Reuters. p. 36.

considering that, historically, there has never been a real priority of the public power, in all its spheres, regarding the public health system, being a notorious fact the terrible conditions of primary care, which should be responsible for actions aimed at risk prevention and health promotion.

Secondary and tertiary care, which involves all the apparatus related to the treatment of patients who are already ill, do not follow a better path. There are countless reports of crowded and ill-equipped hospitals, lack of sufficient tests to diagnose the disease, lack of qualified staff to treat the disease, absence of basic inputs for the care of patients, and even the absence of personal protective equipment for the medical teams.

It is in this context that we are trying to confront this disease. This is a true "war operation". So much so that world leaders affirm, with conviction, that we are living through an unprecedented global crisis, perhaps the greatest global crisis since the Second World War[20].

As B. Santos warns us, from one moment to the next, the future of humanity is at stake. Check it out:

> Suddenly, the pandemic breaks out, the light of the markets dims, and from the darkness with which they always threaten us if we do not pay them homage, a new clarity emerges. The pandemic clarity and the appearances in which it materializes. What it allows us to see and how it is interpreted and evaluated will determine the future of the civilization in which we live. These apparitions, unlike others, are real and here to stay[21].

The survey highlights that the economy has entered a state of alert. The forecasts of economic retraction proved to be shocking and governments had to intervene in the markets in a way not seen before in the last decades, or else countries would plunge into a period of economic recession, unprecedented in recent history.

In this vein, in addition to sanitary measures and treatment of the infected, the world's governments have made intense financial contributions

20 CARBAJOSA, Ana. (2020). Merkel appeals to citizens and calls coronavirus "biggest challenge since World War II". *El país online*. Available at: https://bit.ly/2NHsu4B. Accessed on: 18/6/2020, online.

21 SANTOS, Boaventura de S. (2020). *The cruel pedagogy of the virus*. Coimbra: Edições Almedina S/A, p. 10.

to the economy, either to bail out companies that were unable to operate, or to help citizens, who found themselves without income for their basic needs.

As far as the world of work is concerned, it was hit "hard" by the unprecedented health crisis. Businesses closed down all over the world, causing mass unemployment. Also evident was the large number of informal workers, who, with the pandemic, found themselves deprived of basic income conditions.

The study emphasizes that measures of social isolation were implemented, often establishing a true surveillance state, where the steps of citizens were monitored on a daily basis, under the guise of the necessary containment of the virus.

It must be said that, in many situations, the necessary information was not provided to citizens and the approval of constituted powers, such as Parliament, was not sought.

The research notes that "the vast majority of monitoring systems are a variation on the same theme: using geolocation data produced by smartphones to determine adherence to social isolation and predict where the disease may be headed. It may also be that the information is "cross-referenced with health, credit, social media, and even transportation system cameras.[22]

We must also fear Artificial Intelligence, capable of learning by itself and, in the face of programming defects or the absence of ethical parameters to guide its operation, becoming a true tormentor of privacy.

In this sense, researcher José Eustáquio Alves points out that "[...] the main concern with the unregulated development of AI is the possibility of creating an overcontrol of individual liberties, putting an end to the privacy of personal information, Big Brother style, and, in the face of international conflicts, AI can autonomously unleash catastrophic wars" [23].

The study points out, however, as Z. BAUMAN, that "much of the personal information vigorously absorbed by organizations is, in fact, made available by people using cell phones, shopping in malls, traveling on vacation, having fun, or surfing the Internet", to which it concludes: "We swipe our cards, repeat our zip codes, and display our identities routinely,

22 ROMANI, Bruno. (2020). Use of location data in the fight against covid-19 can threaten privacy. *O Estado de São Paulo*, São Paulo, online.

23 FACHIN, P. (2017). *Artificial Intelligence can become an uncontrollable monster*: Special Interview with José Eustáquio Alves. Available at: http://www. ihu. unisinos. br/159-noticias/entrevistas/572111-a-4-revoluçãoindustrial-ainda-e-umpromessa-entrevista-especial-com-jose-eustaquio-alves. Accessed on: 27/6/2020, online.

automatically, spontaneously" [24].

It is said that "Sensitivity to the political risks linked to mass records goes well beyond the middle class indeed, since the possibility of discrimination affects especially different minorities and those belonging to the working class". Thus, it is understood that "the invocation of privacy goes beyond the traditional individualistic framework and expands into a collective dimension, since it does not take into account the interest of the individual as such, but as belonging to a social group" [25]. Thus, the discussion about privacy has been based on the "emersion of the collective moment and its aspect linked to power" [26].

It is for this reason that "the utmost opacity must be guaranteed to information that may give rise to discriminatory practices and the utmost transparency must be guaranteed to information that, referring to the economic sphere of subjects, contributes to base decisions of collective relevance[27].

The paper highlights that fear of discrimination is a factor that must be observed when collecting sensitive data from citizens, especially in view of the possibility of using this information later for other purposes.

The study cites numerous cases in which citizens' privacy has been violated.

A very interesting report by the international NGO Access Now catalogued governmental behaviors that ended up improperly exposing information of possibly contaminated people, showing the dangers of monitoring without criteria:

> In Argentina, a newspaper published personal information of people infected with COVID-19, indicating their age, where they had traveled, which hospital they were treated at, and more. After this publication was noticed and criticized by the public, they made the names unavailable.
> The National Health Institute of Peru has developed a platform where you can consult the health reports

24 BAUMAN, Zygmunt; LYON, David. (2004). *Liquid surveillance*. 1st ed. [S.l.]: Zahar - Kindle Archive, l. 212.

25 RODOTÀ, Stefano. (2008). *Life in the surveillance society: privacy today*: Part I (Technology and Rights), p. 30.

26 Ibidem, p. 31.

27 Ibidem, p. 35.

> of patients who have been tested for COVID-19 by entering their national identity document. For a few days, the information was therefore accessible to the public, not limited to the patient. After receiving criticism, the national authorities included a second authenticator. To connect to the platform, an SMS-based code is now required.
> In India, at least two state governments - including the state of Karnataka, which is home to the Bangalore technology center - have uploaded PDF files online with names, home addresses, and travel history of people under COVID-19 quarantine. The information is accessible to everyone.
> U.S. citizen Frank King took a cruise in Cambodia, where he was mistakenly identified as a carrier of COVID-19. Although King's test results were eventually corrected and all passengers on the cruise were determined to be healthy, upon returning to the U.S., he received death threats and personal attacks, online and offline, in the weeks that followed[28].

As reported by the BBC News portal in Mexico, Uber suspended the accounts of two of its drivers, as well as 240 customers, after learning that a Chinese passenger, who had taken the drivers' vehicles, had developed Covid-19. Uber had used its database to track the customers who had taken the cars where the Chinese man had been transported [29].

There are also shocking reports that, in India, the transmission of the Coronavirus has been attributed to the Muslim community, which is the largest minority group in that Hindu-majority country - and which already suffers from historical discrimination, acting as a true "scapegoat" in the current health crisis[30].

28 ACESS NOW. (2020). *Recommendations on privacy and data protection in the fight against covid-19*. Online. Available at: https://www. accessnow. org/ cms/assets/ uploads/2020/03/Access-Now-recommendations-on-Covid-and-dataprotection-and--privacy. pdf. Accessed on: 26/6/2020, p. 5.

29 BBC NEWS. (2020). Coronavirus: Uber blocks drivers who picked up coronavirus man. *BBC News online*. Available at: https://www. bbc. com/news/technology51358042. Accessed: 26/6/2020, online.

30 YASIR, S. (2020). India Is scapegoating Muslims for the spread of the Coronavirus: The pandemic has provided fresh opportunity for Hindu nationalists to beat down an

The study points out that this surveillance state has new contours and is much more insidious, as it seeks biometric data: "Until now, when you touched the screen of a smartphone with your finger and clicked on a link, the government wanted to know exactly where the click was made. But with the coronavirus, the central interest has changed. Today the government wants to know the temperature of your finger and the blood pressure under your skin.[31]

The study explains that by collecting data under the skin, the recipient of the information can associate states of temper, blood pressure, heartbeat, and emotional states. He or she will thus be able to tell when a certain person is sad, happy, or interested in a certain subject. This would be an open path to manipulation, such as, for example, offering products. One can also cogitate on the data that is always used to discriminate certain interest groups[32].

Let it be said that S. RODOTÀ, in 2004, already expressed concern about the "[...] increasingly massive use of biometric data, especially fingerprints, thus making it possible to carry out generalized controls on all citizens" and exemplified: "Fingerprints, geometry of the hand or fingers, ear, iris, retina, facial features, odors, voice, signature, keyboard use, walking, DNA" [33].

It concludes that "the nexus between the body, personal information and social control can assume dramatic contours, to the point of immediately evoking respect for the dignity of the person, which imposes a particularly strict interpretation of the principle of strict necessity in the collection and processing of personal data[34].

The survey shows that in Brazil, unfortunately, authoritarian, invasive, or non-transparent measures have also been adopted for the current pandemic scenario.

In this sense, the study condemns Provisional Measure No. 954 of

already disadvantaged minority group. *FP online*. Available at: https://foreignpolicy.com/2020/04/22/india-muslims-coronavirus-scapegoat-modihindu-nationalism/. Accessed at: 26/6/2020, online.

31 HARARI, Yuval N. (2020b). The world after the coronavirus. *Instituto Humanitas Unisinos online*. Available at: http://www. ihu. unisinos. br/78-noticias/597469-the-world--after-the-coronavirus-article-de-yuval-noah-harari. Accessed on: 27/6/2020, online.

32 Ibidem, online.

33 RODOTÀ, Stefano. (2004). Transformations of the Body (Translation by Maria Celina Bodin de Moraes). *RTDC*, v. 19, p. 92 - 107, p. 95, p. 92.

34 Ibidem, p. 97.

2020, which required telephone companies to provide the Brazilian Institute of Geography and Statistics (IBGE) with data on their customers, such as name, telephone number and address. This normative act was withdrawn from the legal system, in an injunction, in the proceedings of the Direct Unconstitutionality Action No. 6.387, with the decision recognizing the need "[...] to prevent irreparable damage to the intimacy and privacy of more than a hundred million users of fixed and mobile telephony services"[35].

We should also mention Provisional Measure No. 928, of March 23, 2020, which inadvertently suspended "the deadline for answering requests for access to information in bodies or entities of the Public Administration whose employees are subject to a quarantine regime.

In essence, the aforementioned provision directly affected the so-called Access to Information Law (Law No. 12,527, of November 18, 2011), rendering its precepts innocuous during the pandemic period. Fortunately, such excrement was removed from the legal world, under the argument that the questioned provision "[...] does not establish exceptional and concrete situations preventing access to information, on the contrary, it transforms the constitutional rule of publicity and transparency into an exception, reversing the purpose of the constitutional protection of free access to information to the whole society[36].

Indeed, information should always be available to citizens, who are ultimately responsible for monitoring the public policies adopted, including with regard to spending. It is not too much to remember the numerous accusations of corruption related to spending on the pandemic.

The study recalls that in a lecture given in Rio de Janeiro in March 2003, the former president of the Italian Data Protection Authority - S. RODOTÀ, then 70 years old - had already called attention to the need for the virtual world to be a "constitutional space rich in adequate guarantees", otherwise the market's logic would prevail in the virtual environment, "since most online activities are commercial and the Web is considered a gigantic mine of personal data, thanks to which a society of surveillance and

35 SUPREME FEDERAL COURT. (2020a). *Medida Cautelar na Ação Direta de Inconstitucionalidade Nº 6.387 - Distrito Federal*, Brasília. Available at: http://portal. stf. jus. br/processos/downloadPeca. asp?id=15342959350&ext=. pdf. Accessed on: 21/6/2020, online.

36 SUPREME FEDERAL COURT. (2020b). *Referendum in the Precautionary Measure in the Direct Action of Unconstitutionality No. 6.351 - Federal District*. Brasília. Available at: http://www. stf. jus. br/arquivo/cms/noticiaNoticiaStf/anexo/ADI6351.pdf. Accessed on: 19/6/2020, online.

classification has been born" [37].

On the loss of people's trust in each other, including in the authorities, let us take from Y. Harari:

> Humanity is facing a serious crisis today, not only because of the coronavirus, but also because of the lack of trust between people. To overcome an epidemic, scientific experts must be trusted, citizens must trust the authorities, and countries must trust each other. In recent years, irresponsible politicians have deliberately undermined faith in science, public authorities, and international cooperation. So now we face this crisis with no world leader able to inspire, organize, and finance a coordinated global response[38].

The research highlights that most of the cited governmental measures are imposed from the perspective of fear or under the alibi of urgency. It poses society a false choice to be made: do you choose health or privacy?

S. RODOTÀ, speaking about the right to truth, sheds light on these false options that are presented to citizens: "Truth is continuously put to the test, immersed in a series of conflicts: memory or oblivion; transparency or privacy; free construction of personality or subordination to controls; inclusive or excluding identity"[39] . He goes on to conclude by launching a sharp criticism against this binary logic "whose alternatives would only be to choose a yes or a no, without any possibility of individuating a point of conjunction, of constituting social relations that would be lacerated if one chose only by means of an abstract isolated attitude" [40].

37 RODOTÀ, Stefano. (2003). *Stefano Rodotà Lecture*. Online. Available at: http://www.rio.rj.gov.br/dlstatic/10112/151613/DLFE-4314.pdf/GlobalizacaoeoDireito.pdf. Accessed on: 28/6/2020, online.

38 HARARI, Yuval. N. (2020a). In the battle against coronavirus, humanity lacks leaders: the antidote to the epidemic is not segregation, but cooperation. *El País online*. Available at: https://brasil. elpais. com/opiniao/2020-04-13/na-batalhacontra-o-coronavirus--a-humanidade-carece-de-lideres. html. Accessed on: 27/6/2020, online.

39 RODOTÀ, Stefano. *The right to the truth*. 2013b. Online. Available at: https://www.passeidireto.com/archive/71110444?utm_campaign=androidarquivo&utm_medium=mobile. Accessed: 28/6/2020, online.

40 Ibidem, online.

The study reminds, however, that there is no choice to be made. It emphasizes that democratic governments have to guarantee both rights to their population, and that unreasonable restrictions to citizens' fundamental rights cannot be considered, as in this case, privileging only health to the detriment of people's privacy.

In fact, "data protection and the use of its processing for collective health protection purposes are not entirely incompatible and need not be considered within a logic of exclusion (loser vs. winner), but may coexist as long as certain principles are observed" [41].

The work quotes that, questioned if after the pandemic countries would be more manipulable, falling into authoritarianism or populism, the South Korean philosopher Byung-Chul Han jokes saying that the virus does not support democracy. He argues that authoritarian regimes feed on fear, promoting, because of the pandemic, regimes of exception. This would be the end of democracy[42].

Still on sensitive data, let us follow the teaching of E. PEIXOTO: "personal data that may, in case of violation, cause some kind of discrimination, affect the personal way of life of those exposed, such as, for example, data on a person's religion, moral and philosophical choices, being the bearer of certain types of diseases, etc." [43].

It is important to highlight Professor M. REQUIÃO's concern with the "post-pandemic". The author reports uneasiness with the possibility that the data collected during this exceptional period will later be used for unconfessable purposes:

> This serious global crisis cannot serve as a justification to set up a system of surveillance and monitoring, by companies and governments, even more severe on citizens. The concern about how this data and the

41 MODESTO, Jéssica A.; EHRHARDT JUNIOR, Marcos. (2020). Collateral damage in times of pandemic: concerns about the use of personal data in the fight against COVID-19. *Revista Eletrônica de Direito e Sociedade online*, Canoas, v. 8, n. 2. Available at: http://dx. doi. org/10.18316/REDES. v8i2.6770. Accessed 6/29/2020.

42 HAN, B. (2020). Korean philosopher predicts post-Covid world in "permanent state of war." [Interview granted to] *EFE Agency*. Online. Available at: https://jovempan. com. br/noticias/mundo/filosofo-coreano-mundo-pos-covid. html. Accessed on: 26/6/2020.

43 PEIXOTO, Erick L. C. (2017). *The content of the right to privacy in contemporary Brazilian law*. Dissertation (Master of Laws) - Universidade Federal de Alagoas, p. 91. EHRHARDT JÚNIOR, Marcos; SILVA, Gabriela B. P. (2010). *Information society and the law in the digital age*, online, p. 93.

> treatment systems will be used in the future becomes worse, especially when we think about governments that tend to authoritarianism. This exceptional monitoring capacity, coupled with the special powers that have been given to rulers in some countries, even to the detriment of democracy [44].

Finally, once again, he is inspired by S. RODOTÀ who, in his work, emphasizes the concept of "person" - nucleus for the concretization of fundamental rights - reason why, when it comes to the reflection on the eventual clash between privacy and health, it is necessary that the "legal attention turns to data that express a new reality, such as, for example, "informed consent, the integrity of the person and his/her irreducibility to the market" [45].

V. FINAL CONSIDERATIONS

The study points out that even in this scenario of combating the new Coronavirus, scholars, jurists, health professionals and government agents should consider the necessity and convenience of collecting data from the population, especially the "use of biometric data", not only based on a "cost-benefit" study but also on the value of "personal freedom, integrity and dignity"[46].

The research reports that Covid-19 has brought about profound changes in human sociability. There is talk of bringing forward the course of history by approximately ten years. In this context, public authorities and society around the world have, for better or worse, organized themselves to respond to the plague that ravages us. Many of these responses involved public discussions and the elaboration of legal norms that came to back them up, as had occurred here in Brazil.

The study points out that governments, in a cunning way, try to take advantage of the pandemic chaos to impose on their citizens setbacks in their fundamental rights. There are many examples: austere and excessive

44 REQUIÃO, Maurício. (2020). Covid-19 and personal data protection: the before, the now and the after - Kindle Archive. In: BAHIA, S. J. C. (coord.). *Fundamental Rights and Duties in Times of Coronavirus*. 1st ed. São Paulo: IASP Publishing, l. 9276.

45 RODOTÀ, Stefano. (2014). *El derecho a tener derechos*. Madrid: Editorial Trotta, p. 154.

46 RODOTÀ, Stefano. (2004). Transformations of the Body (Translation by Maria Celina Bodin de Moraes). *RTDC*, v. 19, p. 92 - 107, p. 95, p. 98.

surveillance, unemployment and loss of labor rights, threats to cut the salaries of public servants, hypertrophy of the executive power over the legislative and judiciary powers, among many other examples.

Asked what he has learned from the whole new Coronavirus crisis, Y. Harari emphasizes the value of "reliable scientific information" and ponders: "when a country suffers an epidemic, it must be willing to share the information about the outbreak truthfully and without fear of economic catastrophe, while other countries must be able to trust this information and help the victim rather than repudiate him. To which conclude: Today, China can offer many important lessons about coronavirus, but it requires a lot of trust and cooperation" [47].

As it turns out, Y. Harari suggests that information should be democratically shared among the people, with no hiding of the truth, or of the purposes underlying the act of sharing and receiving information.

The study argues that this also applies in the context of information sharing between citizens and public authorities. There can be no doubt about the real intentions of sharing sensitive data, especially with regard to preserving people's privacy, which must be observed even in cases of health emergencies.

The research points out that Covid-19 has brought about profound changes in human sociability. There is talk of bringing forward the course of history by approximately five years. In this context, the public authorities and society around the world have, for better or worse, organized themselves to respond to the plague that ravages us. Many of these responses involved public discussions and the elaboration of legal norms that came to back them up, as had occurred here in Brazil.

However, as stated in the work, governments, in a cunning way, try to take advantage of the pandemic chaos to impose on their citizens setbacks in their fundamental rights. The examples are many: austere and excessive surveillance, inadvertent collection of personal data, unemployment and loss of labor rights, threat to cut the salaries of public servants, hypertrophy of the executive power over the legislative and judiciary, among many other examples.

The survey highlights that autocratic governments once again ask the people to make a choice: right to health or privacy? It returns to the fallacy

47 HARARI, Yuval. N. (2020a). In the battle against coronavirus, humanity lacks leaders: the antidote to the epidemic is not segregation, but cooperation. *El País online*. Available at: https://brasil. elpais. com/opiniao/2020-04-13/na-batalhacontra-o-coronavirus--a-humanidade-carece-de-lideres. html. Accessed on: 27/6/2020.

of the "Sophie's Choice". Would it be possible to make choices, or would the pandemic justify any state imposition? "The coronavirus crisis could be the turning point in the battle. When people are given a choice between privacy and health (emphasis in original), they usually choose health." [48]

The work precepts that, however, the accurate interpretation of the reality in which we live leads us to not unduly abdicate the rights that were granted to us as the fruit of historical struggles. In this context, democracy enables the amplification of the voice of resistance of citizens, as well as their union to stand up against the authoritarian excesses of the governments in office.

In the specific case of Brazil, the picture gets worse, since the democratic regime itself has been the object of constant attacks by the current President of the Republic. It must be known, however, that democracy is a conquest of Brazilian society. We are not willing, therefore, as is widely perceived in society, to give up this collective civic heritage.

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48 HARARI, Y. N. (2020b). The world after the coronavirus. *Instituto Humanitas Unisinos online*. Available at: http://www. ihu. unisinos. br/78-noticias/597469-the-world-after--the-coronavirus-article-de-yuval-noah-harari. Accessed on: 27/6/2020, online.

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NEW TECHNOLOGIES AND THE FUNDAMENTAL RIGHT TO HEALTH: THE (UN)JUDICIALIZATION OF HEALTH IN THE STATE OF CEARÁ

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Abstract: The article aims to verify how the new technologies used for out-of-court resolution of health claims will be efficient to assist users of the Unified Health System (SUS) who have not achieved access to health treatment. It seeks to investigate how the new technologies available to offer transparency to society are likely to be a means of resolving unmet health claims, thus avoiding their judicialization. The methodology used is a descriptive-analytical study, developed through bibliographic research, which requires legal knowledge on the right to health and public management. It is verified, as a result of this technology, that the Public Administration and the Judiciary are able to solve health claims faster, mainly due to the information on the required object, as well as due to the price itself, which is already tabulated, not being at the mercy of a supplier at the time of price quotation for a drug acquisition process by the public agency. It can be concluded, therefore, that the provision of information through digital mechanisms prevents protracted questioning in the Judiciary and favors the formation of a legal culture of health mediation, in which the litigant seeks extrajudicially with the Public Administration to solve their health demand.

Key words: Unified Health System. New Technologies. Health Mediation. Public Administration.

I. INTRODUCTION

The judicialization of health care in Brazil[1] is considered a

1 The expression "judicialization of health" is used to mean the jurisdictional control of health issues by judges and courts, through the imposition of legal obligations of medical and hospital treatment and supply of medicines to patients by the federal entities. To understand the expansion of the Judicial Power over political issues, see, at the global level, TATE; VALLINDER (1995) and, at the national level, SANTOS (2014) and ASENSI (2015).

phenomenon that can cause a complex of problems for the public powers, especially those related to the slowness of the jurisdictional provision, the normative conflicts, and the administrative inefficiency, which results in the difficulty of access to the indispensable means for the enforcement of the fundamental right to health by the users of the Unified Health System (SUS) in Brazil. [2]

It is important to note, however, the development of the health issue, which only became explicitly provided for in the current Federal Constitution of 1988. Therefore, it is verified that there is a maturing of the subject, especially on the part of the State powers, especially the Judicial Power, which has been changing its jurisprudential understanding, and the Executive Power, which is looking for options to make the health system as isonomic as possible.

At the international level, the issue started to be mentioned as a fundamental human right in the 1946 World Health Organization Constitution[3], and in 1948, [4]the UN's Universal Declaration of Human Rights established economic, social, cultural, and political rights with the same emphasis.

It is worth mentioning the fact that, in Brazil, health has been seen as a right since the 1970s, through the Sanitary Reform Social Movement, among other actions in favor of health, which were relevant to the development of the theme, as Asensi (2015, p. 6) points out:

> The 'social perception of health as a citizenship right' would be 'a new fact in the history of Brazilian social policies', since 'this perception is the result of social movements for participation in health in the second half of the 1970s and early 1980s'. [...]

2 It should be noted that the World Health Organization defines the term health as "[...] complete physical, mental and social well-being and not merely the absence of disease. (ACCA, 2013, p. 114).

3 According to Article 1 of its constitution, the WHO's primary purpose is to ensure the highest attainable standard of health for all human beings. The WHO's understanding of health is a state of complete physical, mental, and social well-being, and does not consist merely of the absence of disease or infirmity (CONSTITUTION OF THE WORLD HEALTH ORGANIZATION, 1946).

4 The idea of the right to health appears in the Universal Declaration of Human Rights (1948), in its article 25: Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood beyond his control.

> This allows a relative problematization of the State-centered conception of health typical of previous contexts in favor of a relative state openness to social demands and social participation.

With the inclusion of health in the list of fundamental rights, and its universal character, as provided in art. 196 of the Federal Constitution[5], society, in need of such public health services, and having difficulty in accessing them, begins to seek to protect its right to health judicially, which, as Fleury and Faria (2014, p. 104-105) assert, justifies the increase in legal claims on the subject:

> The growth of judicialization can be credited to a number of factors related to access and use of health services; the existence of contractual definitions and benefits; citizens' awareness of their rights and the actions of consumer organizations; the role of the pharmaceutical industry; and, also, the creation of dialogic channels to seek consensus among the actors involved.

It is important to highlight the notion that, currently, the Brazilian State is going through a dialogical moment between the competent authorities and entities interested in health matters, since it has been noticed that judicial decisions should not distance themselves from the organizational structure of the Public Administration, according to its competencies, as well as that a judicial decision should not lead to an inconsequent "dead end", that is, oblige the Public Power to perform something outside its legal and material possibilities.

In order to resolve the issue, however, the judiciary needs to obtain information from the state, so a system that provides access to government data enables the judge to have more knowledge to make decisions. It is important, however, to ask: why not allow litigants this access to information even before it reaches the judiciary?

The litigating bodies, such as the Public Prosecutor's Office, the Public Defender's Office, and the Private Law Office, having access to certain information, are qualified to seek an out-of-court resolution, including a health mediation, to solve the problem, which, sometimes, would be a health

5 Art. 196: Health is a right of all and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other injuries and universal and equal access to actions and services for its promotion, protection and recovery.

treatment different from the one prescribed by the doctor, but that the Public Administration has an adequate and effective medication alternative.

In this way, the work under report proposes to analyze the example of the State of Ceará, which has created new technologies for public health management, allowing wide transparency in various information, such as, for example, the number of beds in its hospitals, and also systems that aim to insert the patient in the ICU bed queue or other surgeries, in case of availability, resolving the claim without it being judicialized, executed in partnership with other institutions, especially the Public Defender's Office.

Furthermore, other systems have also been developed, within a dialog between the institutions, which allow access to information about certain drugs, such as, for example, if the drug prescribed by the doctor would be effective for a respective disease; what is the estimated cost; if it is registered with the National Health Agency (ANS); if it is in the protocol of the Single Health System, and, if it is not in accordance with one of these situations, the system informs whether it would be the only one able to treat the disease or if there are alternatives.

The information entered in these systems is based on information formulated by the National Commission for the Incorporation of Technologies (CONITEC) in SUS, linked to the Federal Government, composed of experts in various areas of health, who, through debates and public hearings, define clinical guidelines and protocols for each disease, including whether or not there is scientific evidence of a particular drug for the treatment.

It is also important to highlight the fact that the World Health Organization (2015, online) defines health technology as the "[...] application of knowledge and skill organized in the form of devices, medicines, vaccines, procedures and system developed to solve a health problem and improve quality of life. The truth is that technologies that allow assisting in the resolution of a health system demand can be incorporated into this concept, considering that their implementation benefits patients, isonomically, enabling access to treatment.

In this circumstance, it is necessary to answer three central questions in this research: (i) how are the new technologies available to offer transparency to society likely to be a means of resolving unmet health demand, thus avoiding its judicialization?; (ii) considering that the Public Administration must be based on formality, which is likely to cause excessive bureaucracy, how can this process be made faster?; and (iii) to what extent is access to broad information by the citizen beneficial to the Health System?

II. OBJECTIVES

The general objective of this paper is to verify how efficient the new technologies used for out-of-court settlement of health claims will be in serving SUS users who have not been able to access their health care.

Regarding the specific objectives, it aims at analyzing, on the one hand, how to meet the demand not met by patients can be resolved quickly, avoiding, in effect, the judicialization of health and, on the other hand, to assess whether access to full information will cause a greater conflict on the part of the citizen who is waiting for health treatment and notices a change in the order of the queue.

III. METHODOLOGY

The methodology used is a descriptive-analytical study, developed through a bibliographic search, demanding legal knowledge about the right to health and about public management, specifically focusing on the electronic systems of the digital platforms of the State of Ceará, as well as those made available by the National Commission for the Incorporation of Technology (CONITEC) in SUS and by the National Council of Justice (CNJ).

IV. OUTCOME (DISCUSSIONS)

The Executive Power of the State of Ceará aims to break the culture of judicialization of health, in order to meet the missing demand of the citizen by consensual and non-jurisdictional mechanisms. Thus, it is verified that there are systems that inform the number of ICU beds available, and, with this, there is the possibility of a change in the administrative organization, aiming to give a speedy response to the patient. Indeed, it can be seen that the insertion of new technologies will certainly be useful in the attempt to achieve administrative efficiency, which requires, for its success, the commitment of public managers with modern formats of governance.

Besides political interest, the reliability of the population in the State's ability to solve a social demand that was not met in the first moment is also relevant to understand the growth of judicialization of health. And the implementation of new technologies will certainly constitute a means to achieve an effective result, or else, to give knowledge to those who are waiting for the answer to their demand.

On the subject, Baptista (2015, p. 179-180) ponders:

> The objective of a governmental policy in health, when proposed, is to align the actions according to structuring principles and guidelines. The values involved in the proposition of SUS favor and facilitate satisfactory practices of quality care. However, the experience in the services often seems distant from the principles and guidelines that govern it [...]. Attitudes of trust or lack of trust are likely to be strongly influenced by individuals' experiences at **access points**. If contact at SUS is unqualified and far removed from what would be the standard of professionalism, credibility in the system is weakened. (emphasis added).

Thus, it is known the importance of the Unified Health System, as it was proposed and has great perspectives for the population. It is, however, in the so-called "access points", that is, at the moment of first care, that the health system's image tends to be tarnished due to the many embarrassing situations that the population is susceptible to when they cannot get medical attention.

On the other hand, from the moment society notices a change in the State's behavior in resolving conflicts, and that it is effective and quick in its response, it tends to increase the credibility in the health system.

In other words, a plausible justification for not providing the medication, such as, for example, indicating the fact that the required drug is not included in the SUS protocol and that, therefore, the State cannot provide it, would be more acceptable or, at least, less frustrating. It would be even better if the solution to the case were presented, that is, the supply of an alternative drug treatment to the one requested, but that results in the same effects as the one not included in the SUS protocol that was prescribed by the physician, but that is now available at SUS.

By the way, to achieve transparency and efficiency in the health system, the new technologies exist, so this is not a mere favor or charity from the Public Administration, but a constitutional obligation, because the art. 37, *caput, of the* Citizen Charter is explicit when listing the principles of Public Administration, among them, publicity and efficiency.

Therefore, in light of the principle of publicity, all acts must be transparent, and, since it is a public health service, its complete data and information must be made public, but not in any way. The provision of information must be done in the most didactic way possible, so that legal operators - lawyers, members of the Public Ministry and public defenders - can understand it without major technical

difficulties.

Regarding the principle of publicity, it is important to register the fact that the State of Ceará has two digital platforms that should be highlighted. One is IntegraSUS[6] , which integrates epidemiological, hospital, outpatient, administrative, financial, and planning monitoring and management systems of the Health Secretariat (Sesa) and the 184 municipalities of the State of Ceará.

Note that during the pandemic of the covid-19 virus, this platform allowed access to information on the number of cases, deaths, and hospitalizations, which is very likely to have influenced the judge in his decision, considering that he can attest that there is a waiting list that is longer than the number of beds in the state health network.

The change in judicial behavior, in other words, goes through the awareness of the magistrate who, when he receives a lawsuit claiming an ICU bed for the treatment of this virus, accesses the system and realizes that by granting the judicial determination he will be harming someone with more severe symptoms on the waiting list or even excluding a person who is already in a bed.

The idea of transparency in Public Management also transits through the aspect of the plaintiff and the magistrate, to the extent that everyone should be aware that the absence of care by the State would not be due to lack of availability of treatment at SUS, in such a way that the argument of the reserve of the possible[7] is predisposed to be accepted by the interested parties.

The second mechanism in the State of Ceará, done in partnership with a litigating body, is the Núcleo de Atendimento Institucional à Saúde[8] - NAIS (Center

6 More information at: https://integrasus.saude.ce.gov.br/

7 The thesis of the reserve of the possible is a way to limit the actions of the State in the realm of the realization of social and fundamental rights, moving away from the individual constitutional right and favoring the collective right of society. We must also add the notion that the principle of the material reserve is constantly referenced in lawsuits that deal with social rights as a basis for reducing or excluding the responsibility of the government to provide services related to the social goods provided for in the Federal Constitution of 1988, among which are health, education, food, and housing. It is important to emphasize, however, the argument that, in actions of right to health, the State is forbidden, in principle, to deny any treatment on the grounds that it does not have sufficient financial resources to pay for the citizen's treatment, because, from the Judiciary's perspective, this request represents an attempt to guarantee the existential minimum to the citizen and, thus, ensure respect for human dignity. Therefore, as a rule, the principle of guaranteeing the existential minimum, when weighed against the maximum of the reserve of the possible, should prevail in judicial decisions, except when there is a clear demonstration of the financial impossibility of the Public Power to fund health demands.

8 More information at: https://www.defensoria.ce.def.br/

for Institutional Health Care), in which the Health Secretariat of the State of Ceará (SESA-CE) and the State Public Defender's Office participate.

The mechanism implemented by the NAIS in the process of de-judicialization of health care becomes preponderant, since the patient who has an unmet demand for an ICU bed seeks out the Public Defender's Office so that it can litigate against the Executive Branch. With this information, however, the State informs the Public Defender's Office of the real situation of the queues, indicating the possible inexistence of vacant beds, as well as making the public health agency aware of their existence, and thus, a job that would be done in the scope of justice, would already be solved out of court.

Once these two systems that exemplify compliance with the constitutional principle of publicity are expressed, it is important to highlight the Public Administration's principle of efficiency, which is verified in the sum of two elements - the moderateness of prices and the celerity of service to the plea.

To illustrate how another technology incorporated into the management helps to solve health rights disputes, we can cite the Technical Support Center for the Judiciary[9] (NAT-JUS), created by the National Council of Justice (CNJ). This is a tool available to the magistrate to verify the active principle, the cost, and the indispensability of a certain medicine. It should be noted that this system of broad access is observable by the lawyer of the eventual lawsuit, or of the other litigating bodies.

Thus, it is a system that assists the judge in his decision, but it is also able to help litigants in general in the out-of-court settlement, since it is likely that a health mediation with the health agency will be occasioned, especially considering that, in the technical sheets contained in NAT-JUS, the situation of each medication is expressed and if it has a similar alternative in SUS itself.

Furthermore, the system shows the estimated value of the drug, which, besides helping the judge in his judicial determination, also helps the litigant, at the moment of postulating in the lawsuit or in the sanitary mediation, as well as the Executive Branch itself, which will know by what value the product is being estimated, and, consequently, would come to establish an expense process for the acquisition of the drug.

As a result of this technology, the Public Administration, and also the Judiciary, are able to solve health demands faster, especially regarding information about the required object, as well as the price itself, which is

9 More information at: https://www.cnj.jus.br/programas-e-acoes/forum-da-saude-3/e-natjus/

already tabulated, not being at the mercy of one supplier or another at the time of price quotation for an acquisition process by the public body.

However, it is up to the public administration to try to expedite the request for the supply of the medicine when it is available, because, due to the infamous "bureaucracy" in public institutions, that is, the complex and long administrative processes and rites, the absence of a simple document or the delay in a sector for receiving documents, for example, can put the health and life of the patient at risk.

We can also highlight the fact that the Federal Government itself, through the Ministry of Health, has a committee of experts that includes opinions and clinical protocols, and that are always encouraged to continue to implement new technologies for health, that is, CONITEC[10], which becomes another institution to favor the federative entities, as is the case of the State of Ceará.

In response to the last question, the importance of access to data by interested parties is verified, in order to reduce the number of health lawsuits. This information to citizens with no knowledge of the health system, however, should be assisted by a legal professional, under the responsibility of the public defender, prosecutor, or lawyer, to justify why the lack or delay in the concession of a medication prescribed by the doctor, or why the immediate hospitalization of a person with a health risk has not occurred, and who sees his problem as the most important.

V. CONCLUSION

Considering that the new technologies in public health management make the State itself comply with constitutional principles, they should be encouraged to its employees and partners, because they bring benefits to the population and to the State itself.

Systems that denote transparency must be didactic to avoid poor or inaccurate interpretation by society or difficulties in understanding by the litigating body, which, if there are problems in the information, will judicially request that the magistrate himself do it or coercively determine it.

Thus, in an attempt to answer the research problems, the provision of information through digital mechanisms that make it possible to check the health system data means that the questioning will no longer be carried out in the Judiciary and will favor the formation of a legal culture of health mediation, in which the litigant seeks to resolve his or her health demand in

10 More information at: http://conitec.gov.br/

an extrajudicial manner with the Public Administration.

It is important to express, finally, the truth that the State must seek to improve bureaucratic procedures within public agencies and institutions, in order to enable rapid access to the means of promotion and enforcement of the rights to health and life, especially medical-hospital treatment and drug supply - within its administrative structure. Furthermore, the State Entity should persist in stimulating the creation and development of digital base systems, such as those of the State of Ceará (IntegraSUS and NAIS) and of the National Council of Justice (NAT-JUS), the latter to support the magistrate, as well as to serve all agents involved in health claims.

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NEOLIBERALISM AND HUMAN LIFE TRANSFORMED INTO HUMAN CAPITAL

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Abstract: Neoliberalism has introduced new processes of subjectivation into society, giving rise to new ways of relating to oneself. From the standardization of competition, the subjects are subjectivized as companies and compelled to behave as such. This essay aims to analyze the reasons that led to the emergence of the entrepreneur of the self as the predominant mode of subjectivity in contemporary society, from the neoliberal rationality, and how this rationality affected social movements such as feminism. The methodology used was deductive inquiry, through bibliographical research and qualitative study.
Keywords: Biopolitics. Neoliberalism. Subjectivity. Feminism.

I. INTRODUCTION

Neoliberalism has enabled the propagation of a market logic conceiving subjects that can be governed according to their interests. Foucault's studies about power and the subject can be seen as a piece of the contemporary politicization of the social and the gradual breaking down of the differentiation between the public and the private.

Foucault examines power in the light of subjectivation, providing relevant conceptual tools for the conception of how power acts in the production of subjects and in the direction of their working power. For Foucault, the subject is the product of the action of powers and discourses of truth, and the ongoing subjectivation is a direct result of the rationality of the biopolitical devices used by modern capitalism, that is, neoliberalism.

Neoliberalism has changed both the course of labor relations and expanded the logic of the market beyond the economic sphere, conceiving individuals-companies. The triumph achieved by the neoliberal logic can be linked to the imposed subjectivation process, or rather, the conduction of subjects submitted to the market logic.

Thus, there is a tactic that generates a flexible entrepreneurial

performance to economic precepts, being introduced to a certain reality outlined by the neoliberal logic, in which the norm is competition. Seeing that, the exploitation of the capitalist system has been coated by the entrepreneurialism of itself, the individual starts to mercantilize his labor force to the entrepreneur who holds the capital, since the capitalist exploitation has come to be understood as a natural link, no longer visualized as exploitation.

Various policies, mechanisms, and devices were put in place to make individuals behave like companies and to make human capital the predominant subjectivity. Societies based on neoliberal capitalist principles came to be controlled and directed to characteristic ends, where the lives of individuals are driven to satisfy a deregulated and immoderate market.

Starting from the conception that work has become an individual enterprise, and the subject has become an "entrepreneur" of the self, this essay sought to analyze the reasons that led to the emergence of the entrepreneur of the self as the predominant mode of subjectivity in contemporary society, starting from neoliberal rationality, and how this rationality has affected social movements such as feminism.

In this sense, this article will initially deal with neoliberal rationality and the mechanisms of control. In the second moment, it will address feminism and its connection with neoliberalism. And finally, it will analyze the conduction of individuals' lives and the contemporary democratic crisis.

To this end, a qualitative approach was used, by means of a deductive investigation and conceived in a bibliographical analysis. The text was constructed starting from the subjectivity of the individual-company, contextualizing it with neoliberal rationality.

II. NEOLIBERAL RATIONALITY AND CONTROL MECHANISMS

The aspect of neoliberalism that should be analyzed is related to the technique of government, based on Foucault's (2008b) concept of governmentality1, which portrays the way in which the conduct of individuals has been implicated, more and more evidently, in the action of sovereign power.

This liberal rationality has as its starting point the analysis that government need not be an end in itself. The concept of governmentality assists a way of governing based on various propositions as well as on power relations based on a broad understanding of the state and its exercise of

1 It is a set of mechanisms and devices used to exercise a government; they are the tactics applied to conduct the conduct of individuals and the population (FOUCAULT, 2008b).

power and control over individuals.

According to Dardot and Laval (2016), the new entrepreneurial reason drives the language and ideals of entrepreneurship linked to the connections between states, between state and individual, and between individuals. Thus, the state ceases to be a mere watchdog of the market system and becomes subject to the market.

Neoliberalism, unlike the liberalism of Smith and Ricardo, is based on competition between individuals, since it is through competition that progress and capital accumulation occur. For Dardot and Laval (2016) both individuals and states are subjectified by competition, and states apply and are subjected to the new techniques of government.

Also according to Dardot and Laval (2016, p. 275), neoliberalism has generated implications beyond a reconstruction of classical political economy, since the policy employed by neoliberal governments has always corroborated the understanding that for the good journey of the market, reducing taxes, decreasing public spending, deregulating markets, especially labor markets, were necessary policies to be adopted.

As pointed out by the authors above, the market is put in the foreground, but this does not mean that neoliberal rationality aims only at the economic sector, far from it, such rationality demands to extend itself throughout the social sphere, aiming at the transformation of the liberal enterprise to an archetype of life.

According to Foucault:

> [...] extend market rationality, its analytical schemes, and its decision-making criteria to fields that are not exclusively, or not primarily, economic: the family and the birth rate, for example, or crime and penal policy (FOUCAULT, 2008, p.323).

Although several highly technologically enhanced control and surveillance devices operate intensely in society, this does not imply that these devices are employed to protect the lives of the population. However, the conception of managing lives, supervising bodies, and monitoring the population in the direction of guiding behavior gradually conforms to neoliberal rationality2. Neoliberalism encourages individuals to act according to the dictates of a company, aiming at self-determination and

2 Foucault (2008b) analyzes neoliberalism as a rationality; above all, the reason for the biopolitical devices handled by current capitalism.

self-esteem, with each individual, in this scenario, being in charge of his own prosperity.

Thus, the conception of governmentality displays neoliberalism as a plan of production of social and political reality and not only as an economic plan. This form of government aims to intensify individuality in order to assign social responsibility and care from the state to the individual (Lemke, 2001).

Thus, the changes brought about by this form of government have intense reverberations for the individual's understanding of himself and society, giving rise to subjects and conducts in line with the neoliberal rationality of competition and entrepreneurship.

According to Belluzo (2009), the neoliberal rationality, in some countries, afflicts the lives of many families, and the skyrocketing race of capitalism has provided an increasing state apparatus of its decisions. There is a gradual modification in the globalized neoliberal capitalist era, with the replacement of human value by the nexus of monetization, where notoriously there is the derogation of state regulations and the lack of market control, which are considered important keys to the strengthening of this system, which causes immense social inequality.

In the neoliberal rationality there is also an intense valorization of the "I", the one who consumes, that man who owns goods, feels alive, since, in the logic of capital, the one who is alive, consumes, buys and owns. Marcuse (2015, p.47) mentions that individuals "recognize themselves in their merchandise; they find their soul in their automobile (...). The very mechanism that binds the individual to his society has changed and social control is anchored in the new needs that this society has produced."

Neoliberal policies generate these new needs, providing a false impression of choice, which provides the expansion of the market model to all spheres of life, aiming to foster, as Dardor and Laval (2016) expose, the incumbency to decide, making individuals assume the market conjuncture placed as the only reality.

In this way, the way of pointing out what would be good or bad in society fits the biopower control mechanism concerning autonomy, due, for example, to the wretched on the streets, who are the ones who do not produce and do not consume, therefore they are the excluded ones.

However, these excluded as well specified by Foucault (2004, p.86), demonstrate to society, how individuals should not stop producing and consequently consuming, to keep up with the standards of capitalism. The situation of the so-called "excluded" is execrable, the punishments

are directly linked to discipline, it is through fear of populating the social dungeons imposed through capitalism, that we eternalize market standards.

Thus, biopolitics comprises in itself the devices of a necropolitics, being the logistics of death cohesive and essential to the "government of lives" (MBEMBE, 2018, p. 19). In the face of the current global pandemic situation caused by Sars-Cov-2, the posture of many rulers is clear in the aspect of letting live and making die, according to the logic of the market.

Because of the virus, the World Health Organization (WHO) has recommended that countries adopt restrictive measures, such as social isolation, in order to avoid overloading their health systems. However, this measure leads to the temporary suspension of economic progress, and consequently there is a strong defense of the discourse that the economy cannot stop at the expense of a disease.

Thus, it is evident that the neoliberal discourse revolves around the alternative life or economy, and it spreads in a more catastrophic way, because both the big businessmen and the precarious worker understood also, as the entrepreneur himself, decide based on calculations of interest that aim both at obtaining personal advantages and expanding profits.

However, it is important to reflect that the pandemic of the new coronavirus revealed how disposable people are, without any harm to the logic of the market, because if in any way life presents itself as an obstacle to neoliberal rationality, it will soon be disposable in favor of the market's permanence.

In this way, life is presented as being biopolitically mapped and fragmented in the direction of determining who can do what and when. Neoliberal rationality, from the perspective of biopolitics, establishes the forms of life and existence from the parameter of protection, even though it is not related to the protection of life, but to neoliberal logic.

The forms of control of the bodies in Michael Foucault's studies are listed at different moments. Disciplinary power is structured at one moment, and biopolitics emerges representing something broader, aimed at population control. In the words of Foucault (2010, p. 204) "what this new technique of non-disciplinary power applies to is - unlike discipline, which addresses the body - the life of men, if you will, it addresses not the man-body, but the living man, the man being alive (...)".

The biopolitics of the human condition, portrayed by Foucault as a new form of power, has underpinned modern rationality and guided the techniques of governmentality. The emphasis is on life, its management, and how necessary population control is.

The regulation of life, by means of biopolitics, predisposes that society lives in absolute normality, because it is very effective and subtle, the ability to capture. The device of biopolitics is so aligned with neoliberal rationality and the logic of capitalism that defining the limits between them is an arduous and difficult task.

According to Foucault (2008), for the neoliberal rationality, the worker does not subsist only in the abstract sphere, but there is a physical and tangible existence, individuals are seen as machines susceptible to perform the labore. From neoliberalism and its logic of behavior management, the "self-entrepreneur" was conceived in today's society, which will be better addressed in the last topic.

It should be noted that psychopolitics works effectively by manipulating the individual into believing that their needs mesh with those of the system. According to Han (2018, p. 45):

> Neoliberal psychopolitics invents ever more refined forms of exploitation. (...) People are controlled by the neoliberal domination technique that aims to exploit not only the working day, but the whole person, total attention, and even life itself. The human being is discovered and made an object of exploitation.

Thus, it is understood that this technique makes these individuals stop questioning and even rebel, and the entrepreneur, in neoliberal rationality, starts appropriating this way of life as being the best for himself, even if he is taken by a congruence of exploitation.

In this sense, it is relevant to clarify that these techniques of government have intense effects on social movements and on the subject's understanding of itself, raising individuals and conducts related to the neoliberal logic of competition, entrepreneurship, and responsibility for due well-being.

In this way, the fragmentation of neoliberalism in the feminist movement will be analyzed below, starting from the conception that neoliberalism acts as a form of government that affects both individuals and states, as well as the action of social movements.

III. FEMINISM AND ITS CONNECTION WITH NEOLIBERALISM

As of 1970, feminism and neoliberalism correspond to intellectual, social and political movements that are influenced by each other and have a complex link, with areas of confluence and areas of divergence. When

studying the nexus between feminism and neoliberalism, one can deduce a strong influence of neoliberal rationality, considering that in addition to being a system of policies, neoliberalism acts as a form of government that affects individuals and states, as well as the action of social movements.

Analyzing the social scenario, the essential questions between the neoliberalism-feminism nexus revolve around the exchange, in which the feminist movement found in neoliberalism to gain growth; of the apparatus, in which neoliberalism takes advantage of the women's liberation movement to spread its ascension as a form of government; of the identity ratification, in which the intensification of the individual caused by neoliberalism conferred the dismemberment of the feminist movement in the face of various coercions regarding identity demands.

Neoliberalism, with its intense power of expansion, has ample power of exchange. Feminism has found in the neoliberal market a suitable surface to spread itself so that states, organizations, and individuals with a certain influence would at least embrace the notion of gender equality.

Neoliberalism has managed to insert itself into feminism, advancing its agenda and, above all, favoring itself without necessarily favoring the feminist movement for the progress of gender equality. Rago (2017), verifies in her analyses that there is an equipping of feminism for the progress of corporate-managed development, the commodification of gender equality longing, and the expansion of neoliberal forms of government.

Thus, there is an intense change in the feminist focus; women are now seen as individuals and not as classes, thus reflecting on the forms of government. In simple lines, the existence of various individual identities challenges the legitimacy of representative democracies, conceiving possibilities of a rupture between the State and the individual.

In the work Discipline and Punish, Foucault exposes how the political subject was materially produced through disciplinary habits, since discipline is a technology of power that acts through the body, aiming to produce a docile and useful body. Foucault (2014), exposes that in the eighteenth century, the bodies of prisoners, workers, soldiers were subjected to new forms of discipline, aiming, on the one hand, to make them more useful for mass production, and on the other hand, more effective to be controlled.

Oksala (2019, p. 117) details that "disciplinary power does not mutilate or coerce its target but, through detailed training, reconstructs the body to produce new kinds of gestures, habits, and skills." These disciplinary practices subject women in search of individualism, professionalism, and

the perfect body, meeting the guidelines of the neoliberal market.

In this sense, it is observed that it can be taken from Foucault's analyses, feminist appropriations to demonstrate how female subjects are governable subjects constructed according to patriarchal, disciplinary and neoliberal practices, since

> [...] the supposedly masculinist liberal conception of the subject as an independent, self-interested, and economic being has also characterized the female subject in recent decades. This was not primarily because of feminism, but because of neoliberalism (OKSALA, 2019, p. 116).

Thus, Foucault's concept of governmentality is relevant to the understanding of this process, since it clarifies how the techniques of government can affect the life, mind, and body of the subjects on whom they are operated, as explained in the previous topic and that will be resumed in the next topic.

Nancy Fraser (2019), analyzes how feminism has become the spawn of capitalism and thinks strategies to reclaim it. The author harshly criticizes feminism's approach to neoliberalism, starting from the conception that domesticated and state-controlled capitalism was bound to be defanged.

In this light, for Faeggi and Fraser (2020) feminism became a driver of neoliberal convictions such as individualism, professionalism, individual responsibility over well-being, and the politicization of personal issues.

> The goal of progressive neoliberalism was not to abolish the social hierarchy, but rather to "diversify" it by "empowering" "talented" women, blacks, and sexual minorities to reach the top. This ideal was inherently class-specific, oriented toward ensuring that "deserving" individuals from "underrepresented groups" obtained positions and paid as equals, along with straight white men of their own class (FRASER; FAEGGI, 2020, p. 223).

The complex problem brought up by the authors is propitious for the contemporary debate about the future of feminism, and also for the repercussion that the cause of women's liberation has had about gender equality in recent times.

Authors Arruza, Bhattacharya, and Fraser (2019, p. 94) bring as a possible solution "that feminism for the 99% must join forces with other anti-capitalist movements around the world," and that

> This path opposes the two main political options that capital now offers us. We reject not only reactionary populism, but also progressive neoliberalism. In fact, it is by dissociating these two alliances that we intend to build our movement. In the case of progressive neoliberalism, we aim to separate the mass of working-class, immigrant, and minority ethnic group women from the Make It Happen feminists, meritocratic antiracists, anti-homophobes, and accomplices of green capitalism and corporate diversity who have appropriated their concerns and subjected them to terms favorable to capitalism (ARRUZZA; BHATTACHARYA; FRASER, 2019, p. 95).

As seen above, the authors' purpose is to recover feminism from the clutches of neoliberal logic by building effective anti-capitalist forces to change society. In the following topic we will discuss how neoliberalism leads the lives of the subjects, giving rise to a democratic crisis.

IV. THE CONDUCT OF INDIVIDUALS' LIVES AND THE CONTEMPORARY DEMOCRATIC CRISIS

It should be noted that democracy, so known since World War II, has begun a period of intense crisis and is committed to implode. Manuel Castells (2018), qualifies the crisis of contemporary liberal democracy by explaining that

> Trump, Brexit, Le Pen, Macron ... are significant expressions of a post-liberal order (or chaos). As is the total decomposition of the political system in Brazil, a key country in Latin America. Or of a Mexico victim of the narco-state. Or of a post-

Chaves Venezuela in near-civil war (2018, p. 8).

Thus, this crisis is not limited to certain countries, since it is a global democratic crisis, even though some countries have political, social, and economic peculiarities that further intensify it.

According to Castells (2018), it would be possible for this crisis of liberal democracy to be clarified by the occurrence of the breakdown of the principles of representation between rulers and ruled, because

> Distrust in institutions, almost everywhere in the world, delegitimizes political representation and therefore leaves us orphaned of a shelter to protect us in the name of the common interest. It is not a matter of political choices, right or left. The breakdown is deeper, both on an emotional and cognitive level. It is about the gradual collapse of a political model of representation and governance: the liberal democracy that had consolidated itself over the past two centuries, at the cost of tears, sweat, and blood, against authoritarian states and institutional arbitrariness (CASTELLS, 2018, p. 7-8).

In reconstructing the process that led to the institutional representative crisis of liberal democracy, the aforementioned author highlights numerous aspects that mutually corroborate each other, such as the globalization of the economy, "xenophobia" and "intolerance" in a scenario of economic crisis and high unemployment, associated with the feeling of unprotection of the miserable population in the face of the fragmentation of social welfare policies promoted by the State by the neoliberal austerity policies, determined to many countries after the economic crisis of 2008 (CASTELLS, 2018, p. 19-20).

Added to this scenario is the organization of a "network society" imbued in the virtual environment, which causes instant poignant consequences for individuals and corroborates the "personalization of politics" and the "politics of scandal", leading to defamatory campaigns in order to undermine notoriety through untruths and manipulations (CASTELLS, 2018, p. 26-27). 26-27), as well as the increase and strengthening of global terrorism and policies of fear adopted by democracies as exceptional deliberations that become permanent precepts.

It is important, in this sense, to clarify that, for the author, there is

a rupture in the reliability between the governed and the governors, with politics being conceived as a space for interests, evidencing the political system's crisis of legitimacy.

Thus, it is important to reflect on the crisis of democracy, and to do so is to highlight and understand the political reasons that can lead it to risk, since, as Levitski and Ziblatt (2018) point out, democracies also die, and when this happens, it is not necessarily by crude coups d'état, but, in a slow and subtle way, by means of the distortion of democratic institutions and political tensions:

> The weakening of our democratic norms is rooted in extreme sectarian polarization - a polarization that extends beyond political differences into conflicts of race and culture. (...) And if one thing is clear as we study collapses throughout history, it is that extreme polarization is capable of killing democracies (LEVITSKI, and ZIBLATT, 2018, p. 20).

To this end, it is relevant to analyze the divergences centered in the cultural and racial groups, especially those pushed by the abuse of the gender group. Thus, the crisis of democracy points to the danger of its peculiar emptiness and meaninglessness, fostering authoritarian and anti-democratic policies.

The neoliberal conduct of populations' lives will be explored from Michael Foucault's The Birth of Biopolitics (2008). The French philosopher reflected on how life and politics are connected in the contemporary neoliberal logic. It should be noted that for Safatle (2020, p. 30), the central point of Foucault's research is related to a

> "[...]internalization of psychological predispositions aimed at producing a type of relationship to self, others, and the world guided through the generalization of business principles of performance, of investment, of profitability, of positioning, to all the intricacies of life. In this way, the enterprise could be born in the hearts and minds of individuals."

It can be seen, therefore, that Foucault perceived neoliberalism as a rationality inherent to the governmentalization of individuals' lives, acting through processes of subjectivation guided by the precepts of market competition, inclining to spread to all areas of social life.

Thus, to reflect neoliberalism as a governmental rationality is to understand it as a set of techniques and actions that aim to conduct, through subtle methods of subjectivation, the conduct of the governed in the most varied spheres of social life.

Neoliberal biopolitics acts and produces social and subjective ends in a subtle and agile way, no longer acting through the excesses of the sovereign power, since governmentality is practiced to individuals who adopt a pattern coming from the competitive market, which encourages the conduction of practices guided by the principles of productivity, consumption, and competition, which penetrate all spheres of social life.

Neoliberal rationality is dedicated to spreading the corporate form, so as to make, according to Foucault (2008, p.154), the "market, competition and, consequently, the company, what might be called the informing power of society."

As well stated by Margaret Thatcher, "the economy is the method. The goal is to change the heart and the soul," that is, to create a new technology, where the economy is not only a management technique, of wealth production, but a technique that creates a new subject, that starts to see itself not only as a human being, but, above all, as a company.

To this end, such modification would be put in place until the subjects identify themselves as "self-entrepreneurs", after the optimization of economic rationality as the only viable rational means. In this sense, Vladimir Saflater (2021, p.30) mentions

> "(...) a profound work of psychological design (...) aimed at producing a kind of relationship to self, to others, and to the world guided through the generalization of entrepreneurial principles of performance, of investment, of profitability, of positioning, to all the intricacies of life. In this way, enterprise could be born in the hearts and minds of individuals."

In simple lines, by subordinating their conduct to neoliberal precepts, subjects become voluntary prey to techniques of subjectivation, which aim at the "formalization of society based on the enterprise model" (Foucault, 2010, p. 222).

It is observed that the subjectivity of the business-form introduced in society reflects in the subjects to perceive themselves as entrepreneurs of

themselves. For Dardot and Laval (2016, p. 16), "what is at stake is nothing less than the form of our existence, that is, the way we are led to behave, to relate to others and to ourselves. This subjectivity further propitiated the "rationalization of desire" (Dardot; Laval, 2016, p. 333).

Thus, it is clear that the market expands its competition precepts beyond the intrinsic economic sphere, aiming to involve society in the tireless valuation of human capital, as well as to adapt to the guidelines of competitiveness and operation so as not to become irrelevant, that is, disposable.

> The new subject is seen as the owner of "human capital," capital that he or she must accumulate through enlightened choices, matured by a responsible calculation of costs and benefits. The results obtained in life are the fruit of a series of decisions and efforts that depend only on the individual (DARDOT; LAVAL, 2016, p.346).

In light of the above, the question is what is the neoliberal logic of the entrepreneur of oneself and the ruin of democracy. Analyzing the social scenario it is possible to deduce that the institution of the neoliberal logic as a factor for the attenuation of democracy manifests itself through the segregation of those individuals who contest the rules of competition imposed by this rationality.

In this sense, the individuals who oppose the neoliberal logic, either by not reducing themselves to the guidelines of competition and performance, or by not fitting in as an entrepreneur of themselves, have their lives characterized as undesirable, subject to precarization.

It should be noted that individuals are charged with the responsibility of the social direction of their lives. Wendy Brown (2019) outlines that neoliberalism by modifying the entire sphere of life into a market, generates individuals adjusted to the logic of the market, producing individuals reduced to the practice of undertaking and consuming. In this conformity, the moral independence of individuals is measured by their ability to take care of themselves, by their aptitude to supply their own needs and provide for their own desires.

Neoliberalism causes effects of democratic depoliticization both in relation to individuals who see themselves outside the market-corporate spectrum, and individuals who insert themselves into the neoliberal logic,

titled by Dardot and Laval (2016, p. 321) as "the factory of the neoliberal subject" in the sense that such logic manufactures the subject it needs.

According to Dardot and Laval (2010, p. 384) "neoliberalism is, not accidentally, but irreducibly, an antidemocratism." In this direction Wendy Brown (2019) analyzes that neoliberal rationality generates de-democratic impacts, causing a strengthening of neoconservative movements, which vilify democracy and adopt antidemocratic conducts.

Although the governmental method of neoliberalism has no affinity with the system of state biopolitical racism, the two end up complementing each other as they constitute techniques of exclusion and vulnerability of individuals who become responsible for their own condition.

However, it is important to reflect that the advent of the Rule of Law consisted of a new form of government and exercise of sovereignty, indicated by the conception of a "rational state whose rational decisions aim to ensure certain values" (SERRANO, 2016, p.164), which are catalogued in democratic principles that ensure fundamental rights to individuals, through the state.

The Universal Declaration of Human Rights in its first article portrays that "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood" (UN, 2009, p.4). However, this statement is not so close to the concrete reality of individuals.

In her work Origins of Totalitarianism, Hannah Arendt dedicates herself to studying the political issues of the present century, especially the effectiveness of human rights in the face of authoritarian governments, since totalitarian experiments have refuted the eminent precepts of Justice and Law. Thus, individuals can be, at any moment, pointed out to society as enemies, dangerous and undesirable.

Even if Arendt's studies focus on the Jews in the context of the war, one can list some cuts to modernity, singularly concerning individuals who, under the jurisdiction of a nation-state, do not have fundamental human rights and full citizenship.

V. CONCLUSION

In view of the above, the life of individuals is approached by neoliberalism as merchandise, the work of individuals reaches the conception of a product, so that the control imposed by capitalism regarding the life of individuals has its position in the disregard of the State's actions.

It became evident that in the neoliberal logic, changes in life and work

were relevant and essential factors, including in the production relationship. The individual started to conceive himself as his own boss and to invest in himself, seeking better conditions of employment and remuneration.

The impact of neoliberalism on social movements, specifically on the feminist movement, had its consequences on human rationality and on the production of individuals submitted to the neoliberal logic.

The economic subject developed the economic woman, from the conception that the free woman encompasses individualistic attributes, professional and responsible for the due well-being, even in the face of structural impasses existing in society. The spirit of competition is also driven into feminism, guiding women to adjust to an imaginary of perfection, excluding those who do not fit this prototype.

It is worth pointing out that the intense democratic crisis needs to be understood starting from the connection between biopolitics and the neoliberal logic of subject conduction. The ruin of democracy is near, and it is essential to look for ways to reestablish it, and it is necessary to establish ways to mitigate the social inequalities resulting from this neoliberal rationality.

The social inclusion of individuals deprived of rights, deprived of access to public goods, deprived of socioeconomic conditions to provide for life, is a necessary and urgent action, since individuals in vulnerable situations are exposed to biopolitics and neoliberalism.

To reestablish democracy is to carry out public policies that aim to reach individuals exposed to vulnerability and marginality, eminent to economic precariousness and exclusion from society and from rights.

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PRISON REFLEXES OF A CONCEPTUAL MISUNDERSTANDING

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Abstract: The present article aims to investigate the possible distortion found in the portrait of those incarcerated in Brazil, due to the inadequate use of the criminal process. In this sense, the effects of the mistaken notion about the purpose of the criminal process in our country will be studied, highlighting conceptual aspects, criticisms and reflexes resulting from this situation, especially in the prison sphere. In a first moment, the process will be treated as a right in itself and not only as an instrument of juridical guarantee and the function of the criminal process will be analyzed, as well as if it, in a garantist conception, would be compatible with the Democratic State of Law. Next, it will be verified that the Brazilian legal doctrine tends to adopt instrumentalist ideas, restricting the purpose of the process to the mere application of the criminal law. Finally, it will indicate a conceptual misunderstanding, which, besides touching the doctrinaire bias, has considerable repercussions in society, building a legal culture that mischaracterizes the criminal process and, therefore, affecting the entire criminal system. For the elaboration of this work, a theoretical, bibliographical and documental research was employed, including specialized doctrines, articles, legislation and official data; the chosen approach is the qualitative and quantitative one, since not only descriptions of situations and analyses of human subjective behavior will be detailed, but also statistical information.

Keywords: Criminal Procedure, Function, Provisional Prisoners, Distortion.

I. INTRODUCTION

Brazil is one of the most violent countries in the world and also has one of the largest prison populations on the planet. At a first glance, this could indicate that crime is being properly repressed and that the criminal process has adequately fulfilled its function. However, a closer look reveals that such an assumption may be premature and mistaken, since a large proportion of the prison system is occupied by prisoners who have not been definitively convicted, many of whom have served their entire sentence before being effectively judged. It is necessary to try to understand the reasons for this distortion.

This is a relevant issue, because Brazilian crime has increased at the beginning of this century, accompanied by a significant increase in the number of people in prison, even without a final conviction. There is, therefore, a situation that challenges the proper understanding of the Principle of Innocence provided for in the Federal Constitution. Although the exhaustive study of the phenomenon of mass incarceration exceeds the limits of this paper, we will take an approach to explore a possible distortion in the profile of the incarcerated, due to an inadequate use of the criminal process.

For this purpose, the concept of the Fundamental Right to Process will be initially presented, as a way to sustain that the procedural institute must be perceived as a right in itself (and not only as an instrument to guarantee other rights; a theoretical clarification essential to fundamental the central argument of this summary. From this conceptualization, we will advance in the discussion regarding the function reserved to the criminal procedure within the system of Procedural Fundamental Rights foreseen in the Federal Constitution; in order to demonstrate that only a garantist conception of criminal procedure is compatible with the Democratic State of Law.

Once this paradigmatic contextualization has been made, the fact that Brazilian legal culture (and doctrine) persists in reproducing concepts related to an instrumentalist conception will be recovered, so that the exclusive function of applying criminal law is reserved to criminal procedure. Finally, the argument that this conceptual misunderstanding has a practical reach that goes far beyond mere doctrinal interest will be constructed, as it contributes to the consolidation of a legal culture that subverts the role of criminal procedure.

The course to be followed has as its initial objective to discuss the function that the Federal Constitution reserves to the process in general, with

emphasis on the criminal process. It also aims to show how the conception of the Fundamental Right to Process should be privileged over the instrumental conception, as it is more compatible with the paradigm of the Democratic State of Law. Such foundations are essential to sustain the central objective of this paper, which is to support the thesis that mass incarceration is a reflection of a misunderstanding regarding the guaranteeing function of the criminal process.

Considering the nature of the research, the work will have as basic methodology the use of specialized doctrine, necessary for its theoretical foundation. The methodology related to the use of official data, essential to expose the distortions present in the Brazilian prison system, will also be used. In the 21st century, the Brazilian justice system continues to maintain a disproportionate number of people imprisoned without a final judgment, which is why it is necessary to discuss the cultural scenario that allows this practice, which defies the presumption of innocence provided for in the Federal Constitution, to thrive. This paper is a contribution in this direction.

II. THE PREDOMINANCE OF PROCEDURAL INSTRUMENTALISM

A quick look at the manuals on Procedural Law[1] reveals that there is almost a consensus in the Brazilian doctrine about the concept of process. It is an instrument of the Jurisdiction used to apply the law to the concrete case, through a procedure that seeks to accomplish the State's meta-juridical goals, including social pacification[2]. The understanding that the process serves to resolve conflicts and give effectiveness to Material Law is clearly established in the Brazilian procedural doctrine, despite the conceptual problems that are intrinsic to it[3].

To understand this, it is necessary to explore the critique that begins with James Goldschmidt (1961) and extends over a century in an attempt to deconstruct the framework of the Legal Relationship Theory[4]. Along this path, the process becomes intrinsically connected to the concept

1 CINTRA, Antonio Carlos de Araújo; GRINOVER, Ada Pellegrini; DINAMARCO, Cândido Rangel. (2007). Teoria *geral do processo***.** 21.ed. São Paulo: Malheiros Editora.

2 DINAMARCO, Candido Rangel. (2008). *The instrumentality of the process*. São Paulo: Malheiros.

3 LEAL, André Cordeiro. (2008). *Instrumentalidade do processo em crise.* Belo Horizonte: Mandamentos, Faculty of Humanities/FUMEC.

4 GONÇALVES, Aroldo Plínio. (2012). *Técnica processual e teoria do processo*. Belo Horizonte: Del Rey.

of adversary [5]and has its constitutional foundation recognized, whose model has binding capacity of the entire legal system[6]. The theoretical assumption of the present work, therefore, is the conception of process beyond the mere resolution of conflicts[7].

It is believed that the paradigm of the Democratic Rule of Law should modulate the interpretation of all legal institutes, making them to be thought in compatibility with the ideas of Democracy, Constitution and Fundamental Rights[8]. In this context, the process should be perceived not only as an instrument to guarantee other rights, but as a Fundamental Right in itself. The Fundamental Right to be in court before an impartial magistrate who conducts a public process with contradictory and ample defense, in order to, in a reasonable time, render a reasoned decision. The Fundamental Right to Due Process[9].

III. THE CRIMINAL PROCESS IN A DEMOCRATIC STATE OF LAW

It should be noted, then, that the fact that the process eventually resolves conflicts and/or applies the law to the concrete case does not exhaust its institutional function. Quite the contrary. The adoption of the paradigm of the Democratic State of Law requires a re-reading of Procedural Law, so that it can absorb the new axiological dimensions typical of this state model. The way to do this is to understand that the process is a Fundamental Right (expressly provided for in the Constitution), which applies not only to the plaintiff (in the sense of access to Justice), but also to the defendant (who can only be deprived of his property and/or freedom through due process of law).

This express constitutional provision is essential to understand that the most sophisticated perception of process applies not only to civil process, but also to criminal process. It applies especially to the criminal

5 FAZZZALARI, Elio. (2006). *Institutions of Procedural Law*. Campinas: Bookseller.

6 ANDOLINA, Italo; VIGNERA, Giuseppe. (1997). *I fondamenti costituzionali della giustizia civile: Il modello costituzionale del proceso civile italiano*. Torino: G. Giappichelli.

7 NUNES, Dierle José Coelho. (2009). *Democratic jurisdictional process: a critical analysis of the procedural reforms*. Curitiba: Juruá.

8 BARACHO, José Alfredo de Oliveira (2008). *Constitutional procedural law: contemporary aspects*. Belo Horizonte: Forum.

9 MARDEN, Carlos. (2012). (Constitutional) process: reconstruction of the concept in the light of the democratic rule of law paradigm. *Revista Opinião Jurídica*, Fortaleza, v. 10, n.14, p. 24-41, jan./dez.

process, which arose together with the Rule of Law, with the objective of domesticating the form of application of the criminal law; bringing with it theoretical evolutions of undeniable civilizing character, such as the overcoming of the inquisitorial model by the accusatorial model (in which the functions of investigating, accusing and judging are segregated). In a Democratic State of Law, the criminal process exists to defend the defendant against the persecutory power of the State[10].

It is important to clarify that it is not a matter of defending the existence of a system that causes impunity, but of seeking a systemic gain of civilizing profile. Like the process in general, the criminal process will still seek the application of the material law to the concrete case; but it will also present itself as a guarantee mechanism, so that the eventual loss of freedom of the accused will happen through due process of law[11]. Within an adequate matrix, the criminal process has a garantist profile, which means that it essentially serves so that the application of the criminal law happens in a civilized manner[12].

It turns out that, despite the fact that the guaranteeist and constitutional-democratic approach of the process has a direct foundation in the Federal Constitution and has been sustained for decades, most of the Brazilian procedural doctrine continues to revolve around an approach that appears as some variation of the instrumentalist perception of the process[13]. Even the newer doctrinaires who write specifically about the constitutional profile of the process find it difficult to overcome the old paradigm of the Legal Relationship Theory[14]. As a result, the criminal process continues to be presented as a mere instrument to enforce the criminal law.

IV. THE CULTURE OF INCARCERATION AND THE CHRONIC

10 BARROS, Flaviane de Magalhães. (2009a). O modelo constitucional de processo e o processo penal: a necessidade de uma interpretação das reformas do processo penal a partir da Constituição. In: OLIVEIRA, Marcelo Andrade Cattoni de; MACHADO, Felipe Daniel Amorim (Coord.). *Constitution and process: the contribution of the process to the Brazilian democratic constitutionalism*. Belo Horizonte: Del Rey.

11 _____. *[Re]forma do processo penal: comentários críticos dos artigos modificados pelas Leis n. 11.690/08, n. 11.719/08 e n. 11.900/09*. (2009b). 2. ed. Belo Horizonte: Del Rey.

12 MACHADO, Felipa; VIANNA, Túlio.(2017). *Garantismo penal do Brasil: estudos em homenagem a Luigi Ferrajoli*. Belo Horizonte: Fórum.

13 DIAS, Ronaldo Brêtas de Carvalho. (2010). *Processo constitucional*. Belo Horizonte: Del Rey.

14 ZANETI JÚNIOR, Hermes. (2007). *Processo constitucional: o modelo constitucional do processo civil brasileiro*. Rio de Janeiro: Lumen Juris.

PROBLEM OF EXCESSIVE PRE-TRIAL DETENTION

Any scenario in which the doctrine constructs an instrumentalist framework will necessarily be inhospitable for a garantist perception of criminal procedure to prosper, and this will certainly have direct repercussions on the way the Judiciary conducts its daily activity. In fact, the profile of procedural training (instrumentalist or garantist) adopted by the majority of the doctrine will affect the training of all the relevant institutions of the Justice System, causing them to mistakenly perceive their own functions. The situation, however, becomes especially serious when these procedural actors are inserted in a context of exacerbated criminality.

A climate of violence and impunity makes the Justice System see itself as part of the state repression mechanism, which distorts the exercise of its functions. The vision of the Brazilian criminal process, linked to the constitutional model of process, falls to the ground, as it is perceived, for example, the growth of a culture of incarceration, reflecting a certain tendency in the repressive acts of individuals, these, by law, still innocent. In this sense, it is worth reporting a problem considered chronic not only in Brazil, but also in several countries of the American continents, which is the excess of pre-trial detention [15].

This misuse of provisional custody is a multifactorial bottleneck, since it includes as causes, among others, the preponderance of repressive policies, the influence of the media, which causes a feeling of impunity, the lack of structure for the implementation of precautionary measures other than imprisonment, disciplinary control over the conduct of judges who apply, as a rule, alternative measures to imprisonment, the inadequacy of public defense and the inconsistency of those responsible for developing the system of administration of justice[16]. Preventive custody seeks to ensure the regular course of the judicial process, free of arbitrary obstacles and subjective impediments, thus allowing the judge to render his final decision in a legal and democratic manner[17].

15 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. (2017). Report on measures to reduce the use of pre-trial detention in the Americas. [S.l.]: *IACHR*. Available at: https://www.oas.org/pt/cidh/relatorios/pdfs/PrisaoPreventiva.pdf. Accessed on: 27 Oct. 2020.

16 _____. Report on measures to reduce the use of pre-trial detention in the Americas. [S.l.]: IACHR. Available at: https://www.oas.org/pt/cidh/relatorios/pdfs/PrisaoPreventiva.pdf. Accessed on: 27 Oct. 2020.

17 VASCONCELLOS, Fernanda Bestetti de. (2008). Preventive imprisonment as a mechanism of control and legitimization of the legal field. 178fl. *Dissertation (Master of Laws) - Pontifical Catholic University of Rio Grande do Sul.* Porto Alegre. Available

In this context, this measure, which should be exceptional, becomes, in practice, the rule, being used as an anticipatory means of punishment of an accused, violating important constitutional precepts, such as the presumption of innocence and due process of law and, consequently, the pillars of the democratic rule of law[18]. This reality is in line with the instrumentalist view of the process, because, as we see in the procedural environment, the predominance of the resolution of the conflict, in a quick and subjective way, intending to achieve various objectives - social, political and legal - the procedural institute appears as an instrument to obtain rights[19].

In 2010, Brazil reached the percentage of 33.18% of provisional detainees compared to the total number of incarcerated, a level higher than that found in the United States during the same period (20.2%). In addition, it is worth noting that, in this period, the U.S. population represented almost twice the Brazilian population, revealing, in the Brazilian scenario, a high rate of pre-trial detainees[20]. According to research conducted by the Working Group on Arbitrary Detention, contained in the United Nations (UN), after three years, a little less than half of the prison population in Brazil was composed of prisoners on remand[21]. This situation has led to some effects, such as overcrowding in the penitentiary units and the joining of provisional and final prisoners in a single space[22].

at: http://tede2.pucrs.br/tede2/bitstream/tede/4657/1/407086.pdf. Accessed on: 09 Oct. 2020.

18 ANDRADE, Gabriela Lima. (2015). Da criminologia crítica ao garantismo penal: considerações sobre a banalização da prisão cautelar no Brasil. *Revista do CEPEJ*, n. 16. Available: https://cienciasmedicasbiologicas.ufba.br/index.php/CEPEJ/article/view/20186/14408. Accessed on: 03 Oct. 2020.

19 MAIOR, Jorge Luiz Souto. (2000). The effectiveness of the process. *Multi-disciplinary Study*. Available at: https://juslaboris.tst.jus.br/bitstream/handle/20.500.12178/111632/2001_maior_jorge_efetividade_processo.pdf?sequence=1. Accessed on: 06 Aug 2020.

20 NATIONAL PENITENTIARY DEPARTMENT. (2020). Prisoners in prison units in Brazil: period from January to June 2020. *DEPEN [site], Painel interativo*, jun. Available at: https://app.powerbi.com/view?r=eyJrIjoiMjU3Y2RjNjctODQzMi00YTE4LWEwMDAtZDIzNWQ5YmIzMzk1IiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9. Accessed on: 26 Oct. 2020.

WORLD PRISON BRIEF. (2019). World Prison Brief data. Country Brazil. *WPB [website]*. Available at: https://www.prisonstudies.org/country/brazil. Accessed on: 29 Oct. 2020.

21 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. (2013). Report on the use of pre-trial detention in the Americas. [*S.l.*]: *IACHR*.

22 _____. Report on the use of pre-trial detention in the Americas. [*S.l.*]: *IA-*

Although summarized recommendations suggested to the member countries of the Organization of American States, through the Report on the use of pre-trial detention in America, the result proved to be insufficient and unable to substantially transform the issue of arbitrary use of pre-trial detention in Brazil. In 2015, the product of the comparison between the two aforementioned nations remained similar, with Brazil outperforming the North American country, despite having a significantly smaller population than the United States[23].

In 2017, the Inter-American Commission on Human Rights (IACHR) of the OAS prepared a report on measures to reduce the use of pre-trial detention in the Americas, which addressed the advances and challenges encountered in the implementation of the proposals set forth in the 2013 report[24]. In that opportunity, probably due to the implementation of the custody hearing and the institution of home detention, the amount of provisional detainees in Brazil has reduced to 255,900, which is equivalent to 35.41% of the total number of custodians [25]. In the same direction follows the year 2019, revealing an index of 30.43% of prisoners without conviction, linking this progressive decrease to improvements arising from public policies, legislative innovation and change in the conduct of magistrates [26].

Thus, despite the positive consequences over the last few years

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23 NATIONAL PENITENTIARY DEPARTMENT. (2020). Prisoners in prison units in Brazil: period from January to June 2020. *DEPEN [site], Painel interativo*, jun. Available at: https://app.powerbi.com/view?r=eyJrIjoiMjU3Y2RjNjctODQzMi00YTE4LWEwMDAtZDIzNWQ5YmIzMzk1IiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9. Accessed on: 26 Oct. 2020.

WORLD PRISON BRIEF. (2019). World Prison Brief data. Country Brazil. *WPB [website]*. Available at: https://www.prisonstudies.org/country/brazil. Accessed on: 29 Oct. 2020.

24 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. (2017). Report on measures to reduce the use of pre-trial detention in the Americas. [S.l.]: *IACHR*. Available at: https://www.oas.org/pt/cidh/relatorios/pdfs/PrisaoPreventiva.pdf. Accessed on: 27 Oct. 2020.

25 NATIONAL PRISON DEPARTMENT. (2019). Inmates in prison units in Brazil: period from July to December 2019. *DEPEN [website], Interactive dashboard*, Dec. Available at: https://app.powerbi.com/view?r=eyJrIjoiZWI2MmJmMzYtODA2MC00YmZiLWI4M2ItNDU2ZmIyZjFjZGQ0IiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9. Accessed on: 26 Oct. 2020.

26 _____.. Prisoners in prison units in Brazil: period from July to December 2019. *DEPEN [website], Interactive panel*, Dec. Available at: https://app.powerbi.com/view?r=eyJrIjoiZWI2MmJmMzYtODA2MC00YmZiLWI4M2ItNDU2ZmIyZjFjZGQ0IiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9. Accessed on: 26 Oct. 2020.

related to mass incarceration in Brazil, it is evident that there is still a long way to go when it comes to the fundamental rights of the accused, since as long as the process is used as a means to satisfy material criminal rights, the principle of presumption of innocence is being shaken and, consequently, freedom, the greatest good guaranteed by Criminal Law.

V. CONCLUSIONS

The Law has a well-known dynamic, configured around 03 (three) interconnected moments: a) the legislator analyzes reality, identifies the conducts that should be disregarded (considered only licit) and those that should be the object of regulation (either through compulsory or prohibition), with their respective sanctions; b) the recipients of the norm are faced with regulated situations and decide whether they prefer to follow the legal command or submit to the foreseen sanction; and c) the Judiciary deals with the cases in which the norm was supposedly breached, seeing to it that the situation is corrected, in an environment subject to due legal process.

Within this legal dynamic, a special function is reserved to the Criminal Law, which is to select the most serious among the illicit conducts, connecting them with the possibility of a sanction restricting freedom. This is such a significant measure of severity that the criminal doctrine has evolved in the sense of linking its application to principles such as legality and the prior existence of law (constitutionally consecrated with the status of Fundamental Rights). The guarantees of Material Law, however, are not sufficient to protect the Right to Freedom; this is why the criminal process arises.

It should be noted that the proper use of the criminal process is one of the greatest challenges of any civilized society. Faced with the alleged practice of conducts whose seriousness has been considered criminal, society automatically aligns itself in favor of a posture that represents a mixed spirit of revenge and desire for protection; so that the State (understood as the sphere of the Public Power competent to deal with crimes) is inclined to fulfill its function of punishing the illicit conduct. However, as the Federal Constitution says, no one can be deprived of his freedom without due process of law.

Contrary to what may be thought at first glance, the criminal process is not an instrument of persecution of the accused; but rather an instrument of defense of the Defendant, in the face of the persecutory activity of the Public Power. Over the centuries that followed the Liberal Revolutions, the

concept of criminal procedure evolved and incorporated new dimensions (such as the accusatorial character), so as to present itself as a true civilizing instrument. In a Democratic State of Law, there can be no reasonable doubt that the criminal process serves essentially to protect the defendant.

It happens that such a garantist conception of criminal procedure is strange not only to laymen, but also to jurists in general. In a scenario in which the procedural doctrine was built upon an instrumentalist matrix, the process is not seen as a Fundamental Right, but as an instrument of the Jurisdiction to achieve the State's meta-juridical goals (including social pacification). As far as the criminal process is concerned, a great part of the Brazilian procedural doctrine reserves to it the function of applying the criminal law, separating the civilized from the uncivilized. And such conceptual distortion cannot be free of consequences.

The adoption of a persecutory criminal procedure has several negative results, culminating in a systemic crisis whereby a system of guarantees is being used to violate fundamental rights (instead of protecting them). This summary has dealt with one of the most serious symptoms of this chronic situation, namely mass pre-trial incarceration. Crimes are serious conducts that must be fought with the necessary energy, but when a large proportion of people are being deprived of their freedom without trial, there is a huge problem. It is not possible to admit the violation of fundamental rights, under the excuse of preserving them.

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OVERCROWDING IN THE BRAZILIAN PRISON SYSTEM AND CONFRONTING COVID-19

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Abstract: The overcrowding and insalubrity of Brazilian prisons is a reality that has been present for decades in the criminal and socio-educational justice systems. The situation is so serious that, since the year 2015, there has been a debate about the collapse of the prison system and such questioning of legality was brought to trial before the Federal Supreme Court (STF) through ADPF No. 347 MC/DF, which postulated the recognition of the 'unconstitutional state of things', for purposes of combating acts of omission and commission practiced by the public power for massive violation of fundamental rights of the inmates. The situation of prisoners in national prisons is incompatible with what is established in the Democratic State of Law in which we live, especially because, initially, the organizational guidelines based on the social contract, which legitimizes the existence of the state authority, are not respected. In 2019, with the emergence of the Covid-19 pandemic, a disease that afflicted the world, contaminating and killing millions of people, the constant problems of lack of structure, violence, rebellions and riots were added to a devastating public health problem, which called for strong measures so that the majority of the prison population, it should be emphasized: under state custody, was not decimated. Despite the fact that the government has provided funds for the purchase of protective equipment and supplies, such as masks, alcohol gel, and soap, and that social distancing is the most effective measure to protect against Covid-19 infection, prison populations are significantly more susceptible to contracting the disease because they live in crowded conditions. This situation is not acceptable and must be remedied. Thus, the goal of this research is to analyze how overcrowding can impact coping with Covid-19. The methodology adopted for the research is of bibliographic and documental nature, with the use of laws, jurisprudence issued by the Superior Courts concerning the national prison condition and data from specialized electronic sites on the theme.

Keywords: Prison. Overcrowding. Covid-19.

I. INTRODUCTION

Time and space, as well as human history and culture, influence the understanding of human rights. The evolution that has been seen in relation to fundamental human rights generates a reflection on the elaboration of documents that deal with protection, which, in relation to aspects related to human dignity, end up coming up against limitations of individual or collective values, as in the case of prison sentences.

When evaluating the current penitentiary system, one notices that it presents itself as a set of resources and norms that serve to regulate the execution of sentences, different from the way it was used until the mid-seventeenth century, a period in which corporal punishment predominated.

Since its creation, prison has kept the same methods to discipline, placing the inmates in the same physical and continuous structure, imposing extrajudicial punishments such as violence, deprivation of health, comfort, knowledge, among others. At first, prisons did not have the purpose of fulfilling a main sentencing role for the violator of the norm, since they were taken as custody of a precautionary nature while it was decided what punishment would be applied.

Analyzing the scenario of the Brazilian prison system, it is possible to clearly see the violation of the fundamental rights of those who are there serving sentences. The biggest problem is overcrowding, with emphasis on the lack of health and legal assistance. According to surveys on the prison population, in 2015 Brazil surpassed Russia in number of inmates, becoming the third largest prison population in the world, behind only the United States and China[1].

When it comes to health, access to it is foreseen as a social right in article 6 of the Federal Constitution of 1988, and regulated by Law number 8.080/90[2]. In relation to the health of the prison population, the regulation is the responsibility of Law no. 7.210/84 (Law of Criminal Executions - articles 11, item II, and 14). However, in practice, it is clear that these legal premises have not been obeyed, since 31% of prisons do not offer access to medical

1 ZANOTTO, Daiane rodrigues & RUSSOWSKY, Irís Saraiva. (2020). The Brazilian penitentiary system and the current ineffectiveness in the purpose of the penalty in resocializing the convicted in Brazil. Âmbito Jurídico. 16/03/2020. Available at: https://ambitojuridico.com.br/edicoes/revista-194/o-sistema-penitenciario-brasileiro-e-a-atual-ineficacia-na-finalidade-da-pena-em-ressocializar-os-condenados-no-brasil/. Accessed on: 07 Mar. 2021.

2 BRAZIL. (1990) Ministry of Health. *Organic Health Law* - Law no 8.080/90. Brasília: DF, 1990.

care and medication (data from the National Council of Justice - CNJ).

In this context, it is essential to talk about the Covid-19 pandemic, which is a worldwide disease, capable of infecting many people simultaneously, causing from flu-like symptoms to death, which is why it was declared a "Public Health Emergency of International Concern" on January 30, 2020 by the World Health Organization (WHO)[3].

Since then, over the months, it has been observed that, due to the rapid advance, the pandemic has been confirmed in all continents, including the identification of new strains of *Severe Acute Respiratory* - SARS-CoV-2, and even some countries have adopted strict actions, such as *lockdown,* which in Portuguese means total blockade, still not reached a satisfactory resolution, a fact that still creates uncertainty and apprehension to society, especially to health professionals who work in the 'front line', due to uncertainties regarding the transmission and control[4].

The protection measures that have been available to combat Covid-19 and its variants have not been put into practice by everyone, because, although they are simple, such as social distancing, wearing protective masks, cleaning environments, washing hands with soap and water, and using alcohol gel, they are not followed by everyone.

When analyzing the current scenario of the Brazilian prison system, one sees that these measures are even more difficult to put into practice, because, first of all, there is overcrowding, preventing the main preventive recommendation, which is social distancing. In view of this, the strategic action taken was to restrict family visits, which caused even more chaos, because it also started to affect the mental health of the inmates. Moreover, the protective equipment made available by the government was and is insufficient, and the prison environments remain dirty, damp, and fetid; facts that negatively impact the fight against Covid-19.

In the case of legal aid, which includes the free service of representation in court for those who cannot pay for this service, it will be provided by the Public Defender's Office of the States and the Union, depending on the issue faced. However, in some cases, this body may intervene as *custus vulnerabilis* not only when there is economic vulnerability, but also

3 CAVALCANTE, Bruno Bezerra de Menezes; NASCIMENTO, Anderson Luís de Alvarenga; LIMA, Jorge Pinheiro Koren de & MOREIRA, Francisco Jadson Franco. (2020). Strategic management in the fight against COVID: 19 in a Supplementary Health Operator in Brazil. *Braz. J. of Develop*. Curitiba, Volume 6, number 5, pg. 28985-28990.

4 BRAZIL. (2021). Ministry of Health. *Coronavirus* (Covid-19). Available at: https://coronavirus.saude.gov.br/sobre-a-doenca. Accessed on: 9 mar. 2021.

social, technical, informational, such as consumers, elderly, indigenous, children and adolescents, among other groups.

The idea is to give priority to minority groups that are underprivileged, whether in individual or collective claims, promoting the adequate judicial protection of the interests entrusted to them.

In Brazil, according to data from Infopen in December 2019 (a tool used to compile statistical information on the Brazilian prison system), the prison population in Brazil is 748,009 people, excluding prisoners in police stations. This alarming number of prisoners weakens adequate care, which ends up causing them to spend years in prison, serving a sentence that has not even been fixed in a final judgment.

Therefore, it is relevant to deal with this issue because human dignity is the foundation of the Federative Republic of Brazil, considered a basic principle of the country's legal system, and cannot be dismissed for those who have their freedom under state custody, that is, while serving a sentence.

Thus, the objective of this study was to analyze how overcrowding can impact the coping of Covid-19 in the criminal and socio-educational justice systems, since the prison population already has a higher susceptibility to diseases due to the unhealthy conditions in Brazilian prisons.

To achieve this proposal, the development of this study is based on a literature and document review on the overcrowding in the prison system, in which books, scientific articles, Infopen data on the prison population, COVID-19 data from the World Health Organization (WHO), and the National Penitentiary Department (DEPEN) websites were consulted.

II. THE BRAZILIAN PRISON SYSTEM AND THE FIGHT AGAINST COVID-19

Just like man, punishment is very old, whose etymological meaning comes from the Latin *poena,* derived from the Greek *poine,* meaning corrective, pain, expiation, fatigue, penalty, penance, suffering.

The protection of inmates is guaranteed in the 1988 Federal Constitution: "prisoners are assured respect for physical and moral integrity"[5]. Some member-states have similarities in their constitutions. The Constitution of the State of São Paulo, for example, determines that "the state prison legislation will ensure respect for the minimum rules of the United Nations for the treatment of prisoners, the technical defense in disciplinary

5 MIRABETE, Julio Fabbrini. (2012). *Manual de direito penal*. São Paulo: Atlas, p. 72.

infractions [...]"[6] .

The Minimal Rules for the Treatment of Prisoners in Brazil, from 1994, is a document, even more obviously, of pretensions. Possessing 75 articles, its rules comprise topics such as: classification, food, medical assistance, discipline, prisoners' contact with the outside world, education, work, and the right to vote[7] .

The Magna Carta of 1988, in its article 5, rejected some conducts that could come to attempt against fundamental human rights and the principle of the dignity of the human person. It is explicit, for example, in the referred article, that no one may be subjected to inhuman treatment or even degrading treatment (item III) and that the prisoner must have his physical and mental integrity respected (item XLIX)[8]. This determination stems from the very human nature of the imprisoned person who, even when committing a crime, never loses his condition as a human being.

It is also explicit in the constitutional text the guarantee of due legal process, as well as the adversarial process and the ample defense. These guarantees allow everyone, without exception, to protect themselves from the abuses of the State's power to punish, defending themselves from unjust accusations that may be attributed to them. The aforementioned article also guarantees that no one will be considered guilty before a final decision has been made, and that there cannot be, within the sphere of the Brazilian State, the institution of a court of exception, and that every demand must be heard by a competent judge.

However, many cases remain unfinished, causing overcrowding in the Brazilian prison system, a reality that highlights the fragility of the system and hurts the dignity of the human person, besides impacting the confrontation of COVID-19.

For a better understanding of the study's proposal, it is intended to initially present the scenario of the Brazilian prison system, followed by the panorama of COVID-19 in general, ending with the confrontation of the pandemic among the prison population.

6 TOGNOLLI, Cláudio Júlio. (2006). *Get to know the report of the CPI of the Prison System*. Available at: https://www.conjur.com.br/2006-mai-20/conheca_relatorio_cpi_sistema_prisional. Accessed on: 1 Nov. 2019.

7 MIRABETE, Júlio Fabbrini. *Op. cit*.

8 BRAZIL. (1988*). Constituição da República Federativa do Brasil de 1988*: promulgated on October 3, 1988. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm Accessed on: 9 mar. 2021.

Brazilian prison system

The contemporary Criminal Law assumes the important role of imposing sanctions for each of the behaviors elected as harmful to social welfare. The penalty imposed is nothing more than the state response to a criminal action and should have, besides the sanctioning character, the power to re-educate the offender.

The arrest in the Brazilian legal system is based on art. 5, subsection LXI, of the Federal Constitution, which states, *in verbis*: "No one will be arrested except in flagrante delicto or by written and reasoned order of competent judicial authority, except in cases of military transgression or crime properly military, defined by law"[9] . Other sections of art. 5 of the Constitution regulate the other aspects, prohibiting the death penalty and perpetual imprisonment.

The prison population is spread out in several establishments, of different categories, all over the country, where "penitentiaries are included, as well as prisons, public jails, jails, detention houses and districts or even police stations"[10] are included.

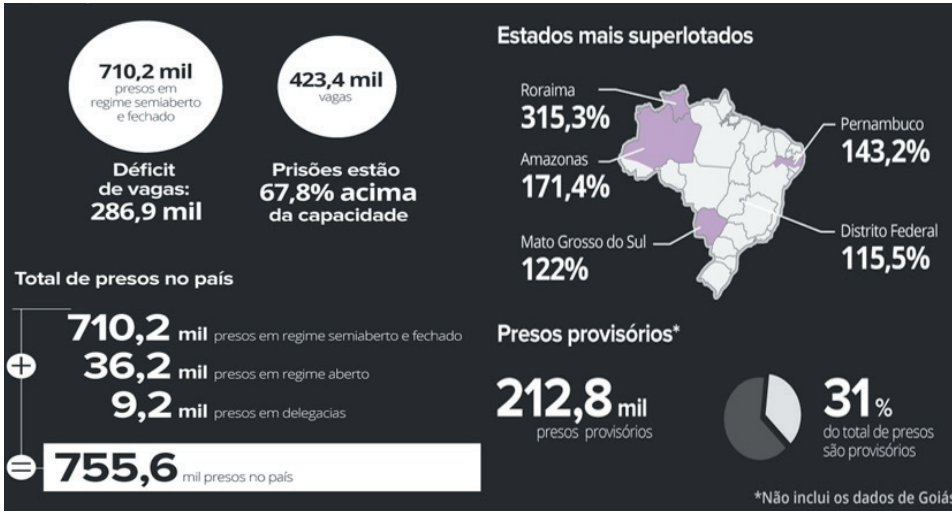
Based on statistical data extracted from Infopen, a program created by the National Penitentiary Department (Depen), one can see, through the numbers, the problem of overcrowding. On February 14, 2020, the National Penitentiary Department (Depen) released the prison scenario until the year 2019 of Brazil's prison units. According to the data presented, overcrowding continues, although the percentage has shown a slight decrease[11]. Complementing this theme, figure 1 is presented with the scenario of the prison system in Brazil. See it here:

9 Ibid.

10 BARATTA, Alessandro. (2012) *Critical criminology and critique of criminal law*: introduction to the sociology of criminal law. Trad. de Juarez Cirino dos santos. 3. ed. RJ: Instituto Carioca de Criminologia. Revan, p. 188.

11 BRAZIL. (2021). Ministry of Health. *Op. cit.* Available at: https://coronavirus.saude.gov.br/sobre-a-doenca. Accessed on: 9 mar. 2021.

Figure 1. X-ray of the Brazilian prison system [12]



As seen, there is a *deficit of* almost 287 thousand vacancies, representing that the prisons are 67.8% over capacity, although 7,429 new vacancies have been created. It can be seen, therefore, that the prison system continues to be overcrowded. In comparison with the previous year, there was an increase in the number of vacancies, whose occupation percentage exceeded capacity by 69.3%[13].

In relation to the occupation capacity of the prison system in the states, the most overcrowded are: Roraima (315.3%), Amazonas (171.4%), Pernambuco (143.2%), Mato Grosso do Sul (122%) and Distrito Federal (115.5%). It is registered that the provisory prisoners correspond to 212,8 thousand, with the State of Ceará concentrating the biggest percentage[14]. Complementing this analysis, we present figure 2, with the evolution of the occupation of the prison system in Brazil between the years 2017 and 2020.

12 VELASCO, Clara; CAESAR, Gabriela & REIS, Thiago. (2020). Em um ano, percentual de presos provisórios cai no Brasil e superlotação diminui. *G1*. 19/02/2020. Available at: https://g1.globo.com/monitor-da-violencia/noticia/2020/02/19/em-um-ano-percentual-de-presos-provisorios-cai-no-brasil-e-superlotacao-diminui.ghtml. Accessed on: 9 mar. 2021.

13 Ibid.

14 VELASCO, Clara; CAESAR; Gabriela & REIS, Thiago. (2020). *Op. Cit*. Available at: https://g1.globo.com/monitor-da-violencia/noticia/2020/02/19/em-um-ano-percentual-de-presos-provisorios-cai-no-brasil-e-superlotacao-diminui.ghtml. Accessed on: 9 mar. 2021.

Figure 2: Evolution of the occupation of the prison system in Brazil from 2017 to 2020 [15]

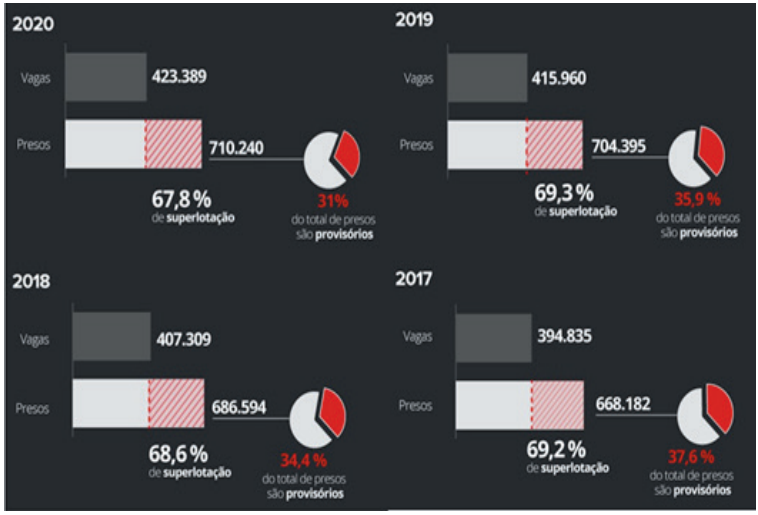


Figure 2 shows that the number of vacancies was the highest in the years analyzed, with a significant increase of 7.2%. However, the number of prisoners also increased by 7.3%, i.e., the demands of the prisoners were not really met. On the other hand, the number of provisional detainees decreased, being the lowest in four years. In the case of provisional detainees, they may be presumed innocent[16].

Thus, it can be observed that the prison system has some flaws, especially regarding the provisional detainees, who end up being detained for months and may even be innocent. In this context, custody in Brazil stands out, which gained its normative text with the creation of Law No. 11.449/2007[17] . Later, there was the enactment of Law No. 12.403/2011, which proposed significant changes in pre-trial detention, proposing several precautionary measures intended to avoid imprisonment before the trial of the accused or indicted, although the provisional arrest is configured as a rule of *prima ratio*[18] .

15 Ibidem

16 Loc. Cit.

17 BRAZIL. (2007). *Law No. 11.449*, of January 15, 2007. Alters art. 306 of Decree-law n. 3.689, of October 3, 1941 - Code of Criminal Procedure. DOU 14.5.2007. Available at: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/l11449.htm. Accessed on: 8 mar. 2021.

18 BRAZIL. (2011). *Law No. 12.403*, of May 4, 2011. Alters provisions of Decree Law No. 3689 of October 3, 1941 - Code of Criminal Procedure, relating to procedural arrest, bail, provisional freedom, other precautionary measures, and other provisions. DOU 05.5.2011. Available at: http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/lei/

With the proposed changes and aiming to reduce overcrowding in the prison system with provisional detainees, the National Council of Justice instituted Resolution No. 213 on December 15, 2015, which had the purpose of ensuring the detainee, in cases of arrests in flagrante delicto, the prompt presentation to a judge within 24 hours[19] .

COVID-19

In 1937 the first human coronaviruses were registered and isolated. However, this denomination only became known after 1965, which happened due to the discovery of the profile in microscopy, which resembles a crown receiving the name of HCoV-OC43. It is common throughout life for a person to be infected with one of the coronavirus types, and the most noticeable group to the most common type of the virus is the child population (WHO, 2020).

Discovered on December 31, 2019, the Covid-19 pandemic had its first record in China, in Wuhan, Hubei Province. It was classified as a family of viruses that causes respiratory infections, with severe pictures going by the name of *Coronavirus Disease* (COVID-19)[20] .

According to experts, the "19" was included in reference to the year 2019, when the first infected was reported. The International Committee on Virus Taxonomy designated it SARS-CoV-2 because of the similarity with CoV, responsible for generating Severe Acute Respiratory Syndrome (SARS-CoV), identified by researchers in late 2002[21] .

In Brazil, on February 26, 2020, the Adolfo Lutz Institute identified the first infected patient, with confirmation by the Ministry of Health, in the state of São Paulo. A 61-year-old man, a resident of the capital, recently arrived from a trip to Italy. Faced with the first case, preventive measures were initiated. The authorities of the State of São Paulo started to orient the search for medical assistance to cases that presented symptoms of fever,

l11449.htm. Accessed on: 8 mar. 2021.

19 BRAZIL. (2015). *Resolution nº 213* of 15/12/2015. Available at: http://www.cnj.jus.br/busca-atos-adm?documento=3059. Accessed on: 8 mar. 2021.

20 WORLD HEALTH ORGANIZATION. (2021). Fact *sheet COVID-19* - PAHO and WHO Office in Brazil. Disponível em: https://www.paho.org/pt/covid19#:~:text=Em%2011%20de%20mar%C3%A7o%20de%202020%2C%20a%20COVID-19,-dia%20anterior%29%20at%C3%A9%2026%20de%20junho%20de%202020. Accessed on: 7 Mar. 2021.

21 WORLD HEALTH ORGANIZATION. (2021). *Case Comparison*: WHO Regions. Available at: https://covid19.who.int/. Accessed on: 02 mar. 2021.

cough, runny nose, and also created an emergency operation center.

The pandemic outbreak was declared by the World Health Organization on March 11, 2020. About this pathology, it is understood that:

> According to the World Health Organization (WHO), most patients with COVID-19 (about 80%) may be asymptomatic and about 20% of cases may require hospital care because of respiratory distress and of these cases approximately 5% may require support for the treatment of respiratory failure (ventilatory support)[22] .

According to information released by the World Health Organization, between January 5, 2020 and June 18, 2021, 17,628,588 cases were reported, of which 493,693 died in 217 countries/areas/territories. Also according to worldwide data, 2,307,901 patients have recovered[23].

In Brazil, from the first confirmed case until June 17, 2021, 17,702,630 cases have been reported, of which 493,004 have died, 16,077,483 have recovered, and 1,129,143 are in follow-up[24]. It is important to remember that in Brazil not all people with symptoms are being tested to confirm whether or not they have Covid-19, so there may be an underreporting of cases.

The Southeast and Northeast regions have the most cases of Covid-19, with 6,666,577 and 4,182,302, respectively[25]. It is worth mentioning here about this data presented about the numbers of COVID-19 in Brazil and in the world, that they were updated on June 18, 2021, being these updated daily by the World Health Organization and the Ministry of Health.

Addressing COVID-19 among the prison population

With the advent of the Covid-19 pandemic, social isolation was established as one of the main rules of containment; however, in most, if not all, Brazilian penitentiaries, it is not even possible to keep the distance, due

22 BRAZIL. (2021). Ministry of Health. *Coronavirus Brazil*. Coronavirus Panel 06/18/2021. Available at: https://covid.saude.gov.br/. Access on: 9 mar. 2021.

23 WORLD HEALTH ORGANIZATION. (2021) *Coronavirus disease (COVID-19) pandemic*. Available at: https://www.who.int/emergencies/diseases/novel-coronavirus-2019. Accessed on: 18 jun. 2021.

24 BRAZIL. (2021). Ministry of Health. *Op. cit.* Available at: https://covid.saude.gov.br/. Accessed on: 18 jun. 2021.

25 Ibid.

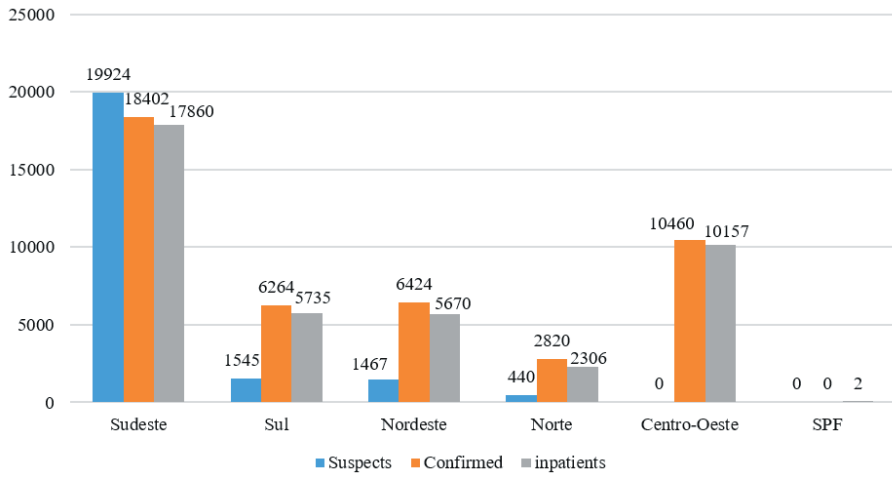
to the already so punctuated agglomeration.

In order to reduce the epidemiological risks in the Brazilian prison system, the National Council of Justice (CNJ) issued Recommendation No. 62/2020, in which it orders the reassessment of the infrastructure of provisional prisons, also determining priority in evaluations of pre-trial detention over 90 days[26] . However, it was analyzed that such measures did not present satisfactory results, and the CNJ itself found an increase of contamination among inmates of 800% from May to September 2020.

To monitor the control of the pandemic in Brazil's penitentiaries, the National Penitentiary Department (DEPEN) has been working with monitoring panels. By March 11, 2021, the panel presented the following scenario: Prison population: 702,069; suspected cases: 23,526; detected cases: 44,372; inmates recovered after internment: 41,730; deaths: 137[27] .

Corroborating this theme, we present graph 1, with data per Brazilian regions and Federal Penitentiary System (SPF).

Graph 1. COVID-19 in the Brazilian prison system [28]



26 BRAZIL. (2020). National Council of Justice. *Recommendation no. 62*, of March 17, 2020. Available at: https://www.cnj.jus.br/wp-content/uploads/2020/03/62-Recomendação.pdf. Accessed on: 7 mar. 2021.

27 NATIONAL PENITENTIARY DEPARTMENT - DEPEN. (2021). *Measures to combat COVID-19:* monitoring panels. 11/03/2021. Available at: https://app.powerbi.com/view?r=eyJrIjoiYThhMjk5YjgtZWQwYS00ODlkLTg4NDgtZTFhMTgzYmQ2MGVlIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9. Accessed on: 09 mar. 2021.

28 NATIONAL PENITENTIARY DEPARTMENT - DEPEN. *Op. cit.* Available at: https://app.powerbi.com/view?r=eyJrIjoiYThhMjk5YjgtZWQwYS00ODlkLTg4NDgtZTFhMTgzYmQ2MGVlIiwidCI6ImViMDkwNDIwLTQ0NGMtNDNmNy05MWYyLTRiOGRhNmJmZThlMSJ9. Accessed on: 09 mar. 2021.

It can be seen that the region with the highest number of suspected, confirmed, and hospitalized cases is the Southeast, followed by the Midwest. As for visits and preventive measures, the panel prepared by DEPEN, until March 11, 2020, had not provided information.

The analysis released on 03/31/2020 by the United Nations Organization (UNO) presented a Positioning Note - Preparations and responses to the Covid-19 in prisons, admitting the context of greater social and individual vulnerability of people deprived of liberty in penal establishments in which structural conditions of allocation of prisoners and precarious supply of personal hygiene inputs are verified, the example of prison overcrowding, recommending the adoption of alternative measures to imprisonment to face the challenges imposed by the pandemic to the already fragile national prison systems and the situation of unquestionable vulnerability of the populations inserted in them.

In addition, the Inter-American Commission on Human Rights (IACHR) expressed, through Resolution No. 1/2020, the need to implement alternative measures to imprisonment in order to mitigate the high risks of spreading Covid-19 in prison environments, especially because it considers people deprived of liberty to be more vulnerable to the infection in question than those who enjoy full freedom or are subject to precautionary measures that replace imprisonment.

In order to collaborate with the fight against the Covid-19 pandemic, the Superior Court of Justice (STJ), in the judgment of the collective *Habeas Corpus* no. 568.693/ES, on October 14, 2020, the reporting Justice Sebastião Reis Júnior ordered the release of all prisoners whose provisional release was conditioned to the payment of bail, based on CNJ Recommendation 62/2020, which took into consideration the notorious and greater vulnerability of the prison environment to the spread of the new coronavirus[29].

Under the terms recommended by the CNJ, prevailed the understanding that it is not proportional to keep the investigated in prison just for not paying the bail, because they are notorious cases of lesser gravity, which are not essential for the decree of preventive detention; moreover, because the pandemic has generated great financial impact on the Brazilian economic scenario, with increased unemployment and decrease or even loss

29 CAVALCANTE, Márcio André Lopes. (2021). *Due to Covid-19, the STJ determined the release of all prisoners who had provisional release conditioned to the payment of bail.* Buscador Dizer o Direito, Manaus. Available at: https://www.buscadordizerodireito.com.br/jurisprudencia/detalhes/cd81cfd0a3397761fac44ddbe5ec3349. Accessed on: 29 mar. 2021.

of individual and family income, which makes it even more unreasonable to condition the provisional release to bail. However, it is necessary to clarify that, if bail is not the only precaution imposed, other precautionary measures will subsist.

Despite the fact that there is no express rule that admits such a *writ* in the Brazilian criminal procedure system, the minister understood that it is possible to file a writ, with potentiality, also in the criminal scope, and with effects extended to the entire national territory.

Among the many relevant arguments, the following stand out the application of article 25, 1, of the American Convention on Human Rights, which guarantees the use of a simple, rapid and effective procedural instrument to protect the violation of fundamental rights recognized by the Constitution, by Law or by the aforementioned Convention; the gathering and judgment of the merit, in a single proceeding, of issues diluted in hundreds of *habeas corpus,* implying an economy of time, efforts and resources, above all for the purpose of making the provision of jurisdiction by the STJ rapid and efficient; there are precedents of the Supreme Court in the scope of HC no. 143.641/SP, HC nº 568.021/CE and HC nº 575.495/MG; and, furthermore, also in foreign law, when the Argentine Supreme Court, despite the inexistence of an express rule regulating collective *habeas corpus,* in the famous "Verbitsky case", accepted the applicability of the collective action against any and all situations of aggravation of detention that imply cruel, inhuman or degrading treatment to a group of people affected by the arbitrary action of the State.

Adding these reasons to the recognition by the STF itself, in a precautionary measure in ADPF No. 347, of the state of affairs in which our prison system finds itself, it is particularly important to follow the recommendations coming from national and international spheres that establish maximum exceptionality to new orders of pre-trial detention, adopting, by the way, alternative measures to prison, as one of the means to contain the worldwide pandemic caused by the coronavirus (Covid-19).

In order to avoid the chaos that comes from human coexistence in the state of nature, man surrenders his freedom to the State in exchange for protection, and then we have a society organized by laws and values that will guide social relations and will be organized in the form of a social contract, since, otherwise, there would be endless conflicts and annihilation of the human species.

This being so, the State's mission is to organize society, making the social-legal-political rationality less transcendent, more human, raising

everyone to the same level of treatment and relevance, including those incarcerated in sentencing regimes.

Since 1988, the date of the Brazilian re-democratization, the Judiciary assumed the role of affirmation of citizenship, with a promise to restrain the threat or injury to rights expressed in the new Federal Constitution and other Brazilian legislation. In a pandemic context, the Judiciary could not behave any differently, as a branch that is oblivious to the anxieties of society, which is why it has had to make decisions to safeguard rights, including those that, although they have transgressed rules of social conduct, do not rid themselves of human dignity.

It is certain that the Brazilian legislative scenario imposes prison as a penalty for most crimes, with the use of a penal code dating from 1940, which generates great problems in its prison environment, precisely because it does not take into account the state failure to provide basic social rights, such as food, health, housing, education, security, etc. The minimum wage does not supply at least in part these rights. Add to this, successive financial crises and economic instability, which induce many unemployed to join the crime statistics, and the problem of the lack of procedural promptness.

Moreover, over time, more factors contributed to prison overpopulation, such as penal populism, which required the legislator to impose severe penalties to curb the practice of crimes. Unfortunately, the laws that imposed prisons as the penalty par excellence, with the increase of penal rigor, only raised crowded prisons, without conditions to promote resocialization to the convicts, and with repeated episodes of riots and rebellions, which resemble the ritual of the 17th century torture.

Over time, a state of calamity was reached such that measures, especially legislative, had to be taken to reduce the number of provisional and definite defendants incarcerated, in addition to curbing the entry of new inmates. In this sense, Law No. 12,403/2011 is presented, which inserted in the Code of Criminal Procedure precautionary measures other than imprisonment, among which stands out the popular electronic anklet. See below:

> Article 319 - They are precautionary measures different from prison:
> I - periodic appearances in court, within the period and under the conditions set forth by the judge, to inform and justify activities;
> II - prohibition of access or frequency to certain places when, due to circumstances related to the fact, the accused

> must remain away from such places to avoid the risk of new infractions;
> III - prohibition to maintain contact with a specific person when, due to circumstances related to the fact, the accused must remain distant from it;
> IV - prohibition to leave the District when the stay is convenient or necessary to the investigation or instruction;
> V - home detention at night and on days off when the investigated or accused has a fixed residence and work;
> VI - suspension from exercising a public function or activity of an economic or financial nature when there is a fair fear of its use for the commission of criminal infractions;
> VII - provisional internment of the accused in the cases of crimes committed with violence or serious threat, when experts conclude that the accused is not or is not sufficiently capable of being held responsible (art. 26 of the Penal Code) and there is a risk of repetition; VIII - bail, in the case of offenses that admit it, to ensure attendance at acts of the process, to prevent obstruction of its progress, or in the case of unjustified resistance to the court order;
> IX - electronic monitoring.

Law No. 12,433/2011 was also enacted, amending article 26 of Law No. 7,210/84 (Lei de Execução Penal), to regulate the time limit for the remission of the penalty through work and study, with the possibility of cumulation of both. The jurisprudence is broadening the hypotheses of remission to the point of considering activities related to reading and music as also being able to remit prison sentences. However, there is still a very low number of prisoners who study and/or work to remit their sentences. Official numbers are needed in order to evaluate and improve this very important initiative aimed at ensuring the intellectual and professional development of those who had no other opportunity to survive away from crime.

In 2015, the Arguição de Descumprimento de Preceito Fundamental nº 347 was filed, which is a constitutionality control action proposed by the Partido Socialismo e Liberdade (PSOL), in which it was requested the recognition of the "unconstitutional state of things" to the Brazilian prison system, in view of the atrocity situation in which the prisoners were, who had their fundamental and human rights daily disrespected, denoting an unacceptable and unconstitutional factual situation.

Among the various claims of ADPF No. 347/2015, the following

stand out: application of the principle of individualization of punishment with the immediate separation of prisoners; creation of vacancies in the prison system, since there is a considerable current deficit and prisoners are exposed to all types of violence, including sexual violence, which spread the contamination of diseases; release of funds from the prison fund controlled by the Union; containment of the abusive use of precautionary arrest measures; ensure health care for prisoners, with special attention to the elderly and pregnant women; improve the inhuman and degrading treatment destined to the incarcerated in Brazilian prisons; etc.

Justice Marco Aurélio, reporting on the case, accepted the relevance of the aforementioned constitutionality control action and granted a preliminary injunction initially recognizing two requests: the implementation throughout the country of custody hearings and the immediate release of funds from the National Penitentiary Fund. His *decision* was subsequently followed by the other Justices and this action is still in progress, having been considered an example of judicial activism for having created, in Brazilian jurisprudence, the figure of the unconstitutional state of things.

Continuously, Resolution 213/2015 of the CNJ, arising from the provision contained in the Pact of San José da Costa Rica, determined the inclusion of the custody hearing as a measure to reduce as much as possible the entry of new prisoners in the national prison system without prior evaluation on a case-by-case basis by a competent magistrate. It consists of a procedural instrument that will allow the prisoner to be brought quickly before a judge for a hearing after arrest in flagrante delicto, as a precautionary measure or as a result of a conviction, allowing the prisoner to contact the public defender and the public prosecutor to evaluate any illegalities in his arrest.

Moreover, there is publicity about the efforts made by the Judiciary to conduct joint reviews of the procedural conditions of prisoners. In this way, those who are able to return to society are immediately released.

In relation to the granting of injunction in ADPF No. 347/2015 regarding the immediate release of funds from the National Penitentiary Fund, it is noted that Brazilian society is quite resistant to the investment of funds to carry out public policies to assist the prison population, so much so that this has already caused too much damage to public safety.

It is essential the clarification and awareness of all about the evils arising from the inhumanity imposed on prisoners in prisons in the country. Under revolt, prisoners control drug and weapons trafficking, determine kidnappings and deaths of authorities and enemies, dragnings, slaughters,

burning of public transportation, among other violent acts that terrorize the population. This whole scenario shows an inversion of powers, reversing the logic of the social contract idealized by Rousseau.

In view of this, the reality of the prison system can no longer be ignored, and society, the Public Prosecutor's Office, the Public Defender's Office, and the Brazilian Bar Association must join forces with the State in search of re-socialization for the former inmates and the allocation of public funds to improve the prison system, especially to solve administrative and budgetary shortcomings, demanding less bureaucracy in the use of funds from the national prison fund, which is contingent on the Union.

In this context, it is emphasized: "An indispensable basis for a socializing thought is that life in prison should be oriented toward preparing the prisoner for freedom and, consequently, that the rights he enjoys as a free person should be guaranteed to him as a prisoner. [30]

Furthermore, it is essential to grant the defendants the enforcement of their rights, as well as the opportunity to serve their sentence in a dignified manner, that is:

> The dignity of the human person is a spiritual and moral value inherent to the person, singularly manifested in the conscious and responsible self-determination of one's own life. It carries with it respect from other people, constituting an invulnerable minimum that every legal statute must ensure, so that only exceptionally may there be limitations[31].

In the general context, it can be seen that, in the Brazilian prison system, the risks to life and health are further aggravated by the problem of prison overcrowding, resulting in damage also of psychological order, with clear violation of fundamental rights. Even with the recommendations and court decisions exposed above, there is still much to be done to protect this population from the Covid-19 pandemic that affects not only Brazil, but the whole world.

Finally, far from the gloomy prison environment recognized by the Supreme Court as an unconstitutional state of things, resocialized former inmates have real conditions to enter the job market, provide for their own and their families' support, be useful to the community they live in, and not reoffend in crime.

30 RODRIGUES, Anabela Miranda. (2013). Prison overpopulation. Execution control and alternatives. *Revista Eletrónica de Direito Penal*, AIDP - GB, Year1, volume I, number1, jun. 2013. Accessed on: 7 mar. 2021.

31 MORAES, Alexandre de. (2016). *Direito Constitucional*. São Paulo: Atlas, p. 48.

III CONCLUSION

At the end of this study, it is noted that, although Brazil stands as a democratic nation organized under the model of social contract, when it comes to the treatment of prisoners in Brazilian prisons, the laws are not properly enforced. For a long time, the situation of the Brazilian prison system has put at risk the harmony and social peace expected by citizens who surrendered their freedom to the State in exchange for protection, having erupted with the devastating pandemic of Covid-19, a disease that has ravaged the world with millions of people infected and killed, and that still scares and calls for measures, especially of an institutional nature.

The inefficiency of state protection in favor of society is due to social problems that encourage many people to choose crime. It is necessary that the social rights are offered to the satisfaction and that Law No. 7.210/84 (Criminal Enforcement Law) is fully complied with, so that there is re-socialization of prisoners and the possibility of returning to the collective coexistence, and not the opposite.

It is essential that the organization of prison environments offers decent conditions of segregation of freedom and that opportunities of work, study, reading and music workshops are made available to the prisoners, so that their time in prison can be productive for the improvement of their intellects and professionalization, and that Brazilian society wins by not perpetuating violence.

Making resocialization effective is an active measure to curb violence inside and outside prisons. Humanizing prisons does not only mean benefiting prisoners, but also making collective coexistence safer and more harmonious, as intended by the Brazilian legislator and law operators.

In the prison environment, the fundamental and human rights that should ensure dignity are constantly violated, because the inmates have not only lost their freedom, but also basic rights ensured by the country's legislation, such as health.

The number of confirmed cases of contamination by Covid-19 among the prison population was significant, and there was a great deal of silence regarding the actions taken to minimize the effects of the pandemic. Rules were published suspending social and intimate visits, educational and religious assistance services, as well as virtual and limited permission to meet with public defenders and lawyers, which also affected the mental health of prisoners, despite the fact that these measures were intended to prevent the further spread of Covid-19 in prisons.

The National Council on Criminal and Prison Policy issued a resolution that was more concerned with the increase in spending on health care for the prison population and the possibility of occupying vacancies in hospitals, as well as enabling the release of more prisoners, according to Resolution No. 62 of the CNJ, than with the priority of vaccination established by the National Immunization Plan. Moreover, it pointed out that 42,517 prisoners were contaminated by Covid-19 between March 2020 and January 2021, and 133 died because of the disease.

In view of this, the prison population in the states is far from receiving at least the first dose. Data from the Secretariat of Penitentiary Administration of the State of São Paulo (SAP/SP) in July 2021, of the more than 210 thousand prisoners in the state, 13 thousand received at least one dose, i.e., only 6%, a fact that led the Public Defender's Office to file a request for immediate inclusion of this population in the vaccination schedule.

It cannot be denied that the public authorities have provided funds for the purchase of protective equipment and supplies, such as masks, alcohol gel, and soap, but the most effective measure up to this point, which is social distancing, was not available for the prison population, because they live in crowds, and are therefore more susceptible to contracting the disease.

Overcrowding is a reality in the Brazilian prison system, with flaws that have long cried out for changes, especially regarding provisional detainees, who end up being held for months, and may be innocent, further aggravating the crowding and the confrontation with Covid-19.

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YOGYAKARTA PRINCIPLE #9 AS A GUIDELINE FOR SERVING TIME IN BRAZILIAN PRISON: THE (NON-)PLACE OF TRANSSEXUAL AND TRANSVESTITE PRISONERS WITH FEMALE GENDER IDENTITY

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Abstract: The study is developed from the recent decision of the Supreme Court (STF) to determine that transsexual and transvestite prisoners, with female gender identity**,** have the option to serve sentences in female or male prisons. In case they choose the male prison, they will have to stay in a reserved area. The reflection turns its gaze to the LGBTQIA+ community and the repeated violations to their human rights, which are aggravated in the prison situation. Considering the conditions of the Brazilian prison system, one can observe the scenario of not being welcomed, together with multiple violations (physical, sexual, psychological, etc.). First, an overview of the situation of transsexual and transvestite prisoners in prison will be presented, followed by a discussion of the effects of the STF's decision in the Argument of Noncompliance with Fundamental Precept (ADPF) 527, which addresses the protection and promotion of human rights of both vulnerable groups - transsexuals and transvestites. This decision, which is paradigmatic and innovative, gave publicity to the prison problems in Brazil, at the same time that it brought the question of what is the real strength of a decision, from the highest judicial court in Brazil, to contribute to the transformation of the national prison routine, under the focus of the content of Yogyakarta Principle No. 9.

Keywords: Transsexuals and Transvestites. Yogyakarta Principle #9. Imprisonment. Human Rights. Violence.

I. INTRODUCTION

Internationally, democratic states under the rule of law have duties to their national society and the international community, and among them is the duty to deal with the consequences of human rights violations because of their commitment to uphold the covenant of democracy.

Human rights violations are more common among historically vulnerable groups, such as transgender and transvestite people. This group suffers marginalization of various kinds, such as social exclusion and greater difficulty in finding formal employment.

This is accentuated in the gender binarism that underlies the prison system, as it disregards human plurality in favor of standardization.

Parallel to this, Brazil was considered the country where there are more murders of transsexuals in the world. This demands from the Public Power an attention to the violence scenario that grows more and more, either because of the invisibility of these people, the neglect of public bodies, the police violence, but, mainly, the prejudice of the whole population.

Motivated by the injustices of the system, this research seeks to understand and base the reflection on the paradigm of the "Argument of Non-compliance with the Fundamental Precept (ADPF) 527", in order to understand the reasons for the decision of Justice Luis Roberto Barroso in face of the national and international order, in a perspective of achieving, more precisely, the positive effects for the LGBTQI+ community, but also, to present considerations, due to the violation of the human rights of this minority group.

The study will focus on the Yogyakarta Principles and important decisions, such as Enunciation 46 of the National Forum of Judges and Justices of Domestic and Family Violence against Women (FONAVID), and a Public Civil Action (ACP) that the Public Defender's Office of Minas Gerais (DPMG) filed against the State of Minas Gerais, because the result can be reflected elsewhere.

We will start with the problem question: How and to what extent can the ADPF 527 decision be implemented in penitentiaries?

As for the general objective, the study aims to demonstrate that the reality of the Brazilian prison system requires that clear criteria be established that are aligned with the effectiveness of the right set forth in the jurisprudential decision of ADPF 527. As specific objectives, we seek to present the initial outlines of a transitional public policy, which, together with a training effort for prison guards (who monitor the execution of

sentences), may, over time, result in the construction of specific wings in prisons, which we believe is the best option.

The article was written based on the reading of scientific articles, the analysis of legal provisions and jurisprudence on the subject, as well as the verification of data on the prison population in Brazil and the conditions in which they live in prison.

II. THE SCENARIO OF THE BRAZILIAN PRISON SYSTEM IN THE YEAR 2021 FOR TRANSSEXUAL AND TRANSVESTITE PRISONERS WITH FEMALE GENDER IDENTITY

The Federal Constitution of Brazil has as one of its foundations the dignity of the human person, which is evident in the prevalence of human rights in the international relations that Brazil maintains with other states and institutions. Moreover, in addition to basic premises such as that no one shall be subjected to inhuman, degrading treatment or torture[1] .

Analyzing periods of oppression and the breakdown of republican and democratic structures is not an end in itself, but an opportunity to strengthen our commitment to a state that promotes, respects, and protects human rights.

The history of Brazil and the construction of Brazilian society is permeated with violence. It started with the arrival of the Portuguese and the massacre of the indigenous people, followed by the barbarity of African slavery, and culminated in the structuring of a society and a State forged in oppression and unequal opportunities.

Making a historical leap of a few centuries, in the early 1960s, the civilian military dictatorship was established in Brazil, a period that lasted from 1964 to 1985. In the last years of this period, the approval of the Amnesty Law (Law 6.683/79) was placed in the center of the debate by actors who occupied power. This was intended to make it possible to forget the crimes committed by the state (torture, imprisonment, kidnapping, forced disappearance, and murder of hundreds of Brazilians who opposed the regime) and to silence all those who did not submit.

The National Truth[2] Commission was created in 2011, through Law 12.528, and officially installed on May 16, 2012. It sought to rescue the circumstances of the violations that occurred and, at the end of its work,

1 SARLET, Ingo; MARINONI, Luiz Guilherme; MITIDIERO, Daniel. *Curso de direito constitucional*. 4. ed.São Paulo: Saraiva, 2015.

2 http://memoriasdaditadura.org.br/comissao-nacional-da-verdade-2/

among several conclusions, it pointed out that about 90% of the victims of the dictatorship were subjected to sexual violence.

All this history serves to illustrate a recent past of oppression to diversity of thought and freedom of expression, as well as the extent of the "strong arm" of the state, which, as a rule, dialogues with the hegemonic groups that have been in political and economic power since the country's constitution.

Thinking that violence was once institutionalized, and that people who did not obey the "indoctrinators" were tortured, added to the current knowledge of the high rates of abuse of authority by public security agents, generates a natural fear in the population, especially generates distrust in vulnerable groups, since they do not occupy the spaces of power and decision making, and are sometimes seen by those in power as undesirable, unnecessary, and dangerous to the community.

Despite the advances in the recognition of rights in the Western world, especially after the end of World War II, the legacy of intolerance and the use of state force emerges every time a more controversial context is faced or one that, to some extent, represents a threat to the hegemonic *way of* life. At times oppression occurs in various forms, sometimes through police violence, and at other times through social intolerance.

In this scenario, discussions about the human rights of historically vulnerable groups have gained space, among them transsexuals and transvestites, who aggregate around themselves a political, economic and social alienation. In Brazil, this exclusion has translated into a significant increase in the disrespect for human rights enshrined in international documents and internalized in the Brazilian legal system, with greater severity for incarcerated persons.

The Brazilian prison scenario in 2021

The prison system is a humanitarian tragedy in the history of Brazil, because the function of the penalty to recover the person is mitigated by the inhumane treatment that is usually directed to him since the police phase. This is what is called the State of Things[3].

3 The "unconstitutional state of things" is a thesis professed by the Constitutional Court of Colombia in *Unificación Sentence* 559 of 1997, when it declared that the non-compliance with the State's obligation with the pension rights of teachers from the municipalities of María La Baja and Zembrano was generalized, reaching a large and undetermined number beyond those who filed the lawsuit, and that the failure could not be attributable to a single body, but to the entire state structure. (...) In general lines,

With the pandemic of the coronavirus, the reality became more perverse in prison units. The National Prison Pastoral (organization that follows and intervenes in the reality of prison on a daily basis) has [4]received complaints about the violation of the right to health care and about the miserable conditions of survival in the midst of contamination by the virus, especially due to the notorious overcrowding of cells that makes it impossible to comply with health protocols, which is why the number of contamination and death was significant[5].

According to the newsletter of the National Council of Justice (CNJ)[6] , published in January, 57,454 covid-19 infections were registered in the units, among servers and inmates. In the first 20 days of 2021, more than 2.3 million infections were confirmed. In total, the number of people deprived of liberty who tested positive for the virus is 43,799, with 130 deaths recorded. In addition, there are many reports of torture (53 physical assaults, 52 reports of humiliating and degrading conditions of treatment). In addition, it is listed that they are not offered sunbathing, water is rationed, they are subjected to the procedural position (with head down and hands behind for a long time), and a constant neglect in the provision of material assistance: food, clothing, personal hygiene products, and cleaning products.

According to the Prison Monitoring Database of the National Council of Justice (CNJ), the prison population in Brazil is 909,704 people[7]. However, it is important to remember that, beyond the official data, there are underreportings, which show that the number of violations is much higher, and that the absence of attention from the control bodies justifies the State

there would be 03 (three) assumptions for the decreeing of the "unconstitutional state of things": (a) Verification of a framework not simply of deficient protection, but of massive and generalized violation of fundamental rights that affects a large number of people; (b) Repeated omission of public authorities in fulfilling their obligations to defend and promote fundamental rights, generating a structural failure to the point of occurring systematic violation of fundamental rights; (c) The overcoming of fundamental rights violation requires the expedition of remedies and orders directed not only to an organ, but to a plurality of them, so that a simple decision (of those of the traditional arsenal of the constitutional jurisdiction) is not enough.

4 https://carceraria.org.br/

5 SUDRÉ, Lu. *Pandemic worsens rights violations in Brazilian prisons, report says.* São Paulo: Brasil de Fato. Available at: https://www.brasildefato.com.br/2021/01/23/pandemia-agrava-violacoes-de-direitos-nas-prisoes-brasileiras-denuncia-relatorio. Accessed on June 19, 2021.

6 https://portalbnmp.cnj.jus.br/

7 https://portalbnmp.cnj.jus.br/#/estatisticas

of Things. The pandemic only made evident the situation of invisibility that these people live, as it became more onerous by suspending family visits and religious assistance.

In truth, if it is a place where there is not enough food or medicine, one does not expect the correct distribution of masks or other sanitary protocols. What this scenario is intended to demonstrate is the sickness of the system as a whole and the high number of victims.

Situation faced by transsexual and transvestite prisoners with female gender identity in this hostile environment

The human being is plural, and it is up to the State to preserve respect for differences, in attention to the equality principle, which represents, in short, the right to treat the equal equally and the unequal unequally, according to their differences.

The transsexual woman is recognized as coming from the female gender. According to DINIZ[8]: "transsexuality can be defined as a sexual condition of a person who rejects his genetic identity and his own anatomy, identifying himself psychologically with the opposite gender". And according to the words of the very document that entitled the research, gender identity is:

> The deeply felt internal and individual experience of each person's gender, which may or may not correspond to the sex assigned at birth, including personal sense of the body (which may involve, by free choice, modification of bodily appearance or function by medical, surgical, or other means) and other expressions of gender, including dress, speech, and mannerisms. [9]

There are numerous judgments of the Superior Courts on the possibility of changing name and gender in public records, regardless of transgenitalization surgery or judicial authorization. A landmark is Direct Unconstitutionality Action 4.2756, in which the STF ruled for the possibility of changing name and gender in the civil register, even without undergoing

8 DINIZ, Maria Helena. *Direito civil brasileiro.* 31. ed. São Paulo: Saraiva, 2014.

9 http://www.clam.org.br/uploads/conteudo/principios_de_yogyakarta.pdf

surgical gender reassignment procedure. The votes of the justices were based on the right to honor, image, private life, material equality, freedom, dignity, and above all, the right to be different.

However, despite the apparent evolution, this recognition is difficult to achieve in other fields, as well as to put it into practice. Until the ADPF that gives the title to this research, transsexual women were sent by the state to serve time in a male prison when they committed a crime. In fact, this is still the case, due to the short time of the decision and the lack of apparatus to carry it out.

Thus, transsexual women are exposed to several violations of their fundamental rights, because they do not receive the appropriate treatment for their gender identity. In prisons, they are not welcome, and are often raped, tortured or killed by prisoners or the police. It is worrisome to realize that the police, an institution that has public protection as its north, is responsible for most of the violence and oppression, from the ostensive work in society to the moment of custody. [10]

In theory, the initial solution is to place them in separate cells, but this is where this study is concerned, because the police are a major source of violence.

The daily life of these people is humiliating, because the torture is also psychological when they are forced to expose their intimacy to a population different from their gender, to sunbathe without a blouse, to undergo the mandatory haircut, the deprivation of treatment with hormones, and the threat of the police for their (non) protection. As G. G. Ferreira (2019) teaches[11] :

> It is no coincidence that the Brazilian tradition is to lock transvestites and transgender women in wards for sex offenders, as these are usually the only wards that accommodate the transgender population (even though transvestites themselves also consider sex offenders to be the scum inside the prison). The husbands of transvestites, likewise, are excluded from recreational and social activities

10 https://forumseguranca.org.br/wp-content/uploads/2021/02/anuario-2020-final-100221.pdf

11 FERREIRA, Guilherme Gomes apud. NECCHI, Vitor. *Violence in prisons. Women, transvestites, transgender people and gays are the biggest victims.* Available at: http://www.ihu.unisinos.br/159-noticias/entrevistas/568746-mulheres-travestis-pessoas-trans-e-gays-encarcerados-enfrentam-mais-violencias-que-os-demais-detentos-entrevista-especial-com-guilherme-gomes. Accessed on: 19 July 2021.

> when they assume relationships with transsexual people: they no longer drink from the same glass as the other men, they no longer play soccer together, and they are also treated by the category "faggot," which serves as a homogenizer of all these populations of dissident gender and sexuality.

To visualize the difficulties of theory when we talk about practice, we cite the Joint Resolution of the National Council to Combat Discrimination[12], which states that transvestites and homosexuals should be offered specific living spaces in male prison units, considering their safety and vulnerability. However, through the interpretation of this resolution, a judge of the Court of Criminal Executions of the Federal District[13] dismissed the request of eleven provisional detainees declared to be female transsexuals or transvestites, denying them to stay in the female penitentiary, because, according to her, the Resolution does not make express reference to female penitentiaries, but only determines that there is a specific living space, separate from male prisoners. In other words, it is a polemic theme and, at the time of the decision, there is still room for personal interpretation.

Article 1 of this resolution has in its scope the prohibition of any kind of discrimination by prison administration officials or private individuals based on the sexual orientation or gender identity of the person deprived of liberty, in order to ensure that prisoners respect their dignity of self-determination.

In its 1st, it states that the identity of transvestites, transgender women and men will be by self-determination, as soon as they enter the prison system and, thus, the unit in which they will be imprisoned will be compatible with the gender declared at the time of entry into the prison system, respecting the freedom of self-determination of the prisoner.

In addition, it ensures the right to a social name (the name that transvestites, transsexual women and transsexual men want to be called), according to their gender, and, also, that transvestites and homosexuals deprived of freedom in male prison units should be offered specific living spaces in order to ensure their individualized dignity and accommodation.

12 BRAZIL. Joint Resolution 1. *National Council for Criminal and Penitentiary Policy and the National Council for Combating Discrimination CNPCP-CNCD/LGBT*, of September 21, 2018. Disponível em: https://www.in.gov.br/materia/-/asset_publisher/Kujrw0TZC2Mb/content/id/41965371/do1-2018-09-24-resolucao-conjunta-n-1-de-21-de-setembro-de-2018-41965115.Accessed on: 06 July 2021.

13 BRAZIL. Court of Justice of the Federal District and Territories. *Case No. 0002253-17.2018.807.0015*.

It is also important to mention that it is foreseen the transfer of the prisoner to a specific living space, according to his expressed will, as well as the option of using female or male underwear, besides the option of getting a haircut, and the prohibition of intimate searches of transvestites or transsexual women and men in a public environment, in order to preserve the embarrassment of nudity exposure in front of other prisoners. Finally, access to hormone treatment, distribution of condoms and lubricant gel is guaranteed.

What is most interesting in observing all this, is to compare it with what, in fact, happens, and realize that it does not portray a real condition, not even close to happening.

Another important fact is Enunciation 46 of the National Forum of Judges and Justices of Domestic and Family Violence against Women (FONAVID), which states: "The Maria da Penha Law applies to transgender women, regardless of the need to change their name or to undergo sexual reassignment surgery, whenever the hypotheses of Article 5 of Law 11.340/2006 are configured. The Maria da Penha Law [14]is a milestone in Brazilian legislation, effective to a good extent, but, unlike the Enunciado, it is not usually considered by magistrates when deciding cases involving trans women.

III. PLEA OF BREACH OF FUNDAMENTAL PRECEPT (ADPF) 527 AND ITS IMPACT AS A FORM OF SOCIAL TRANSFORMATION

The case begins when Minister Luís Roberto Barroso, of the Federal Supreme Court (STF), granted an injunction, in June 2019, in the Argument of Noncompliance with Fundamental Precept[15] (ADPF) 527, filed by the

14 Creates mechanisms to curb domestic and family violence against women, in accordance with § 8 of art. 226 of the Federal Constitution, the Convention on the Elimination of All Forms of Discrimination Against Women and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women; provides for the creation of the Courts for Domestic and Family Violence against Women; amends the Code of Criminal Procedure, the Criminal Code and the Law of Criminal Execution; and makes other provisions.

15 Excerpt from the vote of Justice Gilmar Mendes in ADPF 33: It is very difficult to indicate, *a priori, the* fundamental precepts of the Constitution that are liable to be so seriously violated as to justify the proceeding and the judgment of the violation claim. There is no doubt that some of these precepts are explicitly stated in the constitutional text. Thus, no one can deny that individual rights and guarantees (art. 5, among others) are fundamental precepts of the constitutional order. In the same way, one cannot fail to attribute this qualification to the other principles protected by the stony clause of art.

Brazilian Association of Gays, Lesbians and Transgender (ABGLT), through which it questions contradictory judicial decisions in the application of the Joint Resolution of the Presidency of the Republic and the Council for Combating Discrimination 1/2014, which established parameters for the reception of transsexuals and transvestites, when subjected to deprivation of liberty, in Brazilian prisons.

The association argued that the criminal magistrates frustrated the realization of the right to adequate treatment within the prison system, resulting in violation of the fundamental precepts of human dignity, the prohibition of degrading and inhumane treatment and the right to health[16].

On that occasion, the minister determined that transsexual women prisoners should be transferred to female prisons. Regarding transvestite prisoners, he pondered that the little information he possessed did not allow him to define, in a safe way, and in light of the 1988 Federal Constitution, the appropriate treatment to be given to that group.

In light of this, two documents were added to the case file by the federal government, adding information to instruct the process, and which seemed to signal an evolution in the treatment of transsexuals and transvestites identified with the female gender.

The documents were: the report "LGBT in prisons in Brazil: diagnosis of institutional procedures and incarceration experiences", having as source the Ministry of Women, Family and Human Rights, which explained

60, § 4 of the Constitution, namely the federative form of the State, the separation of powers and the direct, secret, universal and periodic vote. On the other hand, the Constitution itself specifies the so-called "sensitive principles", the violation of which can lead to the decree of federal intervention in the Member States (art. 34, VII). It is easy to see that the breadth conferred on the fundamental clauses and the idea of the unity of the Constitution (*Einheit der Verfassung*) end up placing a significant part of the Constitution under the protection of these guarantees. (...) The effective content of the 'guarantees of eternity' will only be obtained through hermeneutic effort. Only this activity can reveal the constitutional principles that, even if not expressly contemplated in the stone clauses, are closely linked to the principles protected by them and are, therefore, covered by the guarantee of immutability that derives from them. The principles that deserve protection, as they are normally stated in the so-called 'permanent clauses', seem to be devoid of specific content. This orientation, consecrated by this Court for the so-called "sensitive principles", must be applied to the concretization of the permanent clauses and also of the so-called "fundamental precepts".

16 BRAZIL. Federal Supreme Court. *Transsexuals and transvestites with female gender identification may choose to serve time in female or male prison, decides Barroso***.** Brasília: Press, 2021. Available at: http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=462679&ori=1. Accessed on 22/03/2021.

about the several survival strategies in prison; and the Technical Note no. 7/2020, from the Ministry of Justice and Public Safety.

Both concluded that the ideal is transfer upon individual consultation of the transgender or transvestite person, and that detention in a male prison must take place in a special wing that ensures the integrity of these people.

Another guideline considered by Minister Barroso was the Yogyakarta Principle #9 (Right to Humane Treatment in Detention). This document was approved in 2007 by the international community to produce *standards* for the treatment of the LGBTI population. Specifically, its number 9 recommends that, once incarcerated, such persons may participate in the decision-making processes regarding the place of their detention, considering the peculiarities of their sexual orientation: "*ensure, to the extent possible, that detained persons participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity*" (Yogyakarta Principle 9).

The Yogyakarta Principles state that human rights are, among several characteristics, indivisible and interdependent. The dialogue between them, together with the national law, should generate, in fact, a sum close to the ideal.

This institutional interlocution resulted, on March 19, 2021, in the same minister adjusting the terms of that measure, at which time he settled that transsexual and transvestite prisoners with female gender identity may choose to serve sentences in female or male prison facilities, being due, in the latter case, a reserved area as a way to ensure their safety.

It is paradigmatic to notice the successful dialogue with the associations representing the interests of the vulnerable group, with the Executive and the Judiciary, harmonizing the national and international scenario for the protection of this community, in addition to the Court's recognition of the duty of the States to adopt measures to ensure its physical and psychological integrity.

Talking about this dialogue between institutions and rights translates an almost utopian concept of access to justice, in Cappelletti's view[17], from the perspective that such access aggregates not only the structures and institutions that make up the justice system, but an entire state organization that favors the exercise of a wide range of rights for all people without distinction. This becomes evident when, when observing the eventual suspen-

17 CAPPELLETTI, Mauro; GARTH, Bryant. ***Access to Justice***. Porto Alegre: Sergio Antonio Fabris, 1988.

sion of the exercise of some right by the state, due to an improper practice (as verified in the deprivation of liberty in prison, as a response to the commission of a crime), the manifestations of other rights need to be maintained, such as health, physical integrity, hygiene, *etc*.

Therefore, we understand that when the STF judged ADPF 157, it demonstrated that it was aligned with this conception of access to justice.

IV. IMPORT OF YOGYAKARTA PRINCIPLE #9: SOLUTION OR PROBLEM?

Signed in early November 2006, at the Gadjah Mada University, in Yogyakarta, Indonesia, the Yogyakarta Principles arise as a result of studies by experts and Non-Governmental Organizations (NGOs), in 2005, as a way to map the experiences of human rights violations that victimize people of diverse sexual orientations and gender identities.

These experts come from 25 different countries, and represent all places, with the central purpose of analyzing the application of human rights treaties in specific cases, as well as to compel States to effectively implement the rights set forth in the document[18].

This document was presented in 2007 at the United Nations Human Rights Council[19] in order to establish new rights for the LGBTQIA+ community, reflecting the predictions of the main international human rights instruments, and justifying that such rights should be extended to this community, as well as explaining that states have the obligation to study how best to apply and protect these rights.

In this research, the reflection turns directly to the Yogyakarta Principle [No. 9,] for being directly cited in the case law of the STF in the decision of the reporting justice. However, on this theme, the following principles deserve to be highlighted: 1. the Right to Universal Enjoyment of Human Rights; 2. the Right to Equality and Non-Discrimination; 3. the Right to Personal Security; 4. the Right to Freedom from Torture and Cruel, Inhuman and Degrading Treatment or Punishment; and 5. the Right to Protection from all Forms of Exploitation of Human Beings.

One of the most complicated central points about this issue is the

18 O'FLAHERTY, Michael; FISCHER, John. *Sexual orientation, gender identity and International Human Rights Law: contextualising the Yogyakarta Principles.* Human Rights Law Review, Oxford, v. 8, n. 2, p. 207-248, Jan. 2008.

19 ACCIOLY, Hildebrando; SILVA, Geraldo Eulálio do Nascimento e; CASELLA, Paulo Borba. *Manual de direito internacional público.* 23. ed. São Paulo: Saraiva, 2017.

precariousness of the structure of prisons, regardless of who the detainees are subjected to**,** but it is inevitable to notice the sum of disrespect to rights when we are dealing with transgender and transvestite people**.**

The transsexual person demands, beyond the basics inherent to his or her human condition, also access to specific care for gender transition - from the social name to antiretroviral and hormonal treatments. In this sense, the Yogyakarta principles state that:

> All human beings are born free and equal in dignity and rights. All human rights are universal, interdependent, indivisible, and interrelated. Sexual orientation and gender identity are essential to the dignity and humanity of every person and should not be a ground for discrimination or abuse.

We realize that, both because of the repeated violence, duly proven in legal and jurisprudential documents, and because of the national and international context that explicitly defends non-discrimination between people, human dignity, and non-torture, it is necessary to pay attention in the next decisions on the subject to ask the person in these conditions what type of prison they intend to serve their sentence in.

Arguments contrary to the one decided by the minister will be that it is dangerous to have someone anatomically male (not transgenitalized, for this is not the issue) in front of a female universe. However, it is to be wondered if it is not worse to represent this small portion of characteristic in a hostile environment.

To think otherwise seems to stigmatize someone for a physical characteristic that this person does not even identify with. Moreover, no sexual orientation is exempt from exploitation and rape in prisons, either by prison guards or by other inmates.

Once the right is recognized and accepted, its monitoring is indispensable. This monitoring needs to be not only for the positive execution of the measure, but also to prevent and combat oppression. For this, it is necessary that there is ownership on the part of control organs, such as the Public Defender's Office, the Public Prosecutor's Office, and the National Council of Justice.

In truth, because there is the recognition of the structural problem

that is characteristic of this group in the prison system, it is inevitable to reflect on the solutions. At first, in fact, this study compiles statistics and information to present the unhealthy situation in which the jurisprudential decision will be received, and categorically states that there is no room for confidence in the effectiveness of the measure. This is because there is fear, above all, that the "separate cell" will become a torture chamber.

What the studies present is, at first, the lack of structure in the country to receive the execution of this measure, without turning it into a new moment of fear for these people. However, in a second moment, it is intended to present the suggestion of creating their own wards in all binary prisons, little by little, because, by virtue of representing a much smaller number of people, little space is enough in the structure of the place. In addition, it does not create the problem of distance from family members for visitation, i.e., it will also meet the psychological and social demands, which are equally important.

However utopian it may sound, it is important to consider new designs as a solution to new conflicts. In this sense, the most recent in the country occurred on June 15, 2021. As a result of five suicides and three attempts in the LGBTQIA+ wing, the State Department of Justice and Public Safety (Sejusp) changed the entire Penitenciária Professor Jason Soares Albergaria, in the city of São Joaquim de Bicas (metropolitan region of Belo Horizonte, state of Minas Gerais), to be the first prison unit in Brazil dedicated exclusively to receive self-declared gay, lesbian, transvestite and transgender prisoners. Initially, the idea was to be a mixed prison, so it held men and women, but it became a male-only unit 11 years ago. Now, Sejusp has transferred its male public, cisgender and heterosexual, which was in this wing, to other penitentiaries in the region.

The change was prompted by the Minas Gerais Public Defender's Office (DPMG), which filed a Public Civil Action (PCA) [20]against the State

20 Public civil action is the appropriate procedural instrument (...) for the exercise of popular control over the acts of the public authorities, demanding both the repair of the damage caused to the public patrimony by an act of improbity, and the application of the sanctions of art. 37, § 4, of the Federal Constitution, provided to the public agent, as a result of his irregular conduct. This constitutional provision expanded the list provided in Art. 1, Item IV of Federal Law No. 7.347/85 to include the defense, by means of public civil action, of transindividual interests, making it possible to establish responsibilities (reimbursement to the public treasury; loss of office; suspension of political rights; application of fines) for damages caused not only to the interests expressly provided for therein, but also any other of a diffuse or collective nature, without prejudice to popular action. Among these other interests not provided for in the cited law, we highlight the defense of public property, of administrative morality, both of undeniably

of Minas Gerais, due to the failure to preserve the lives of those inmates who died. As a result of this transformation, the São Joaquim de Bicas penitentiary will undergo structural reforms.

This fact has become a reference in the reception of self-declared LGBTQIA+ prisoners, regardless of the region of the state where the arrest occurred. However, despite the positive change, a negative point stands out: Minas Gerais has 222 prisons, and only this one has its own wing, so family visits become more difficult, and this directly affects the mental health of prisoners. The situation gets worse if you consider the situation of people from other states.

One can point out, critically**,** that, despite being recognized as a good solution, or path, what exists is the idea of extending imprisonment, instead of measures of de-incarceration, of LGBTQIA+ people or others. It is the eternalization of physical punishment, docilizing into submission. [21] As much as it will not solve the problem of prison overcrowding, it will serve to meet specific demands. And this specific case gives shape to the ideal that, at one time, may have seemed like a daydream.

Moving towards the end of the study, it is important to comment on the Brazilian-Congolese anthropologist Kabenguelê Munanga, who in his speech at the meeting "Democratic construction and society of fear", an edition of the "Democratic Dialogues" Program, which took place in Brasilia (DF), in October 2019, elucidated that human beings, like other animals, have their behaviors guided by instinct.

He also talked about the natural and hereditary principle that commands our primary reactions for survival in relation to the environment and other living beings, but with the emphasis on something we have that sets us apart: reason. It allows us to reinvent ourselves daily, to create, to develop; at the same measure that it makes us go into chaos. The reason that sometimes saves, sometimes kills. It finds solutions, creates rules of conduct, cultures, science, technology.

Parallel to this, Munanga points out that something common to nations are the conquests through battles. He even cites Europe, the sacrifice of many lives during World War II, for example. At the same time, he recognizes the victories documented in human rights declarations.

The same human being that eliminated a great number of lives in gas chambers, could have been a political agent in the Brazilian military

diffuse nature. (MORAES, 2017).

21 FOUCAULT, Michel. *Vigiar e punir: nascimento da prisão*; translated by Raquel Ramalhete. Petrópolis, Vozes, 1987. 288p. Petrópolis: Vozes, 1999.

dictatorship, as he could be, today, a prison agent. One dares to say that the violence of those who occupy spaces of power can be dangerous and instinctive.

The jurisprudential decision (ADPF 157) deserves, besides celebration, care, because the prison system is unhealthy for all, indistinctly. Given the presence of multiple factors exposed above, it is natural to foresee the worst-case scenario.

In the opportunity to read official documents, besides the author's work practice, there is a volume of information that needs to be pondered and others that urgently require a defensive posture, because ideas of opposition are coming. It is necessary to be careful not to be utopian, considering that this is a country with a high level of police corruption, sexual violence, insufficient medicines in prisons, people serving extinct sentences, provisional detainees sharing space with definitive detainees, and, among them, adolescents, among many other factors.

As mentioned before, the jurisprudential permissive is paradigmatic, but the reality demands criteria for its effectiveness. Let it be accepted, parameterized, and only the beginning of the return of the dignity lost to this community.

The main objective is that the euphoria of the advance does not undermine the need for a public policy of transition, a pedagogical movement aimed at police officers, and, above all, inspection.

Official documents are increasingly stronger and more prepared in exposing rights and guarantees for minority groups as a whole. However, this is not enough. Society needs to follow, in practice, the strides that have been made in theory.

V. CONCLUSIONS

The study rescued a bit of history, grounded in the present day, and justified in anthropology, to present that there is no fertile ground for welcoming the oppressed. Which is not to say, in any way, an apology for the stagnation of rights.

In understanding the precedent of the STF that paradigmatized the dispute presented, there was an explanation of the reasons for the decision, the documents that supported it, and the theoretical construction of the problem.

In listing the endless sequence of clashes in the prison system, the intention was to demonstrate how delicate the context is if observed in a

panoramic way. Rather than presenting structural problems, especially with regard to the abuses of rights committed by police officers responsible for the execution of sentences, the intention was to construct a reasoning dialogue between: a problematic and traditional structure (the prison), the existence of a vulnerable group and its necessary access to such structure (transsexual and transvestite prisoners with female gender identity), and a disruptive decision (ADPF 157).

The need to advance in the protection of minority groups is certain, but human perversion, especially when institutionalized, is reckless, and inflames even in the face of cases that should be safeguarded.

Without a doubt, the decision by Minister Luis Roberto Barroso has given a voice to transgender people in the prison system, as it represents the recognition of the right to self-declaration of gender of the transvestite population and other transgender people in the justice system, which generates discussion around so many other rights that surround it.

The anguish increases when the reflection is faced, in practice, with the absence of minimum fundamental rights for these vulnerable groups of people, and, in theory, with a decision that rightly considers personal will, self-identification, respect and, above all, the dignity of the human person. These are two extremes at which the justice system seeks to find a point of balance.

Given the study, it is suggested, initially, a public policy of transition that involves interdisciplinary professionals to provide a step forward, in order to receive and conduct the days of these apenadas in an enemy environment, for, later, there is what the research signals as a solution: special wards for this public. Thinking of a reverse movement of this induces the continuation of new episodes of silenced terror.

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PROTECTION OF INDIGENOUS PEOPLES' RIGHT TO HEALTH: IMPACTS OF COVID-19 ON INDIGENOUS COMMUNITIES IN BRAZIL

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Abstract: This paper aims to analyze the different impacts of Covid-19 on indigenous communities in Brazil. The main goal is to identify the specific challenges and threats indigenous peoples are facing during the global fight against the virus, and to analyze the factors that lead to their special vulnerabilities in this situation. By conducting a case study, this paper intends to draw concrete conclusions of the indigenous peoples' struggle against the disease in order to depict the general conditions and consequences of the pandemic for the indigenous population in the specified area. Economic, social, and cultural impacts are analyzed while also taking into account the political dimension. In this context, this study addresses the following research questions: (1) What are the impacts of Covid-19 on indigenous peoples in Brazil? (2) Which are the measures taken and not taken by the government? (3) Which factors contribute to the special vulnerability of indigenous peoples?

Key words: Indigenous Peoples Rights, The Right to the Highest Attainable Standard of Health, Human Rights Law, Impacts of Covid-19, Vulnerable Social Groups.

I. INTRODUCTION

Throughout history, indigenous peoples have seen their political, economic, social, and cultural rights systematically undermined. Within the scope of the newly developed SARS-CoV-2 virus, indigenous communities all around the world are finding themselves facing a new threat. Following the new epidemic outbreak, on January 30th, 2020, the World Health Organization (WHO) declared an international health emergency and expressed its concern regarding the consequences for less developed countries with weak health systems.[1] As the virus continued to spread across

1 WORLD HEALTH ORGANIZATION. (2020). *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV).*

the globe, the Americas became an epicenter of the pandemic, mainly due to Brazil.[2] Indigenous peoples belonging to one of the most socially vulnerable groups in the world, international concern has been rising regarding the possible impacts of the disease on indigenous groups.[3] Despite an existing number of instruments that recognize their rights and provide them with special protection, international organizations and academic experts have made numerous observations indicating higher levels of morbidity and mortality, stressing the experience of 'cumulative and more intense harm'[4] inside the indigenous population. In a statement made by the United Nations Committee on Economic, Social and Cultural Rights in November 2020[5], the group referred to the access to vaccines and stated the importance of prioritizing not only health staff and care workers but also the most vulnerable groups, including indigenous peoples. The Committee further stressed that even though vaccines will be subject to intellectual property of the respective companies, States have the obligation to prevent patent regimes from making critical public goods inaccessible to less developed countries. Hence, guaranteeing equal access to the vaccines as a criterion for ensuring public health should remain a priority in the fight against the current global health crisis.

II. METHODOLOGY

The general aim of this research paper is to capture the social reality of indigenous peoples during the Covid-10 pandemic. Therefore, a case study as a mix-methods approach is the most suitable methodological approach since social realities can be explicated better by considering both qualitative and quantitative data.[6] In order to examine the different impacts

2 THE GUARDIAN. (2020). 'WHO says the Americas are centre of pandemic as cases surge'. 2020 May 17th.

3 *See Statement by Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).* (2020). *COVID-19 yet another challenge for indigenous peoples.* 2020 Apr 6.

4 UNITED NATIONS ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN. (2014). The right of health: the need for a holistic approach. In: *Guaranteeing indigenous peoples' rights in Latin America: Progress in the past decade and remaining challenges.* 2014, LC/L.3893/Rev.1.

5 UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS. (2020). *Statement on universal and equitable access to vaccines for COVID-19.* E/C.12/2020//2. 2020 Nov 27.

6 CARUTH, Gail D. (2013). Demystifying Mixed Methods Research Design: A Review of the Literature. *Mevlana International Journal of Education*. Volume 3, Issue 2.

of Covid-19 on indigenous peoples, this paper considers and analyzes numerical data, for instance on infection and death rates. Quantitative research will be applied to give a standardized overview of the consequences for indigenous communities in South America. When analyzing the specific challenges these communities are facing and how Covid-19 affects their daily life, qualitative research through interviews seeks to create a better understanding of the subject matter at hand.[7] Using the qualitative research approach allows for a more concrete investigation and comprehension of the meaning that individuals or groups relate to a certain social issue[8], in this case the Covid-19 pandemic. Hence, it is important to consider the subjective experiences of individuals, which is an underlying principle of qualitative research[9] and justifies its choice for the present study.

The case study approach generally emphasizes qualitative analysis and is commonly found in many social science disciplines.[10] Evidence can be collected from many different sources such as documents, archival records, and interviews.[11] The various sources complement each other and therefore increase the value of the study.[12] In the present case study, primary data will be collected from interviews to understand the experiences and perspectives of the respective communities. Two different indigenous communities in Brazil will be analyzed with the use of semi-structured interviews. The ladder is very common in qualitative research due to the circumstance that it creates more accurate data since emotions and body gestures can also be

7 DENZIN, Norman K. & LINCOLN, Yvonna S. (2018). Introduction: The Discipline and Practice of Qualitative Research. In: CRESWELL, John D. & CRESWELL, J. David (Eds.). *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches.* London: Sage.

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12 WOODSIDE, Arch G. (2010). Building Theory from Case Study Research. In: *Case Study Research: Theory, Methods and Practice.* London: Emerald.

captured.[13] The method is characterized by posing a certain number of open-ended questions, giving respondents the freedom to express feelings and their own experiences. Among the advantages of standardized questions, the interviewer is able to ask varied questions depending on the flow of the conversation. Such questions will be based on the personal experiences of the respondents, for instance, how many community members have seeked medical attention and how Covid-19 affects their social lives. The interviews will be carried out through an online video conference and not face-to-face, although the interviewer will still be able to detain certain feelings and perceptions of the person interviewed. Regarding the use of interviews as a qualitative research method, there are a number of important ethical concerns that need to be taken into consideration.[14] In respect to which kind of data will be included or not included in this study, research will be done in accordance with the main principles of qualitative research ethics, such as preserving privacy, minimizing harm and respecting the autonomy of the interviewed individuals. In addition to the collection of primary data through the interviews, secondary data will also be collected. Documentary information is highly relevant for the present case study topic which is why several types of information will be considered for data collection. This includes the consideration of previous studies related to the case as well as reports made by international organizations and governments, news articles and administrative documents. Moreover, archival records in the form of statistics, graphics and maps are used as further sources. This is especially important for examining the number of indigenous groups that have been affected by Covid-19, as well as infection and death rates.

The idea behind choosing a mixed research method for the present study is based on the fact that all research methods include different biases and weaknesses.[15] By collecting both qualitative and quantitative data, the disadvantages and limitations of each research method can be minimized which allows for higher accuracy of the research findings. In this way,

13 HAQ, Muhibul. (2014). A Comparative Analysis of Qualitative and Quantitative Research Methods and a Justification for Adopting Mixed Methods in Social Research. *Annual PhD Conference, University of Bradford School of Management.* Available from: http://hdl.handle.net/10454/7389 [cited 2021 June 9].

14 TRAIANOU, Anna. (2017). The Centrality of Ethics in Qualitative Research. In: LEAVY, Patricia (Ed.). *The Oxford Handbook of Qualitative Research.* Oxford: Oxford University Press.

15 CRESWELL, John D. & CRESWELL, J. David. (2018) Mixed Methods Designs. In: *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches.* London: Sage.

using multiple sources for data collection allow for a better understanding of the underlying problem and more complete evidence since the different databases complement each other. Recalling that the present research aims to examine the different *impacts* of Covid-19 on indigenous peoples in a specific region, the greatest advantage of choosing a case study is the ability to analyze different variables of interest, which are notoriously difficult to measure.[16] To depict the social reality of the topic under examination, it is necessary to consider different contextual variables very precisely to then draw a comparison that aims to find equivalencies and produce generalizations. Nevertheless, the production of generalizations also needs to be considered as a weakness of the research method since it can distort reality and reduce the validity of the findings. Another issue that should be kept in mind is that the responses found in interviews are based on objective knowledge of the interviewees and therefore include certain biases.[17] There is also the risk that the interviewer influences the interviewees responses and therefore the research findings by leading them into a desired direction.[18] In this context, it is necessary to address the fact that with the purpose of collecting as much information as possible on the research aims, those indigenous communities have been examined that are known to be affected by the virus. Therefore, the reality for other groups could differ from the present findings. However, with the consideration of quantitative data in the first phase of data collection, this study provides the opportunity to identify the different impacts of Covid-19 on indigenous communities while also taking into account for *how many* groups those impacts are a present reality.

16 SPRINTZ, Detlef F. & WOLINSKY-NAHMIAS, Yael. (2005). Comparative Advantages of Case Study Methods. In: *Case study methods: Design, use and comparative advantages. Models, numbers, and cases: Methods for studying international relations.* University of Michigan.

17 SEIDMAN, Irving. (2006). A Structure for In-depth, Phenomenological Interviewing. In: *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences.* Columbia: Teachers College Press.

18 YIN, Robert K. (2018). *Addressing Tradition Concerns About Case Study. In: Case study research hand applications: design and methods.* London: Sage.

III. CASE STUDY

Background

Indigenous Peoples in Brazil

Brazil is the largest and most populous country in South America and minority groups are present in all regions of this nation.[19] Although indigenous peoples account for the smallest among the major ethnic groups, this has not always been the case in the past. Before the arrival of Europeans about 500 years ago, there was an estimated number of around 1,000 tribes living in Brazil, accounting to a number of approximately 11 Mio. indigenous people.[20] In the following years, 90% have been wiped out, mainly due to the introduction of European diseases, slave trading and physical attacks.[21] In fact, the indigenous population was drastically reduced as a consequence of diseases such as influenza, measles, and smallpox, which had been brought to the country by Europeans.[22] Today, more than 300 indigenous tribes are living in Brazil, totaling to the amount of roughly 800,000 - 900,000 people, demonstrating a significant decimation.[23] Currently, there are over 274 different indigenous languages, although more than three quarters of the Brazilian indigenous people speak Portuguese.

About half a million of these peoples live in rural areas, while the rest live in urban zones. Though indigenous groups are present in all states, the largest concentration can be found in the northern region of Brazil, in the state of Amazonas. Those tribes living in rural areas live almost entirely off the forests, savannas, and rivers, by using techniques such as hunting, fishing, and gathering. [24] They dispose of detailed knowledge of the different

19 MOMSEN, Richard P. (2021). Brazil. *Encyclopedia Britannica*. Available from https://www.britannica.com/place/Brazil [cited 2021 May 19].

20 SURVIVAL INTERNATIONAL. (2021). *The Brazilian Indians.* Available from: https://www.survivalinternational.org/tribes/brazilian [cited 2021 May 21].

21 KOCH, Alexander *et al.* (2019). Earth system impacts of the European arrival and Great Dying in the Americas after 1492. *Quaternary Science Reviews.* Volume 207, Pages 13-36.

22 LEITE DA SILVA, Luciana *et al.* (2021). The Articulation of the Indigenous Peoples of Brazil in Facing the Covid-19 Pandemic. *Frontiers in Sociology.* Volume 6.

23 INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS. (2021). *Brazil.* Available from: https://www.iwgia.org/en/brazil.html#:~:text=Indigenous%20peoples%20in%20Brazil&text=The%20principal%20indigenous%20ethnic%20group,%2C%20while%2076.9%25%20speak%20Portuguese [cited 2021 May 21].

24 SURVIVAL INTERNATIONAL. (2021). *The Brazilian Indians*. Available from: https://www.survivalinternational.org/tribes/brazilian [cited 2021 May 21].

plants and animals and use it to grow food and medicine. Today, the biggest group is the *Guarani*, which consists of more than 50.000 members. However, most of their land has been taken away from them and they only have little land left.

One of the most special characteristics of Brazil's indigenous peoples is the existence of many *uncontacted* tribes living in voluntary isolation.[25] There is great concern about the protection of these groups because illegal logging and drug trafficking pose serious threats to the communities.[26] In order to escape these threats, in the past, many of the tribes had to flee and migrate to other lands. This is a serious problem considering that indigenous groups depend very much on their specific territory since they have gathered important knowledge for their survival throughout the last centuries. New territories mean that they need to adapt once again and ensure that there are enough resources to survive. Apart from that, one of the biggest issues for indigenous peoples is the fact that those who live in rural areas - and had been living there for hundreds of years - do not have the same immunological defenses as the rest of the population.[27] Individuals and groups entering their territory and getting in contact with them consequently pose a serious risk. As a result, many disease outbreaks in the past have led to serious decimations and many extinctions of indigenous groups.[28] Hence, the most recent Covid-19 pandemic has put a lot of pressure within indigenous groups in Brazil, particularly in the Amazon area.[29]

a) Yanomami

One of the indigenous peoples examined in this case study are the *Yanomami*. The fact that they belong to the 'largest relatively isolated tribe in

25 ORTIZ-PRADO, Esteban *et al.* (2021). Avoiding extinction: the importance of protecting isolated Indigenous tribes. *AlterNative: An International Journal of Indigenous Peoples.* Volume 17, Issue 1.

26 PRINGLE, Heather. (2014). Uncontacted tribe in Brazil emerges from isolation. *Science.* Volume 345, Issue 6193.

27 RAMÍREZ, Juan D. *et al.* (2021). Correction: SARS-CoV-2 in the Amazon region: A harbinger of doom for Amerindians. *PLoS Neglected Tropical Diseases*. Volume 14, Issue 10.

28 MINORITY RIGHTS GROUP INTERNATIONAL. (2021). *World Directory of Minorities and Indigenous Peoples – Brazil.* Available from: https://www.refworld.org/docid/4954ce5a23.html [cited 2021 May 25].

29 BOADLE, Anthony. (2020). 'After smallpox and malaria, Brazil's tribes fear coronavirus is next lethal import'. *Reuters.* 2020 March 25.

South America'[30] makes them especially interesting for the research purpose of this study. According to the non-governmental organization (NGO) Survival International, the *Yanomami* consist of roughly 38,000 people and their territory covers around 17-19 Mio. hectares spread across the rainforests and mountains in the North of Brazil and southern Venezuela. [31] This makes it the largest forested indigenous territory in the world. Their contact with the non-indigenous has been relatively recent – the first encounter dates back to the 1940s when groups were sent to establish the border to Venezuela. Back then, foreign diseases against which the *Yanomami* were not immune have already led to a decimation of the population. Typically, the local groups live in multifamily houses and the members usually try to marry inside their community, however, inter-village relations are important and quite deep.[32] The main reason for choosing the *Yanomami* for the present study is the fact that they have been hit hard by territorial invasions in the past.[33] In fact, 20% of the Brazilian *Yanomami* population has lost their lives during a gold rush in the 1980s and early 90s when goldminers brought in diseases. Apart from that, the Brazilian Court later even found a number of miners guilty of genocide after the shooting of *Yanomami* people.[34] Thus, the community has suffered serious consequences from the invasions of their territory since the first contact with the non-indigenous population. This includes the destruction of their habitat, water pollution and the increased spread of diseases. Considering that they live in the forests, the community qualifies as a good example of understanding the different impacts of Covid-19 on communities living in rather isolated areas. The largeness of the group as well as the fact that many campaigns are running to protect them will also contribute to more quantitative data being available to analyze their situation during the pandemic.

b) Xavante

The second indigenous community analyzed in this study is the

30 SURVIVAL INTERNATIONAL. (2021). *The Yanomami.* Available from: https://www.survivalinternational.org/tribes/yanomami [cited 2021 May 27].

31 *Ibid*.

32 INSTITUTO SOCIOAMBIENTAL. (2021). *Yanomami.* Available from: https://pib.socioambiental.org/en/Povo:Yanomami [cited 2021 May 27].

33 SURVIVAL INTERNATIONAL. (2019). 'Thousands of goldminers invade Yanomami territory'. 2019 July 1.

34 STF -RE: 341487 RR, Relator: CEZAR PELUSO, Data de Julgamento: 03/08/2006, Tribunal Pleno, Data de Publicação: DJ 10/11/2006 PP-0005- EMENT VOL-02255-03 PP -00571 RT v. 96, n. 857, 2007, p. 543-557 LEXSTF v. 29, n. 338, 2007, p.494-523.

Xavante community. Currently, there are about 10,000 – 20,000 *Xavante* living in the East of Mato Grosso, making it the biggest indigenous community in this area.[35] Identical to the *Yanomami*, the *Xavante* are hunters and gatherers typically living in smaller groups which might also move from place to place to benefit from the natural resources available. In the past, the *Xavante* community has specifically suffered from the environmental consequences of territorial invaders including cattle ranching and the spread of soy farms.[36] Besides, the group is well known in Brazil for its resistance against the government which has decided to open up the *Xavante* territory to colonists in the mid 1900s. After fighting for their rights and territories for a long time, the struggles against hunger and foreign diseases finally led to the establishment of relations between the *Xavante* and the Brazilian society. This also meant that colonists got access to their territories, which the *Xavante* once again had tried to get demarcated later. The indigenous group has always fought hard for their rights.[37] By putting a lot of pressure on the government, they have overcome many obstacles and gained political power. Nevertheless, the presence of many non-indigenous in their territories has led to a loss of traditional life, making the group dependent on crops and goods brought in from neighborhood towns by The National Indian Foundation (FUNAI). These circumstances make it very difficult to survive during a pandemic, where roads are closed, and travel is restricted. Therefore, the impacts of Covid-19 on the *Xavante* are examined in the present study.

Development of the Covid-19 Situation in Brazil

After the United States, Brazil accounts to the second most affected country by the current Covid-19 disease.[38] At the end of May 2020, South America was declared the epicenter of the pandemic, mostly because of

35 CULTURAL SURVIVAL. (1992). Xavante. *Cultural Survival Quarterly Magazine.* Available from: https://www.culturalsurvival.org/publications/cultural-survival-quarterly/xavante [cited 2021 May 29].

36 INSTITUTO SOCIOAMBIENTAL. (2021). *Xavante.* Available from: https://pib.socioambiental.org/en/Povo:Xavante [cited 2021 May 30].

37 *Ibid.*

38 WORLD HEALTH ORGANIZATION. (2021). *Brazil: WHO Coronavirus Disease (COVID-19). Dashboard.* Available from: https://covid19.who.int/region/amro/country/br [cited 2021 May 30].

Brazil.[39] The number of deaths related to the disease is particularly high in the country. As a matter of fact, more than 25% of global Covid-19 deaths belong to Brazil.[40] From January 3rd 2020, to May 27th 2021, there have been over 16 million confirmed Covid-19 cases and almost half a million deaths according to the WHO.[41] While numbers were starting to go down in many parts of the world, Brazil reached its Covid-19 peak in March 2021.[42] The record of cases and deaths has led to the collapse of the hospital system and the vaccination process is moving slowly.[43] Hospitals in the most affected cities are overwhelmed and a shortage of oxygen as well as lack of adequate equipment is bringing health care workers before an extraordinary challenge.[44] The new variant of the virus has become especially dangerous for the population. In order to control the situation, the posing of national measures is crucial, but President Bolsonaro claimed to have taken enough action. Since the beginning, the strategy of the government included the buying of massive amounts of drugs rather than encouraging measures proposed by the WHO and other international organizations, such as the use of masks and social distancing.

Hence, there are concerns regarding the impacts of the disease on the indigenous groups inside the country. Due to cases such as the one of Aruká Juma - the last male indigenous leader of the Juma people losing his life to Covid-19[45] - many fear an irreparable loss in the country's indigenous communities. Although indigenous peoples inside Brazil are properly protected from a legal perspective[46], it is often the lack of political will to

39 CASTRO, Marcia C. *et al.* (2021). Spatiotemporal pattern of COVID-19 spread in Brazil. *Science.* Volume 372, Issue 6544.

40 HORTON, Jake. (2021). 'Covid-19: Why have deaths soared in Brazil?' *BBC news.* 2021 Apr 9.

41 WORLD HEALTH ORGANIZATION. (2021). *Brazil: WHO Coronavirus Disease (COVID-19). Dashboard.* Available from: https://covid19.who.int/region/amro/country/br [cited 2021 May 30].

42 THE WORLD BANK. (2021). *The World Bank in Brazil: Overview.* Available from: https://www.worldbank.org/en/country/brazil/overview [cited 2021 June 5].

43 CASTRO, Marcia C. *et al.* (2021). Spatiotemporal pattern of COVID-19 spread in Brazil. *Science.* Volume 372, Issue 6544.

44 CANINEU, Maria L. & ARIDA, Anna L. (2021). 'Covid-19 pandemic ravages Brazil'. *Human Rights Watch.* 2021 March 30.

45 GALARRAGA GORTÁZAR, Naiara. (2021). 'Muere por covid el ultimo indígena varón de los juma de Brasil'. *El País*. 2021 February 19.

46 The Brazilian government voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples (2007) and the American Declaration on the Rights of

comply with existing laws and policies that leads to a different reality for the indigenous population.[47]

The Brazilian Indigenous Health System

Brazil was one of the first countries in South America to propose a national health policy particularly dedicated to indigenous peoples.[48] The in 2002 established 'National Policy for the Health Care of Indigenous Peoples' (PNAPSI) finally led to the creation of an indigenous health subsystem as part of the Brazilian Unified Health System (SUS).[49] It is currently coordinated by the Secretaria Especial de Saúde Indígena (SESAI), which was created later in 2010 after harsh criticism about misuse and corruption, and with the intention to guarantee health with a more ethnic-racial approach.[50] The subsystem consists of 34 local healthcare units called 'Indigenous Special Health Districts' (DSEI) which are spread across the different regions in Brazil.[51] Each district provides primary care to indigenous communities and is supported by several health teams. Since the main idea behind the creation of this model was to include the linguistic, socio-economic, and cultural concepts of indigenous peoples, indigenous health workers, doctors, and nurses form part of the individual health teams. Though certain improvements inside the indigenous healthcare system have been made, the implementation of policies remain problematic and the gap between

Indigenous Peoples (2016) and has also signed ILO Convention 169. Moreover, the Constitution of 1988 recognizes indigenous peoples as the natural owners of the land and guarantees them fundamental rights. The government body FUNAI further works to develop and implement policies related to indigenous peoples. *See* Presidência da República Brasil. (1988). Constituição da República Federativa do Brasil de 1988. Capítulo VIII. Available from http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm; Ministério da Justiça e Segurança Pública. (2021). Fundação Nacional do Índio. Available from: http://www.funai.gov.br/index.php/quem-somos

47 SURVIVAL INTERNATIONAL. (2021). 'Brazil: one year since first indigenous death from Covid-19'. 2021 March 24.

48 LANGDON, Esther J. & CARDOSO, Marina D. (2015). Introdução. In: *Saúde Indígena: Políticas Comparadas na América Latina.* Trindade: Editora da UFSC.

49 MENDES, Anapaula M. *et al.* (2018). The challenge of providing primary healthcare to indigenous peoples in Brazil. *Pan American Journal of Public Health.* Volume 42, E184.

50 MINISTÉRIO DA SAÚDE. (2021). *Sesai.* Available from: https://www.gov.br/saude/pt-br/composicao/saude-indigena-sesai [cited 2021 June 7].

51 PONTES, Ana Lucia de M. & VENTURA SANTOS, Ricardo. (2020). Health reform and Indigenous health policy in Brazil: contexts, actors and discourses. *Health Policy and Planning.* Volume 35, Issue 1.

indigenous peoples and the rest of the population proves that inequalities are still very much persistent.[52] As for that, the increase of financial resources provided for the indigenous health system implementation did only result in minor changes regarding health indicators, and social participation of indigenous members to ensure intercultural dialogue is still a structural deficiency.[53]

Measures taken by the Brazilian Government as a Response to Covid-19 Outbreak

The first Covid-19 case officially registered in Brazil was on February 26th 2020, and the first death had been reported the following month on March 18th.[54] Since then, the number of infections has increased drastically. By the time of the first death, the government had just started to implement physical distancing and confinement measures.[55] Moreover, the government cancelled events expecting a large number of participants and closed schools and universities. It is important to consider that the undertaking of measures was mostly left to the different State governments of the 21 states in Brazil, which is why most measures taken to control the spread of the virus such as temporary curfew and the closing of companies had been decided on a state-basis rather than being adopted nationwide.[56] Thus, a comprehensive lockdown for a specific period, for instance, had never been implemented by the federal government. On the other hand, there have been information campaigns to educate citizens and spread awareness regarding preventive measures such as social distancing, hand hygiene and staying at home.[57] The launch of a mobile phone application to inform the public about important issues did also aim to educate the citizens about the current situation. While

52 *See* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. (2021). *Situation of human rights in Brazil.* OEA?Ser.L/V/II, Doc.9. 2021 Feb 21, para 463.

53 MENDES, Anapaula M. *et al.* (2018). The challenge of providing primary healthcare to indigenous peoples in Brazil. *Pan American Journal of Public Health.* Volume 42, E184.

54 CASTRO, Marcia C. *et al.* (2021). Spatiotemporal pattern of COVID-19 spread in Brazil. *Science.* Volume 372, Issue 6544.

55 DE MOURA VILLELA, Faria *et al.* (2021). Covid-19 outbreak in Brazil: adherence to national preventive measures and impact on people's lives, an online survey. *BMC Public Health.* Issue 152.

56 REVERDOSA, Maria & PEDROSO, Rodrigo. (2021). 'Covid-19 is out of control in Brazil. So why are some officials easing restrictive measures?' *CNN World*. 2021 Apr 12.

57 PETHERICK, Anna *et al.* (2020). Do Brazil's COVID-19 government response measures meet the WHO's criteria for policy easing? *BCS Working Paper Series.* Issue 33.

inland travelling remained possible, borders were shut to foreigners wanting to enter the country. Furthermore, restrictions were adopted which provided for the closing of non-essential businesses.[58] Measures taken to support the nation financially mainly consisted of credit lines made available for small and medium enterprises and an emergency income support of 600 Reais a month.[59] This income support was eliminated in January 2021 and later replaced with a much smaller amount of only 250 Reais. Apart from that, FUNAI has distributed food kits and personal protection items across the country.

Indigenous peoples have also been included in the first priority group of receiving the vaccine, although only those living in demarcated areas were vaccinated.[60] Apart from that, the government has taken measures to support the most affected areas. For instance, as a response to the very severe situation in the city of Manaus, which is home to many indigenous groups. Several health teams were sent by the national health city in order to support those in need and unburden the local health facilities.[61] The State also increased the number of hospital beds and medical equipment, and an emergency hospital was built. Nevertheless, numbers have been rapidly increasing.

Key Findings

Infection and Mortality Rate: Vulnerabilities due to Health and Living Conditions

The first reported Covid-19 case among Brazilian indigenous peoples took place on March 19th, 2020.[62] Almost fourteen months later,

58 Presidência da República Secretaria-Geral Subchefia para Asuntos Jurídicos. Decreto No. 10.282, de 20 de março de 2020.

59 FILHO, Alfredo S. & FEIL, Fernanda. (2021). 'COVID-19 in Brazil: how Jair Bolsonaro created a calamity'. *The Conversation*. 2021 Apr 23.

60 DOS SANTOS COSTA, Ana C., AHMAD, S. & ESSAR, Mohammad Y. (2021). Vaccination: Brazil fails Indigenous people again with two-tier scheme. *Nature*. Volume 593, Issue 510.

61 CUPERTINO, Graziela A. *et al.* (2020). COVID-19 and Brazilian Indigenous Populations. *The American Journal of Tropical Medicine and Hygiene*. Volume 103, Issue 2.

62 SURVIVAL INTERNATIONAL. (2021). 'Brazil: one year since first indigenous death from Covid-19'. 2021 March 24.

48,770 Covid-19 cases have been confirmed within the indigenous population according to the official data provided by the Special Indigenous Health Department (SESAI).[63] The number of total deaths amounts to 690 individuals. However, the Indigenous Organizations of the Brazilian Amazon (COIAB) has started to collect data on indigenous Covid-19 cases since the beginning of the pandemic as part of their Emergency Action Plan and reported a much higher number of cases and deaths.[64] This under-reporting of cases from the public health institution is mainly due to the fact that the government does not include indigenous people from urban areas or people living in isolated territories in their numbers. Apart from that, more than half of the 305 groups have been affected already. The most worrying part is the fact that the infection and mortality rates are much higher in comparison to national rates. According to a study carried out in June 2020 by the *Coordination of the Indigenous Organizations of the Brazilian Amazon (COIAB)* and the *Institute of Environmental Research of the Amazon (IPAM),* the infection rate per 100,000 inhabitants among indigenous groups in the Amazon area was estimated to be 84% higher than the Brazilian average.[65] The study also found that while the national death rate of Covid-19 is around 5%, the rate among indigenous people is around 6.8%, which means that it is 136% higher than the country's average. In the *Xavante* village Namurunja, the lethality rate currently runs at 11,7 %, meaning that it is 234% higher than the national average.[66] Although numbers for other indigenous regions could be lower considering that the Amazon is the area most affected by the virus, this raises the question of why indigenous groups seem to be more vulnerable to the disease compared to the rest of the population.

One of the key issues are the existing health and living conditions. In a statement made by the Chair of the UNPFII, Anne Nuorgam highlights the vulnerability of indigenous peoples to the virus based on the fact that they tend to suffer from poorer health conditions and extreme poverty.[67]

63 MINISTÉRIO DA SAÚDE. (2021). *Boletim Epidemiológico da SESAI*. Available from: https://saudeindigena.saude.gov.br/corona [cited 2021 June 7].

64 FELLOWS, Martha *et al.* (2021). Under-Reporting of Covid-19 Cases Among Indigenous Peoples in Brazil: A New Expression of Old Inequalities. *Frontiers in Psychiatry*. Volume 4, Issue 12.

65 FELLOWS, Martha *et al.* (2020). 'They Are not Numbers. They Are Lives!'. *Saúde Indigena*.

66 RIBEIRO, Bruno. (2020). 'Covid-19: letalidade entre índios Xavantes é 160% maior que a media nacional'. *PDT*. 2020 June 26.

67 NUORGAM, Anne. (202). Statement by the Chair of the Permanent Forum on Indig-

In indigenous communities, the number of diabetes, tuberculosis and malnutrition is often much higher while there are also higher levels of infectious diseases such as HIV/AIDS. Taking into account that such diseases are known to be risk factors when infected with Covid-19, this also leads to more severe cases and an increased need for hospitalization. In the *Xavante* communities, for instance, there have been almost 1,000 confirmed cases and 56 deaths related to Covid-19.[68] According to the member interviewed, most of the severe and fatal cases attribute to elderly people, pregnant women and people with diabetes. The same groups of people had also been much more affected in the *Yanomami* community, which so far have been hit by 1644 confirmed cases and 17 deaths. The seriousness of pre-existing health conditions as a major risk regarding Covid-19 is specifically visible in the case of indigenous people who had been brought to hospitals: While approximately 30 people from the local *Xavante* community had been sent to hospitals, only one person could recover and overcome the disease, the others lost their lives and never returned to the communities. The member of the *Yanomami* also reported that none of the people from his local community who had been brought to the hospital survived. This implies that especially the severe cases have little to no chances to fight the disease due to pre-existing health conditions. In this context, it should also be added that the general life expectancy of indigenous peoples can be up to 20 years lower compared to their non-indigenous counterparts.[69]

Another reason for their increased vulnerability has to do with their traditional cultural behaviors such as the sharing of household utensils, community housing and different hygiene practices, that contribute to a faster spread of the virus once a community is affected.[70] The lack of safe drinking water and difficult access to soap and disinfectant gel also add up to the troubling situation.[71]

enous Issues on COVID-19. *United Nations Permanent Forum on Indigenous Issues*. 2020 April.

68 MINISTÉRIO DA SAÚDE. *Boletim Epidemiológico da SESAI.* Available from: https://saudeindigena.saude.gov.br/corona [cited 2021 June 7].

69 UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS. (2021). *Indigenous Peoples – Health.* Available from: https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/health.html [cited 2021 June 7].

70 CUPERTINO, Graziela A. *et al.* (2020). COVID-19 and Brazilian Indigenous Populations. *The American Journal of Tropical Medicine and Hygiene*. Volume 103, Issue 2.

71 AMIGO, Ignazio. (2020). Indigenous communities in Brazil fear pandemic's impact. *Science.* Volume 368, Issue 6489.

Socio-Economic and Cultural Impacts

There are also a number of social and economic impacts resulting from the Covid-19 outbreak in Brazil. First of all, indigenous peoples often work under poor conditions and the absence of social protection, which makes them suffer even more from the economic consequences of the pandemic. The member of the *Xavante* groups reported that while the community had been hit hard economically the greatest injustice that happened in terms of the pandemic had been the fact that the Special Indigenous Health District (DSEI) responsible for the *Xavante* decided not to hire indigenous teachers unless they received the vaccine or until 80% of the population would be vaccinated. On the other hand, people not belonging to the indigenous communities were hired without those requirements although the schools were indigenous schools specifically for *Xavante* members. According to the respondent, this situation hasn't changed until May 2021 and led to the suffering of many teachers and their families. At the same time, when asking the member of the *Yanomami* people about the economic consequences, he also stated that it had been especially the teachers that have lost their jobs due to the development of the pandemic.

Moreover, indigenous peoples are almost three times as likely to be suffering from extreme poverty in comparison to non-indigenous people.[72] This is especially the case for those living in rural areas. Not only is this a huge problem considering that medicines are expensive and often impossible to afford, but it also makes it very hard for indigenous peoples to follow important measures regarding the spread of the virus.[73] For instance, the rather complicated access to safe water makes frequent hand washing difficult, despite the fact that it is crucial when it comes to preventing infection. Poverty is one of the main problems for indigenous peoples in this pandemic. When asking the member of the *Xavante* about the biggest impacts of the pandemic on the community, his answer was the hunger. He explained that many people depend on the products of the cities. As a result of the rapid inflation, prices for basic necessities have risen which is a huge issue considering that even before the pandemic, many people could not

72 PAN AMERICAN HEALTH ORGANIZATION. (2020). *The Impact of COVID-19 on the Indigenous Peoples of the Region of the Americas: Perspectives and Opportunities.* Available from: https://iris.paho.org/bitstream/handle/10665.2/53428/PAHOEGC-COVID- 19210001_eng.pdf?sequence=1&isAllowed=y [cited 2021 June 7].

73 BUSIJA, Lucy & CINELLI, Renata L. (2018). The Role of Elders in the Wellbeing of a Contemporary Australian Indigenous Community. *The Gerontologist.* Volume 60, Issue 3.

afford enough food.[74] Additionally, the interviewee explained that in order to reach the cities, the people had to pay for boats and gas, however, the increased gas prices made it difficult for the majority of people.[75]

Another social and cultural issue are elderly groups affected by the virus, who play an important role regarding the transmission of knowledge, wisdom and cultural heritage inside indigenous communities.[76] Traditionally, they are responsible for the health and wellbeing of the community, since they possess crucial knowledge for survival gained through life experiences. This includes knowledge of plants, animals and important characteristics regarding the territory. With the elderly being the 'guardians of memory', the indigenous youth in Brazil has expressed their concerns about the pandemics' impact on their communities.[77] This issue particularly affects the smaller tribes of Brazil. Currently, many communities consist of less that 1,000 members.[78] But there are also groups that consist of a few hundred people; the *Akuntsu*, for instance, now only consists of four people. The tragedy of this problem can be seen in the case of the *Juma* people, which lost their last male member to the disease.[79] However, this is only one example of many showing that indigenous tribes are at risk of becoming extinct due to the new Covid-19 disease.

Difficult Access to Health Care

The data collected in this study has also found that difficult access to health systems, hospitals and basic medication is one of the main reasons why indigenous peoples have been severely affected by the Covid-19 disease. As a matter of fact, equal access to healthcare is an important part regarding

74 WILLIAMS, Lachlan. (2020). 'Brazil was the country where food prices rose most during the pandemic'. *The Rio Times*. 2020 Apr 9.

75 The state-run oil company Petrobras has recently declared a 39% increase in natural gas prices. *See* COSTA, Luciano. (2021). 'Brazilian industry asks Bolsonaro for help with soaring power costs'. *Reuters*. 2021 Apr 9.

76 LEITE DA SILVA, Luciana *et al.* (2021). The Articulation of the Indigenous Peoples of Brazil in Facing the Covid-19 Pandemic. *Frontiers in Sociology*. Volume 6.

77 UNICEF. (2021). 'Indigenous youth open up about the impact of the COVID-19 pandemic on their communities'.

78 SURVIVAL INTERNATIONAL. (2021). *The Brazilian Indians*. Available from: https://www.survivalinternational.org/tribes/brazilian [cited 2021 May 21].

79 GALARRAGA GORTÁZAR, Naiara. (2021). 'Muere por covid el ultimo indígena varón de los juma de Brasil'. *El País*. 2021 February 19.

the right to the highest attainable standard of health.[80] The accessibility to health services is widely recognized as a social determinant of health which is why the State has the obligation to ensure it. Considering that many indigenous tribes in Brazil live in isolated areas where there is only little to no access to health services, the conditions are very tough.[81] Access to medical services remains a challenge for remote tribes in the Amazon who must often travel for days by river to see a doctor. Even then, hospitals often lack important equipment needed to treat the Covid-19 disease, such as ventilators and intensive care beds.[82] Particularly the Amazon region, where most indigenous communities live, only has few hospitals with intensive care units which makes it even harder to provide treatment to all the infected. As a consequence, most indigenous peoples depend on traditional therapists.[83] However, the lack of recognition of their own traditional knowledge and health practices remains a serious problem.

While conducting the interview it has been made very clear by both the member of the *Xavante* and *Yanomami* that the access to medicine and health services has been a major problem. Although SESAI has been present in both communities and working together with the local Special Health Districts, only a few received medical attention. Depending on the location of each community, hospitals could be between 6 and 12 hours away due to the conditions of the roads. But most importantly, trips are very expensive. Despite these circumstances, both members interviewed did not appear to be very concerned about the access to medicines and hospitals. Since for both communities the transfer of members to hospitals had not been successful, they reported that the majority of indigenous peoples preferred to be treated with traditional medicines made from herbs and other plants. According to

80 *See* Section 2.3.1.

81 UNITED NATIONS. (2018). State of The World's Indigenous Peoples: Indigenous Peoples' Access To Health Services. Available from: https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/03/The-State-of-The-Worlds-Indigenous-Peoples-WEB.pdf [cited 2021 June 7].

82 SANTOS, Victor S. & ARAÚJO, Adriano A. S. (2020). COVID-19 mortality among Indigenous people in Brazil: a nationwide register-based study. *Journal of public health*. Volume 43, Issue 2.

83 PAN-AMERICAN HEALTH ORGANIZATION. (2009). *Prestación de servicios de salud en zonas con pueblos indígenas: Recomendaciones para el desarollo de un Sistema de licenciamiento y acreditación de servicios interculturales de salud en el marco de la renovación de la atención primaria de la salud.* Available from: https://www.paho.org/hq/dmdocuments/2009/servicios%20salud%20zonas%20indigenas.pdf [cited 2021 June 7].

the member of the *Xavante*, after seeing that individuals were not coming back from the hospitals, the whole group decided that they did not want to attend medical attention from non-indigenous and preferred to stay in their communities to pass the disease or even to die in their own homes. This shows that the lack of providing proper health care to indigenous also led to the lack of trust in the same context. Considering that the health system in Brazil had already been failing, it can be assumed that the State was not pre-occupied with convincing indigenous people to seek medical attention in the hospitals.

Regarding the Covid-19 vaccines, there have been a few differences between both indigenous groups. According to the *Yanomami*, the whole community has already gotten the second dose of the vaccine. On the other hand, he stated that there was a great resistance inside the community to getting the Covid-19 vaccine which was mainly due to fake news that spread across the group. After President Bolsonaro expressed that he does not give priority to vaccinating the population, and that if people 'would turn into an alligator, it would not be his problem'[84], the mistrust had increased which led to indigenous members refusing to get vaccinated. From the perspective of the *Xavante*, who had sent members to hospitals with only one returning, it can be understood that the general mistrust in the government to help the community in this Covid-19 situation had been growing. The interviewee explained that with the continuous spreading of fake news, it took a while until members could be convinced to change their minds about the vaccine. However, it is not clear how many have yet received it.

Invaders: Territorial issues

The impacts of Covid-19 are broad and complex as they go beyond health, economic and territorial issues.[85] Back-and-forth movements between urban centers and indigenous areas also lead to an increased risk for the spread of the virus inside the populations. Invaders such as gold miners,

84 JUCÁ, Beatriz. (2020). 'Chip na vacina, "virar jacaré" e outros mitos criam pandemia de desinformação na luta contra a covid-19'. *El País.* 2020 Dec 21.

85 According to the *Report of the National Truth Commission. (2020),* there are approximately 40,000 miners present in the Yanomami indigenous land which contributed to the death of thousands of indigenous people. *See* Report of the National Truth Commission. Violations of the Human Rights of Indigenous Peoples Volume II – Thematic Texts. Available from: http://cnv.memoriasreveladas.gov.br/images/pdf/relatorio/Volume%202%20-%20Texto%205.pdf [cited 2021 June 7].

loggers and land grabbers are illegally entering indigenous territories and therefore constitute a major threat towards the communities.[86] Besides continuing to exploit such territories, these people often disrespect important measures such as social distancing, the wearing of masks and reporting on Covid-19 symptoms.[87] The lack of protective mechanisms and policies aiming to prevent such illegal invasions increase the risk of contaminating indigenous people living in forest areas that are technically protected by law, as well as communities who have put themselves in voluntary isolation.[88] With President Bolsonaro adopting anti-environmental measures for the Amazon and therefore easing access of the agribusiness industry, illegal invaders are taking advantage of the Covid-19 situation to optimize their profits in areas previously considered as indigenous land.[89] Nevertheless, not only illegal invaders are bringing the virus into the indigenous territories. For instance, in the northern region, it has been found that the contagion of indigenous peoples was caused by members of the SESAI and the Brazilian Army.[90]

While interviewing a member of the *Xavante*, he reported that it was also the case that many members who had been working in the cities and lost their jobs due to the pandemic had to return home to their communities. Apparently, FUNAI later installed entrance gates in order to regulate people getting in and coming out of the territories. However, only a few barriers were maintained throughout the pandemic which led to uncontrolled in-and-out movements of the communities' territory. The problem of illegal invasion is nevertheless a much bigger issue for the *Yanomami* people who had been dealing with problematic invasions since the 1970s.[91] Since then, thousands of deaths among the *Yanomami* have occurred as a result of

86 FELLOWS, Martha *et al.* (2021). Under-Reporting of Covid-19 Cases Among Indigenous Peoples in Brazil: A New Expression of Old Inequalities. *Frontiers in Psychiatry*. Volume 4, Issue 12.

87 PHILIPS, Dom. (2020). 'Miners out, Covid out': threats to indigenous reserve in Brazil grow'. *The Guardian*. 2020 Dec 29.

88 PALAMIM, Camila V. C., MARQUES ORTEGA, Manoela & LIMA MARSON, Fernando A. COVID-19 in the Indigenous Population of Brazil. *Journal of Racial and Ethnic Health Disparities.* Volume 7, Issue 6.

89 FERRANTE, Lucas & FEARNSIDE, Philip M. (2020). Brazil threatens Indigenous lands. *Science*. Volume 368, Issue 6490.

90 LEITE DA SILVA, Luciana *et al.* (2021). The Articulation of the Indigenous Peoples of Brazil in Facing the Covid-19 Pandemic. *Frontiers in Sociology*. Volume 6.

91 *Ibid.*

roughly 40,000 miners invading their territories. It is also believed that illegal miners have brought the Covid-19 virus to the *Yanomami* territory, not only according to the interviewee.[92] Apart from that, he reported that the people illegally entering their territory did not adhere to wearing masks at all times and keeping the necessary distance to the *Yanomami*. The government had also put a few barriers to regulate the entrance, however, it was much easier for people to enter the territory from the outside than indigenous people leaving the villages from the inside. Complaints about this situation have not been heard by the government, not even when a precautionary measure was filed with the Inter-American Court in June 2020 to prevent the invasion of unauthorized miners.[93]

Measures not taken by the Government: Insufficient State Action?

A lot of criticism has been communicated towards the current Brazilian government under President Jair Bolsonaro for not taking the situation seriously enough.[94] Throughout the pandemic, he has many times downplayed the risks of the situation and told citizens to 'stop whining' while continuing to blocking restrictions taken by state governments.[95] To the contrary, he has been encouraging the population to carry on with their lives without respecting social isolation: Phrases that he has publicly used throughout the pandemic included "One day, we will all die anyway", "It's just a light flu" and "No need to panic".[96]

The WHO has also shared their concern about the handling of the rapid outbreak, especially after the Senate started investigating against the government's response.[97] Despite some measures taken, the situation is worsening daily which demonstrates the ineffectiveness and calls for the adoption of more strict, national measures. Apart from the handling of the

92 AMAZONIA SOCIOAMBIENTAL. (2020). 'El covid-19 se propaga en el Amazonas y pone en peligro a una tribu antigua'. 2020 Oct 3.

93 FACULTY OF LAW OF THE UNIVERSITY OF SÃO PAULO. (2021). *Development and Indigenous Peoples' Law: Research Report.*

94 PHILLIPS, Tom. (2021). 'Brazil's Covid-19 response is worst in the world, says Médecins Sans Frontières'. *The Guardian.* 2021 Apr 15.

95 BBC NEWS. (2021). 'Covid: Bolsonaro tells Brazilians to 'stop whining' as deaths spike'. 2021 March 5.

96 BBC NEWS. (2020). 'Remember Bolsonaro phrases about covid-19'. 2020 July 7.

97 SIMÕES, Eduardo. (2021). 'WHO warns on Brazil COVID-19 outbreak as Bolsonaro blasts Senate inquiry'. *Reuters.* 2021 Apr 9.

pandemic, the new policies and agenda of Bolsonaro's government, which represent the interest of companies and major landowners in the country, 'directly threaten the constitutional rights and freedoms of indigenous peoples in Brazil'.[98] One of the main issues is the fact that important institutions created to ensure the protection of indigenous peoples are losing financial support, such as FUNAI.[99] Moreover, the policies constructed for the protection of peoples living in (voluntary) isolation are being pulled apart. The most critical aspect is the fact that individuals with power inside those institutions are being more and more influenced by the agribusiness while pushing the indigenous agenda to the background.[100] In a report published by the International Work Group for Indigenous Affairs (IWGIA)[101], it is also stated that the institution responsible for indigenous health SESAI has been weakened during the pandemic. For instance, there had been a ban on employing more doctors and medical staff as well as disrupting the work of NGO's. Even though indigenous peoples had been officially recognized as a vulnerable group in the Covid-19 pandemic[102], it is stated that the president had been responsible for crossing out certain provisions that would oblige the state to provide safe drinking water, food and access to medicine and health care services. Furthermore, it has also been criticized that the cooperation between public institutions and indigenous peoples to develop action plans and design measures has not been carried out very effectively. Conferences between the Federal Government and indigenous leaders fail to acknowledge the social reality of indigenous communities, who do not have the resources and capabilities to adopt certain measures such as social distancing and the

98 INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS. (2021). *Indigenous peoples in Brazil*. Available from: https://www.iwgia.org/en/brazil.html#:~:text=Indigenous%20peoples%20in%20Brazil&text=The%20principal%20indigenous%20ethnic%20group,%2C%20while%2076.9%25%20speak%20Portuguese [cited 2021 June 7].

99 PHILIPS, Dom. (2017). 'Brazil's indigenous people outraged as agency targeted in conservative-led cuts'. *The Guardian*. 2017 July 10.

100 The current president of FUNAI has been known to prevent demarcation of indigenous territory and promote the economic use of their lands, such as mining. *See* CHIARETTI, Daniela & DE MOURA E SOUZA, Marcos. (2020). 'Especialistas atacam nova política da Funai. Valor econômico'. *Valor*. 2020 June 17.

101 MAMO, Dwayne. (2021). The Indigenous World 2021. *The International Work Group for Indigenous Affairs*.

102 The Bill 1142/2020 was issued on the 7th of July 2020 and provides for an Emergency Plan regarding the Covid-19 pandemic. Indigenous peoples have been recognized as an 'extremely vulnerable group'. *See* Atos do Poder Legislativo. LEI N. 14.021, DE 7 DE JULHO DE 2020.

use of soap and disinfectant.[103] Another issue is the fact that the Brazilian Government is ignoring measures and guidance provided by international institutions such as the WHO.[104] The failure to comply with international standards has officially been announced by the Brazilian Ministry of Health. Demonstrating the severe consequences of the insufficient state action during the pandemic, a group of different organizations and professionals has filed a complaint before the International Criminal Court accusing the president of Crime against Humanity.[105]

IV. CONCLUSIONS

With the rapid outbreak of Covid-19, ensuring the right to health for indigenous peoples has become even more challenging. Both indigenous communities analyzed in this case study have been significantly affected by the virus. Not only has the pandemic helped to visualize the alarming living conditions in which they live, but also did it disclose existing gaps between legal protection and social reality for these peoples. Given their special vulnerabilities, the Covid-19 disease poses a serious threat to the indigenous population in Brazil. First of all, poor health conditions with high levels of infectious diseases have resulted in higher mortality rates compared to the rest of the population. Second, limited access to healthcare and medicines in a time where national health systems are collapsing also contributes to a higher number of deaths. Throughout the pandemic, only the minority of indigenous peoples have received medical attention owing to the fact that hospitals are too far away for most communities. This circumstance has resulted in increased dependency on traditional medicines and healers. Help from the outside has mostly been provided by relatives living in the cities and indigenous organizations. Since they generally suffer from high levels of poverty, indigenous peoples have also been disproportionally affected by the economic impacts of the pandemic. As a consequence, existing problems

103 ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC) *et al.* (2021). *The impact of COVID-19 on indigenous peoples in Latin America (Abya Yala): between invisibility and collective resistance.* Project documents (LC/TS.2020/171). Available from https://www.cepal.org/sites/default/files/publication/files/46698/S2000893_en.pdf [cited 2021 June 9].

104 CARNUT, Leonardo, MENDES, Áquilas & GUERRA, Lucia. (2020). Coronavirus, Capitalism in Crisis and the Perversity of Public Health in Bolsonaro's Brazil. *International Journal of Health Services*. Volume 50, Issue 1.

105 SIQUIERA, Flavio. (2021). 'Does Jair Bolsonaro commit crimes against humanity by devasting the Amazon rainforest?'. *Open Global Rights.* 2021 Feb 17.

such as malnutrition and the non-ability to afford medicines are increasing. Apart from that, there is much concern about the cultural dimension of indigenous peoples in the scope of the pandemic. On the one hand, the crucial role of the elderly when it comes to transferring ancestral knowledge and traditions are a serious problem considering that they belong to high-risk groups. On the other hand, the collective way of living and the lack of information and resources leads to a faster spread of the virus inside the communities. These factors also make it impossible to comply with isolation requirements and protective measures. Moreover, the lack of political will and incapability to address the special vulnerabilities of indigenous peoples in this health crisis seriously threaten their livelihoods. Outsiders are illegally entering their territories and damaging the environment, while at the same time increasing the risk of contagion and bringing the disease to remote areas. This is especially dangerous for uncontacted and poorly connected groups, who do not have the same immunological defenses. Therefore, the provision of Covid-19 vaccines to indigenous peoples is an important tool to prevent the extinction or tremendous decimation of indigenous groups. Although states have recognized the prioritization of indigenous peoples as regards to the vaccine, actions undertaken to prevent serious damages to the communities have not proven to be very efficient.

The outbreak of Covid-19 disease and continuous spread across the country continue to pose a major threat for the indigenous population in Brazil. Although some groups have started to impose their own measures and go into voluntary isolation[106], there is a need for effective government policies that ensure the protection of their health and prevention of illegal economic actions inside indigenous territories. Insufficient state action and the denial of the severeness of the situation further make a positive development of the pandemic and decrease in infections and deaths seem difficult.

Hence, immediate action is needed to guarantee indigenous peoples' rights and prevent another historical decimation of the indigenous population. The first step is to transform the strong legal basis into concrete action plans with sufficient resources to ensure their realization. The right to health for indigenous peoples as a strong determinant of other basic human rights must be protected, not only to compensate for the serious damages done to them in the past, but also to recognize their significant role in society

106 AMIGO, Ignazio. (2020). Indigenous communities in Brazil fear pandemic's impact. *Science.* Volume 368, Issue 6489.

as ancestors of our lands.

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THE INTERNATIONAL CRIMINAL COURT: A NEW FORUM FOR THE PROTECTION OF INDIGENOUS PEOPLE'S RIGHTS IN BRAZIL?

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Abstract: This paper aims to investigate and analyze how the International Criminal Court can function as an effective legal forum for the protection of indigenous people's rights in Brazil. Since Jair Bolsonaro's election to President of Brazil in 2019, indigenous communities in the country have been subjected to a speedy and continuous deprivation and degradation of their rights. Upon entering in office, President Bolsonaro soon enacted a number of structural changes aimed at weakening if not completely dismantling the measures safeguarding the Amazon Forest and the rights of the indigenous communities living in the Rainforest. Multiple discriminatory statements that have further reiterated the President's anti-indigenous views have accompanied such actions. Just at the beginning of the month, Brazil's Indigenous People Articulation (APIB) has filed a statement before the International Criminal Court as a request to investigate the alleged crimes against humanity and genocide committed by President Bolsonaro. In light of these considerations, an historical overview of the recognition of environmental crimes under International Criminal Law is provided, starting from the creation of the term 'ecocide' in 1970 until the 2016 Policy Paper on case selection and prioritization of the Office of the Prosecutor. This is followed by a brief outlook concerning the historical discrimination suffered by indigenous communities in Brazil from the colonial era until now. Finally, the various legal claims that indigenous people could bring before the International Criminal Court have been assessed. The main focus lies on crimes against humanity, specifically the forcible transfer and persecution of indigenous people, but the crime of genocide is also briefly considered.
Key words: International Criminal Law, Indigenous People's Rights, Amazon Forest, Brazil, Environmental Crimes

I. INTRODUCTION

"*If I become President there will not be a centimeter more of indigenous land*" were the words said by Jair Bolsonaro during his election campaign in February 2018. Throughout his run for the Presidency in Brazil, Bolsonaro made no secret of his discriminatory views on indigenous people

and his intentions to limit the protection of their environment as much as possible. His opinions turned into concrete anti-indigenous policies as soon as he entered in office and since then, he has made it his mission to weaken the protection of indigenous people's lands and resources as much as possible.[1] His policies have had a disastrous effect on the environment, with deforestation in the Amazon increasing by 29.5% from August 2018 to July 2019, as well as indigenous communities, who have been forcibly displaced by loggers, miners and farmers.[2] In response, in late 2019 Brazilian attorneys and human rights advocates from Brazil's Human Rights Advocacy Collective and the Dom Paulo Evaristo Arns Commission for Human Rights requested the Office of the Prosecutor of the International Criminal Court to initiate an investigation into Bolsonaro's criminal conduct, which they argue amounts to crimes against humanity and incitement to genocide.[3] At the beginning of the month, the Articulation of Indigenous Peoples of Brazil (APIB) has formally asked the International Criminal Court to investigate the Brazilian President for the alleged commission of the crimes of ecocide and genocide. According to the APIB, Bolsonaro has been leading "an explicit, systematic and intentional anti-Indigenous policy" since entering into office in 2019. Such claims are triggered by the devastating effects that the Bolsonaro Presidency has had on indigenous communities in Brazil, who have been subjected to increasing human rights violations by both illegal invaders of their lands and the government and have seen crucial institutional safeguards of their lands being wiped out.[4] Such claim has restarted the conversation around the International Criminal Court's capacity to prosecute environmental crimes. Most recently, in June 2021, an Independent Expert Panel for the Legal Definition of Ecocide has

1 CHARLES, Keira. (17 July 2019). Bolsonaro's stance on land demarcation rights. *The Borgen Project*. Accessed at https://borgenproject.org/bolsonaros-stance-on-land-demarcation-rights/.

2 CANINEU, Maria Laura & CARVALHO, Andrea. (1 March 2020). Bolsonaro's Plan to Legalize Crimes Against Indigenous Peoples. *Human Rights Watch*. Accessed at https://www.hrw.org/news/2020/03/01/bolsonaros-plan-legalize-crimes-against-indigenous-peoples.

3 MILHORANCE, Flavia. (23 January 2021). Jair Bolsonaro could face charges in The Hague over Amazon rainforest. *The Guardian*. Accessed at https://www.theguardian.com/world/2021/jan/23/jair-bolsonaro-could-face-charges-in-the-hague-over-amazon-rainforest.

4 ALJAZEERA. (9 August 2021). Brazil Indigenous group sues Bolsonaro at ICC for 'genocide'. *AlJazeera News*. Accessed at https://www.aljazeera.com/news/2021/8/9/brazil-indigenous-group-sues-bolsonaro-at-icc-for-genocide.

proposed an amendment to the Rome Statute with the addition of a crime of ecocide in Article 8.[5] In light of the recent events, this research paper will investigate how International Criminal Law could be a tool for the prosecution of environmental crimes against the indigenous communities in Brazil. Firstly, the historical background surrounding the legal framework on the prosecution of environmental crimes under International Criminal Law will be presented. Secondly, the situation of indigenous people in Brazil will be discussed starting from the colonial era, through the dictatorship and until the Bolsonaro Presidency. Finally, the various claims the indigenous communities could bring during a hypothetical case before the International Criminal Court will be discussed. While the main focus lies on crimes against humanity, specifically the forcible transfer and persecution of indigenous people, the crime of genocide is also briefly considered. It must be noted that issues relating to the admissibility of the case before the Court and its jurisdiction fall outside the scope of the paper.

II. AN HISTORICAL JOURNEY ON THE PROSECUTION OF ENVIRONMENTAL CRIMES UNDER THE ROME STATUTE

The term 'ecocide' was first used during the Vietnam War to refer to the United States' use of chemical warfare and the resulting extreme environmental destruction in Vietnam. While speaking at the 1970 Conference on War and National Responsibility, Professor A. W. GALSTON proposed a new international agreement to ban 'ecocide', as stating: "it seems to me that the willful and permanent destruction of environment in which a people can live in a manner of their own choosing ought similarly to be considered as a crime against humanity, to be designated by the term ecocide"[6]. GALSTON claimed that the US forces' use of Agent Orange in Vietnam was causing lost-lasting environmental damage and that it constituted a violation of the UN's Resolution against the wartime use of poisonous gases.[7] After his statements, the term 'ecocide' started to become popular among legal

5 STOP ECOCIDE FOUNDATION. (June 2021). Independent Expert Panel for the Legal Definition of Ecocide: commentary and core text. Accessed at https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf.

6 ZIERLER, David. (2011). *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment*. Athens, Georgia: University of Georgia Press, pp.19-20.

7 ZIERLER, David. (2011). *The Invention of Ecocide: Agent Orange, Vietnam, and the Scientists Who Changed the Way We Think About the Environment*. Athens, Georgia: University of Georgia Press, p.17.

scholars, who increasingly incorporated it in their articles addressing the use of chemical weapons in the Vietnamese War. However, at that point their understanding of the crime of ecocide was limited to an act of war, thus not considering its commission during peacetime.[8]

The conversation around the crime of ecocide that initiated in the United States soon spilled over at the international level, more specifically at the UN Conference on the Human Environment in Stockholm (hereinafter: the Stockholm Conference or the Conference), the first major UN Conference on international environmental issues. Many political leaders, such as the Swedish and Indian Prime Ministers, acknowledged the disastrous effects that war had on the environment and defined the "indiscriminate bombing, by large-scale use of bulldozers and herbicides an outrage sometimes described as ecocide, which requires international attention"[9]. The Stockholm Conference also focused on wider issues such as transnational pollution and environmental degradation, as the first declarations of principles of international environmental law were developed.[10]

A number of unofficial events and panels were held next to the Conference. A relevant unofficial panel was the Environmental Forum, where various non-governmental organizations that could not participate in the actual UN Conference gathered to discuss the need for a crime of ecocide. However, the most important unofficial panel was the People's Summit, where participants discussed the creation of a law against ecocide and eventually formed a Working Group on the Law against Genocide and Ecocide tasked with developing an Ecocide Convention.[11] The Draft Convention, later called International Convention on the Crime of Ecocide, contained a detailed analysis, definition and framework for the proposed crime of ecocide.[12] The Convention's first notable element was that the destruction of the environment was to be recognized as a crime in both wartime and peacetime.[13] Furthermore, the criminal intent required by the Draft Convention was that to disrupt or destroy, in whole or in part, a human

8 Ibid, p.35.

9 BJORK, Tord. (1996). The emergence of popular participation in world politics: United Nations Conference on Human Environment 1972, p.20. Accessed at https://www.laka.org/docu/boeken/pdf/6-09-0-00-51.pdf#page=2.

10 Ibid, p.22.

11 Ibid, p.22.

12 FALK, Richard A. (1973). Environmental Warfare and Ecocide: Facts, Appraisal and Proposals. *Belgian Review of International Law*. Volume 9, Number 1, p.1.

13 Ibid, p.20.

ecosystem. Instead of containing a precise definition of the crime of ecocide, the Proposed Convention outlined a number of actions that, if perpetrated with the intent of disrupting or destroying either partially or entirely a human ecosystem, would amount to ecocide.[14] Among these actions were the use of weapons of mass destruction; the use of chemical herbicides to defoliate and deforest natural forests for military purposes; the use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops; the use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes; the use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war and the forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives.[15]

Upon being presented before the United Nations in 1973, the UN Sub-Committee was tasked with evaluating the effectiveness of the newly presented proposal and to consider potential changes. In 1978, the Committee delivered its findings in a 'Study of the Question of the Prevention and Punishment of the Crime of Genocide', where it discussed the possibility of drafting additional conventions criminalizing acts against the environment as well as proposals to include the crimes of ecocide and cultural genocide within the Draft Convention. In regards to the definition of ecocide, the Sub-Committee outlined different options in its Proposal: ecocide as an international crime similar to genocide, ecocide as a war crime and ecocide as actions to influence the environment for military purposes. In a 1985 update to the Study, the definition of ecocide was broadened to include "adverse alterations, often irreparable, to the environment - for example through nuclear explosions, chemical weapons, serious pollution and acid rain, or destruction of the rain forest - which threaten the existence of entire populations, whether deliberately or with criminal negligence". Furthermore, the Sub-Commission advocated for the inclusion of the crime of ecocide in the 1948 Genocide Convention. Despite its forward-looking nature, the initial Draft Convention remained a non-binding instrument and the Sub-Commission's proposal to include ecocide in the Genocide Convention was not considered further.[16]

14 Ibid, p.21.

15 FALK, Richard A. (1973). Environmental Warfare and Ecocide: Facts, Appraisal and Proposals. *Belgian Review of International Law*. Volume 9, Number 1, p.21.

16 GREENE, Anastasia. (2019). The Campaign to Make Ecocide an International Crime: Quixotic Quest or Moral Imperative?. *Fordham Environmental Law Review*. Volume

The discussion around the inclusion of the crime of ecocide was picked up again by the International Law Commission (hereinafter: ILC or Commission) as it continued to draft the statutes for a permanent international criminal court. Between 1984 and 1986, the Commission took into consideration the possibility of including a law concerning environmental damage in the draft Code meant to outline the work of the future tribunal. The proposed crime was defined as "acts causing serious damage to the environment" and included a willful intent requirement. However, the latter was met with objection by various countries who found the *mens rea* requirement to be too strict.[17] In 1991, the ILC created the Draft Code of Crimes against the Peace and Security of Mankind. In its Article 26, the Draft Code included an environmental crime, called 'willful and severe damage to the environment', stating "an individual who willfully causes or orders the causing of widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced". Not only did the provision recognize widespread environmental damage as a crime against the peace and security of humankind, but it also acknowledge the existence of such crime during peacetime.[18] However, when the final Draft Code was presented and voted on by the General Assembly in 1996, Article 26 was no longer present. This was due to the strong opposition the provision was perceived with by various government officials, who questioned whether environmental issues could put in such jeopardy the peace and security of humanity. The ICL also refused to incorporate the crime of willful and severe damage to the environment as one of the offences enlisted under Article 21 on crimes against humanity. Instead, the Final Draft of the Code only made mention of environmental crimes under Article 22 on War Crimes. It follows that with the scrapping of Article 26, the future Rome Statute came to lack any recognition of the crime of ecocide in a self-standing provision.[19]

Despite such failure, the Commission tried to bring forward important developments to the law on international environmental crimes once again in 2001 through its Draft Articles on the State Responsibility,

30, Number 3, pp.11-12.

17 Ibid, p.15.

18 PEREIRA, Ricardo. (2020). After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritization: Towards An International Crime of Ecocide?. *Criminal Law Forum*. Volume 30, p.185.

19 PEREIRA, Ricardo. (2020). After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritization: Towards An International Crime of Ecocide?. *Criminal Law Forum*. Volume 30, p.186.

where it included provisions stating "the breach of rules concerning the environment may constitute (…) in some cases, an international environmental crime".[20] These provisions would form the basis for the establishment of an international crime of ecocide. The Commission went even further by recognizing the role played by States' breaches in the destruction of the environment: Article 19(3) of the Draft Articles stated that "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment" could constitute an international crime, such as "massive pollution of the atmosphere and the high seas". The recognition of criminal state responsibility for the commission of environmental damages was quiet innovative and bold, as previous pieces of legislation has focused on establishing individual responsibility. However, while the proposed provisions would have brought an important advancement to the recognition of the international crime of ecocide, the Final Draft Articles adopted in November 2001 ended up excluding any reference to environmental offences triggering criminal state responsibility. In fact, instead of recognizing environmental crimes as international crimes, the 2001 ICL Articles outlined the legal consequences of the breach of peremptory norms of international law without specifying what those norms would be.[21]

The incorporation of a crime against the environment under International Criminal Law was taken into consideration again in 2010, as UK-based lawyer P. HIGGINS proposed the UN Law Commission to amend the Rome Statute to include "ecocide" as a fifth crime against peace. According to her proposed amendment, ecocide was to be defined as "the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished"[22]. HIGGINS' proposal was groundbreaking for various reasons. Firstly, along the lines of the 2001 ICL's Proposed Articles on the State Responsibility, she sought to hold accountable not only big businesses but also nations.[23] In

20 Ibid, p.186.

21 PEREIRA, Ricardo. (2020). After the ICC Office of the Prosecutor's 2016 Policy Paper on Case Selection and Prioritization: Towards An International Crime of Ecocide?. Criminal Law Forum. Volume 30, pp.187-188.

22 HIGGINS, Polly. (2010). *Eradicating Ecocide: Exposing the Corporate and Political Practices Destroying the Planet and Proposing the Laws Needed to Eradicate Ecocide.* London: Shepheard – Walwyn.

23 HIGGINS, Polly; SHORT, Damien & SOUTH, Nigel. (2013). Protecting the planet: a

fact, the provision would apply to any senior person committing ecocide while carrying out State, corporate or any other entity's activities in times of peace or conflict.[24] Secondly, in stark contrast with the other core crimes recognized under the Rome Statute, the crime of ecocide would not require a criminal intent, as it was framed to be a crime of consequence rather than one of specific intent.[25] Thirdly, it was recognized that ecocide could be either caused by humans or naturally by making a distinction between ascertainable and unascertainable ecocide.[26] Fourthly, the proposed piece of legislation took into account the effect that severe environmental damage could have on the inhabitants of the impacted territory, which would include indigenous occupants or settled communities, as well as animals, fish, birds or insects, plants species and other living organisms. Fifthly, the model law applied the very high threshold of "serious ecological, climate or cultural loss or damage to or destruction of ecosystem of a given territory, such that peaceful enjoyment by the inhabitants has been or will be severely diminished". To assess such seriousness, "impact(s) must be widespread, long-term or severe."[27]

It follows that, throughout the Rome Statute the protection of the environment is only explicitly recognized in Article 8(2)(b)(iv), which prohibits intentionally launching an attack in the knowledge that such attack will cause widespread long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated". While recognizing the importance of protecting the environment against those acts that could lead to mass and long-lasting damages, the provision has various shortcomings. Firstly, the 'widespread, long-term and severe damage' criteria constitutes a very high threshold, which is difficult to meet.[28] Secondly, its applicability

proposal for a law of ecocide. *Crime, Law and Social Change*. Volume 59, Number 3.

24 Ibid, p.68.

25 Ibid, p.68.

26 HIGGINS, Polly; SHORT, Damien & SOUTH, Nigel. (2013). Protecting the planet: a proposal for a law of ecocide. *Crime, Law and Social Change*. Volume 59, Number 3, p.63.

27 HIGGINS, Polly. Ecocide Crime – The Model Law – proposed amendment to the Rome Statute. *Ecocide Law*. Accessed at https://ecocidelaw.com/polly-higgins-ecocide-crime/.

28 MISTUSA, Alessandra. (2018). Is There Space for Environmental Crimes Under International Criminal Law? The Impact of the Office of the Prosecutor Policy Paper on Case Selection and Prioritization on the Current Legal Framework. *Columbia Journal of Environmental Law*. Volume 43, Number 1, p.211.

depends on the breach of the proportionality test, meaning that the environmental damage caused has to be disproportionate in comparison to the gained military advantage.[29] Thirdly, the provision only applies to attacks against the environment carried out during armed conflicts, thus leaving out those happening in peacetime.[30]

While the 2010 proposal by Professor P. HIGGINS sparked interest at the international level, especially among the increasingly growing grassroots movement advocating for the recognition of the crime of genocide, it was not met with such curiosity by the International Criminal Court. However, throughout the years the The Hague-based International Tribunal has increasingly recognized the detrimental effects of crimes against the environment. In its 2016 Policy Paper on case selection and prioritization, the Office of the Prosecutor added that environmental concerns should be included in the assessment of the manner of commission and impact of the crime. In fact, the Prosecutor stated that particular consideration would be given to the prosecution of crimes contributing to environmental destruction.[31] When it comes to the manner of commission, it should be considered whether the crimes recognized in the Rome Statute are perpetrated by means of, or resulting in, the destruction of the environment. Furthermore, when assessing the impact of these crimes, particular attention should be paid to those crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.[32] This way, the Prosecutor acknowledges that ecological destruction, can lead to the commission of the crimes enshrined in the Rome Statute.

While in principle, the International Criminal Court Policy Paper appears as a step forward, many limitations spark doubts regarding the Court's capacity to address environmental crimes. The exclusion of environmental destruction during peacetime is particularly problematic, as the majority of environmental crimes take place outside of conflict situations. Furthermore, some of the most common and damaging attacks on the environment, such as land grabbing and deforestation, can only be prosecuted if they destroy a population. Another important obstacle to prosecution remains the *mens*

29 Ibid, p.212.

30 Ibid, p.210.

31 INTERNATIONAL CRIMINAL COURT. (15 September 2016). Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation. *The International Criminal Court,* p.14

32 Ibid n.28, pp.201-203.

rea element that is required by the core crimes outlined in the Rome Statute, under which environmental crimes would be prosecuted. Furthermore, it does not create a new crime of ecocide and does not extent the scope of application of the existing crimes.

Until now, the International Criminal Court has never heard cases on environmental crimes falling under Article 8(2)(b)(iv) Rome Statute. However, the case *Prosecutor v. Omar Hassan Ahmad al Bashir* constitutes the first instance in which the Court considered how the means of commission of a crime affected the environment when assessing its gravity and admissibility. In the case at hand, the Sudanese Liberation Army led by Al Bashir polluted water and destructed food, shelter, crops, livestock and wells and water pumps, all fundamental means for the survival of the targeted minority groups Fur, Masalit and Zaghawa groups. The Court concluded that the destruction of such fundamental means of survival constituted a deliberate infliction of "conditions of life calculated to bring about its physical destruction in whole or in part", as a form of the crime of genocide. In its reasoning, the Prosecutor put particular emphasis on the gravity of the contamination, poisoning and destruction of wells and water pumps, as it considered access to water as a fundamental aspect for life and the denying thereof as a depravation of the necessary means for a group's survival.[33] While in the case at hand the Court did not directly address the issue of environmental crimes, it acknowledged how environmental destruction could be used as a means to commit the other core crimes enshrined in the Rome Statute, such as genocide.

III. INDIGENOUS COMMUNITIES IN BRAZIL: A HISTORY OF DISCRIMINATION AND VIOLENCE

According to a survey of the International Work Group for Indigenous Affairs, indigenous persons form part of 0.4% of the Brazilian population, amounting to 900.000 individuals with 305 ethnicities.[34] Indigenous communities share a peculiar connection with their territories, as they are central to their culture, sustainment and wellbeing. The nature surrounding them is not only a source of nourishment and resources but also of wisdom, meaning the survival of indigenous communities is directly linked and thus dependent on the existence of their sacred ancestral lands. This makes indigenous peoples in Brazil the most skilled and dedicated

33 Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09-3 (May 6, 2019).

34 SURVIVAL INTERNATIONAL. The Brazilian Indians. Accessed 25 July 2020 https://www.survivalinternational.org/tribes/brazilian.

guardians of the territories they reside in, as they use their ancestral knowledge to safeguard their lands' biodiversity and heritage while using their materials in a sustainable and environmentally friendly way. It follows that indigenous communities and their lands have a relationship of co-dependency, as they depend on one another to survive.[35]

The special relationship between indigenous communities and their ancestral lands has been recognized by multiple pieces of legislation at both the international and the national level, with the Brazilian legal system itself providing a number of safeguards. The rights of indigenous people are outlined in Chapter VIII of the Brazilian Constitution, with many provisions specifically safeguarding their exclusive right to the possession and use of their traditional lands, as they are the only ones entitled to the enjoyment of the riches of the soil, the rivers and the lakes existing on their lands. Article 231 of the Brazilian Constitution specifically outlines a number of protections against the abuse and exploitation of indigenous lands: the removal of indigenous peoples from their ancestral lands is prohibited together with their occupation by outsiders.[36]

Indigenous communities in Brazil have always been subject to violence and discrimination. European colonialism led first to the death of millions of indigenous people due to newly imported diseases and then to the enslavement of the surviving ones until the end of the 1888.[37] During that time, many tribes were also forced to move from their ancestral lands. With the 1988 Brazilian Constitution recognizing indigenous people's rights to their ancestral lands, they were meant to gain access to their newly demarcated territories within the next five years. However, for many it took much longer than that, with some never getting access.[38] One of the most significant attacks to the ecosystem of the Amazon was perpetrated during the dictatorship through the 'Operation Amazon'. This was a colonization plan aimed at integrating the Amazon region into the rest of Brazil through

35 Ibid

36 DIEGUEZ, Marcia & LYNGARD, Kylie. (2016). The land rights of indigenous and traditional peoples in Brazil and Australia. *Brazilian Journal of International Law*. Volume 13, Number 1, pp.420-421.

37 BOURCIER, Nicolas. (23 October 2012). Brazil Comes to Terms with its Slave Trading Past. *The Guardian.* Accessed at https://www.theguardian.com/world/2012/oct/23/brazil-struggle-ethnic-racial-identity.

38 MENDES, Karla. (26 April 2019). Brazil Supreme Court land demarcation decision sparks indigenous protest. *Mongabay*. Accessed at https://news.mongabay.com/2019/04/brazil-supreme-court-land-demarcation-decision-sparks-indigenous-protest/.

the construction of roads, the development of agribusiness and corporate enterprises, as well as the resettlement of people from the south, southeast and northeast of the country. The project had devastating effects on both the environment, with the building of 10.000 miles of roads opening up the Amazon to extractive and agricultural businesses, and the indigenous communities, whose opposition resulted in the massacre of thousands of them.[39] The aim of Operation Amazon and the catastrophic effects resulting from it are not far off from the policies implemented by President Bolsonaro in the last few years, who has begun the biggest push into the region since the military dictatorship. The Brazilian President plans on further exploiting the Amazon's resources by connecting the remote northern region of state of Parà with the more developed and industrialized south, as well as the rest of Brazil, with three large-scale construction projects. Being a particularly isolated area, the state of Parà has managed to remain one of the most diverse areas in Brazil with its uncontacted tribes and well-preserved tropical forests.[40] Since entering office, President Bolsonaro has continuously worked towards the expansion of mining and agro-business in protected areas. He has done so not only by hindering the independence of the agencies primarily responsible with the protection of indigenous people's lands, but also by lowering the penalties for practices such as illegal mining and farming. In 2019, just a few days after starting his term in office, he reassigned the task of demarcating indigenous lands from the Department of Indigenous Affairs (FUNAI) to the Ministry of Agriculture.[41] The Brazilian Forestry Service, tasked with issuing forest concessions and collecting relevant data of forests for farming policies to ensure their preservation and development, was also moved from the Ministry of Environment to the Ministry of Agriculture. In May 2019, the rates of illegal deforestation rose by 34% compared with 2018. INPE published that in May 2019, 739 km² of Amazon forest were swept, while in May 2018, 550 km² were destroyed.[42] Since the beginning

39 RAFTOPOULOS, Malayna & MORLEY, Joanna. (2020). Ecocide in the Amazon: the contested politics of environmental rights in Brazil. *The International Journal of Human Rights*, pp.10-11.

40 Ibid, p.11.

41 BRANFORD, Sue & TORRES, Mauricio. (2 January 2019). Bolsonaro hands over indigenous land demarcation to agriculture ministry. *Mongabay*. Accessed at https://news.mongabay.com/2019/01/bolsonaro-hands-over-indigenous-land-demarcation-to-agriculture-ministry/.

42 BRANFORD, Sue & BORGES, Thais. (10 June 2019). Brazil Guts Environmental Agencies, Clears Way for Unchecked Deforestation. *Mongabay*. Accessed at https://news.mongabay.com/2019/06/brazil-guts-environmental-agencies-clears-way-for-un-

of Bolsonaro's Presidency, the rates of violence against indigenous people in Brazil have increased. The number of invasions of indigenous territories went from 62 in 2018 to more than 160 during the first half of 2019. In 2019, there was a 23% increase in the number of indigenous people murdered was also registered.[43]

IV. HOLDING PERPETRATORS OF ENVIRONMENTAL CRIMES ACCOUNTABLE: WHAT OPTIONS AVAILABLE?

In the case at hand, Article 8(2)(b)(iv) of the Rome Statute will not be applicable as the alleged crimes did not occur during an armed conflict. However, indigenous communities could be successful in bringing claims either under Article 7 of the Rome Statute concerning Crimes against Humanity or under Article 6(c) of the Rome Statute concerning Genocide.[44]

IV.1 Crimes against humanity

Article 7(1) of the Rome Statute defines crimes against humanity as a list of specific acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. In order for an attack to be considered widespread or systematic, it must involve multiple commissions of acts pursuant to or in furtherance of a State or organizational policy to commit such attacks (Article 7(2)(a) Rome Statute). The State policy does not need to be explicit or formally adopted, as it can also be inferred from the overall circumstances.[45] Furthermore, the perpetrator must have intent to act with knowledge that their actions are part of a larger attack. The knowledge of the attack can be derived from an awareness of the consequences of one's actions arising in the ordinary course of events (Article 30(2)(b) Rome Statute). Among the specific crimes enlisted in Article 7, the persecution (Article 7(1)(h) Rome Statute) and deportation or forcible transfer of a population (Article 7(1)(d) Rome Statute) could be perpetrated through environmental means and thus be relevant to the situation of Brazilian indigenous communities. Deportation or forcible

checked-deforestation/.

43 BERETZ, Clarissa. (17 October 2019). Violence against indigenous peoples explodes in Brazil. *Mongabay*. Accessed at https://news.mongabay.com/2019/10/violence-against-indigenous-peoples-explodes-in-brazil.

44 DURNEY, Jessica. (2018). Crafting a Standard: Environmental Crimes as Crimes Against Humanity Under the International Criminal Court. *Hastings Environmental Law Journal*. Volume 24, Number 2, p.416.

45 Prosecutor v. Tadić, Case. No. ICTY14-94-1-T, Judgment para. 653 (May 7, 1997).

transfer of a population is defined as forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law (Article 7(2)(d) Rome Statute). Under this definition, coercive acts include harm to vital human assets such as the environment.

Concerning the situation of indigenous populations in Brazil, the various elements forming crimes against humanity could be fulfilled. When it comes to the existence of a widespread or systematic attack on them, this is demonstrated by the multiple attacks perpetrated by land grabbers, miners and other groups interested in the occupation and destruction of indigenous reserves. Not only have they threatened and killed individuals from the indigenous communities, but they have also illegally occupied their lands and exploited their natural resources.[46]

Furthermore, such attacks could be linked to a larger state policy actively promoting and encouraging them. Bolsonaro's failure to prosecute those responsible for the violent attacks against indigenous communities, the administrative actions taken to weaken the protection of indigenous lands and his widely known opinions on the rights of indigenous people could amount to State policy.[47]

Since the start of his presidential campaign in 2017, Bolsonaro has been particularly vocal about his intentions to harm indigenous communities and to deprive them of their rights and the measures in place to safeguard them and their ancestral lands. His anti-indigenous comments date back to 2017, when he stated that upon becoming president he would leave no piece of indigenous lands untouched.[48] In 2018, he once again reiterated his plan to end the demarcation of indigenous lands. His anti-indigenous statements have continued since his Presidential election in 2019. President Bolsonaro has continuously referred to indigenous people as "Indians", a term used during the colonial period, and has made statements such as "the Indians are evolving, more and more they are human being like us". On other occasions, he has talked about the presence of indigenous communities in Brazil as

46 HUMAN RIGHTS WATCH. (2019). Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil's Amazon. *Human Rights Watch.* Accessed at https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon.

47 GRISAFI, Lily. (2020). Prosecuting International Environmental Crime committed against Indigenous Peoples in Brazil. *International Environmental Crime in Brazil*, p.48.

48 MENDES, Karla & PONTES, Nadia. (26 October 2018). Indigenous land, culture at stake in Brazil election – experts. *Reuters*. Accessed at https://www.reuters.com/article/us-brazil-election-landrights-deforestat-idUSKCN1N0241.

"the indigenous problem" and called them "prehistoric men".[49] Through these statements, it becomes clear that President Bolsonaro has undertaken an aggressive and violent approach against indigenous communities with the direct result of fueling hatred and violent attacks against them. Such anti-indigenous statements have also been reflected in the dangerous structural changes made to the organization of the Brazilian governmental agencies by Bolsonaro's administration. The transfer of competencies from the FUNAI to the Ministry of Agriculture has certainly been one of the most dangerous evolutions, with the identification, demarcation and conservation of indigenous lands being one of the key safeguards for indigenous people's land rights. Another detrimental change was brought when the Brazilian Forestry Service (SFB), tasked with ensuring the sustainable use of forests and maintaining a fair balance between economic interests and environmental protection, was moved from the Ministry of Environment to the Ministry of Agriculture. This put the Ministry of Agriculture in charge of issuing concessions and licensing for farming, as well as collecting data on the use of forests necessary for the development of agricultural and development policies.[50]

These changes caused the Ministry of Agriculture, whose interests lie in the exploitation of indigenous lands and the strengthening of ties with agribusinesses, to become in charge of tasks that are fundamental for the protection of the indigenous population and their lands. Other than, by the dramatic changes to the structure of Brazilian government agencies, Bolsonaro's anti-indigenous interests have also been upheld by the newly appointed ministers selected as part of his cabinet. Not only was the ex-Minister of Environment Ricardo Salles a promoter and supporter of the use of indigenous lands for economic interests, but in 2019 he also decided to suspend all partnerships and collaborations with organizations working on the protection of the Amazon forest. While the measure was only in force for 90 days, it left many organizations playing a crucial role in the protection of indigenous lands without the necessary funds to continue their mission. As a result, this further hindered the rights of indigenous communities, who were

49 SURVIVAL INTERNATIONAL. What Brazil's President, Jair Bolsonaro, has said about Brazil's Indigenous Peoples. *Survival International*. Accessed at https://www.survivalinternational.org/articles/3540-Bolsonaro.

50 CASES SANCHEZ, Marina. (2019-2020).The International Criminal Court to the rescue of the home and lives of the Brazilian indigenous peoples. *Global Campus of Human Rights Europe,* p.67. Accessed at https://repository.gchumanrights.org/bitstream/handle/20.500.11825/1758/Cases%20S%C3%A1nchez%20Marina.pdf?sequence=1&isAllowed=y.

left incapable of relying on these associations for protection and assistance against the violent attacks of land grabbers, miners and other individuals interested in the economic exploitation of their ancestral territories. Following a similar plan of action, in 2019 the Minister of Agriculture Tereza Cristina agreed to the implementation of an agribusiness model on indigenous lands, practically opening them up to cultivation.[51]

Bolsonaro's government took another step towards the exploitation of indigenous lands by diminishing the competencies of various environmental agencies. Agencies such as the Instituto Chico Mendes de Conservaçao da Biodiversidade (ICMBio) and Brazilian Institute of Environment and Renewable Natural Resources (IBAMA), which are given the responsibility to protect the Amazon Forest's biodiversity and indigenous territories by ensuring compliance with environmental laws and policies and preventing and combating illegal practices such as deforestation, saw their mandates and competences cut together with their funding and staff. An important attack was also lodged against funding agencies such as the Amazon Fund, whose funds are managed by the Brazilian National Development Bank (BNDES). The two committees forming part of the latter, the Amazon Fund Guidance Committee (COFA) and the Amazon Fund Technical Committee (CTFA), comprised of government representatives from both the regional and national level, as well as members from civil society and experts in environmental matters, were dissolved by Bolsonaro's administration. As this sparked outrage at the international level, many donors decided to suspend their contributions to the fund, leaving various projects without crucial funding and forcing others to suspend their operations.[52] It follows that the many changes brought by President Bolsonaro to the structure and competencies of the Brazilian governmental agencies, especially the Ministry of Environment and the leading environmental agencies, has had the sole intent of weakening the safeguards in place against the exploitation of indigenous lands. When these detrimental alterations are taken into consideration also in light of his multiple and continuous anti-indigenous comments and statements, it becomes clear that there is an informal State policy aimed at the erasure of indigenous communities and the destruction of their ancestral lands.

51 CASES SANCHEZ, Marina. (2019-2020).The International Criminal Court to the rescue of the home and lives of the Brazilian indigenous peoples. *Global Campus of Human Rights Europe,* pp.25-26. Accessed at https://repository.gchumanrights.org/bitstream/handle/20.500.11825/1758/Cases%20S%C3%A1nchez%20Marina.pdf?sequence=1&isAllowed=y.

52 Ibid, pp.26-27.

Furthermore, by deliberately not holding the illegal land grabbers and miners accountable and thus increasing the chances they will carry out their threats, the State is fueling the invasion of indigenous lands and the brutalization of the community. Bolsonaro's anti-indigenous policies have also contributed to the perpetration of violence against indigenous people, as he continues to defund agencies responsible for the protection of their lands and continues to fund support bills decriminalizing the exploitation of protected territories.[53]

However, the *mens rea* requirement could become problematic to prove. On one hand, it could be argued that the individual perpetrator's knowledge of the larger attack is evident from the fact that they commit such crimes knowing they will not be held accountable as the President, and thus the system, is on their side. However, this is very subjective and could be difficult to prove.

Forcible transfer of indigenous peoples in Brazil

Indigenous people are forcibly transferred from their homes and lands through land grabbing, deforestation, and the resulting Amazon Rainforest fires. The destruction of the Amazon Rainforest represents for indigenous people the destruction of their shelter, water, food and medicine. Since 2019, deforestation in the Amazon Forest has drastically increased. Between January and August 2019, the National Institute for Space Research (INPE) recorded an outstanding number of 74.000 fires in the Amazon Forest, with an area bigger than Ireland being affected by the resulting deforestation. While wild fires have previously affected the Amazon Forest, this level of destruction had never been reached before, as the 2019 fires represented the largest ones since 2012, when the INPE started to conduct such measurements. The fires had a tremendous impact on the biodiversity of the Rainforest, as thousands of wildlife did not managed to escape and many natural resources crucial to the sustainment of indigenous people were destroyed.[54] Following the devastating events, President Bolsonaro accused the media of misrepresenting the situation before the United Nations General Assembly, denying the Amazon Rainforest was being ravaged by the fires. He also claimed that individuals from environmental

53 GRISAFI, Lily. (2020). Prosecuting International Environmental Crime committed against Indigenous Peoples in Brazil. *International Environmental Crime in Brazil*, p.49.

54 HOPE, Mat. (2019). The Brazilian development agenda driving Amazon devastation. *The Lancet Planetary Health*. Volume 3, p.408.

organizations and the indigenous communities were responsible for starting the blazes.[55] The Brazilian President also refused to call the Amazon "the heritage of mankind" and insisted that the disastrous events had just strengthened "Brazil's patriotic sentiment".[56] Since the disastrous events of 2019, deforestation in the Amazon Forest has reached a dramatic high by hitting the highest annual level in a decade: between August 2020 and July 2021, 10.476 km² of rainforest have been lost.[57]

Contrary to Bolsonaro's statements, the disastrous fires ravaging the Amazon are not caused by indigenous communities and environmental activists but rather by illegal miners and loggers, going from big agribusinesses to smallholders, interested in exploiting the Forest for economic interests. As defined by Human Rights Watch, "illegal deforestation in the Amazon is a multi-million dollar business".[58] There have been reports of indigenous ancestral lands being used by outsiders for mining, harvesting and growing cattle. When it comes to the latter, cattle farmers use the following *modus operandi*: the chosen plot of land is set on fire after cutting down trees and grass is then planted to welcome the cattle. In 2019, Amnesty International visited two Reserves and three Indigenous territories in the Amazon Forest and found cattle grazing to be present in all of them.[59] Human Rights Watch has also denounced on multiple occasions the presence of illegal miners in the Amazon Rainforest, especially the Munduruku Indigenous territory, a hotspot for illegal gold mining.[60]

Such illegal activities have a number of detrimental effects that

55 UNITED NATIONS. (24 September 2019). Brazilian President Speaks out against "Media Lies" Surrounding Amazon Fires. *UN News*. Accessed at https://news.un.org/en/story/2019/09/1047192.

56 Ibid n.54, p.409.

57 MILHORANCE, Flavia. (20 August 2021). Amazon rainforest – Deforestation in Brazilian Amazon hits highest annual leave in a decade. *The Guardian*. Accessed at https://www.theguardian.com/environment/2021/aug/20/brazil-amazon-deforestation-report-bolsonaro-climate.

58 HUMAN RIGHTS WATCH. (2019). Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil's Amazon, p.30. Accessed at https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon.

59 AMNESTY INTERNATIONAL. (2019). Fence off and bring the cattle – illegal cattle farming in Brazil's Amazon, pp.5-6. Accessed at file:///C:/Users/franc/Downloads/AMR1914012019ENGLISH.pdf.

60 HUMAN RIGHTS WATCH. (12 April 2021). Brazil: Remove Miners from Indigenous Amazon Territory. *Human Rights Watch*. Accessed at https://www.hrw.org/news/2021/04/12/brazil-remove-miners-indigenous-amazon-territory

directly affect the livelihood of indigenous communities, as they deprive them of shelter, water and food. It follows that the deforestation of protected indigenous lands is a coercive act forcing the indigenous peoples from their homes.[61]

However, in this case the issue of accountability comes in. On one hand, President Bolsonaro cannot be held accountable as a direct perpetrator, as he did not set up the fires ravaging the habitat of indigenous communities or engage in illegal activities such as mining, harvesting or cattle growing. There is also no evidence indicating that he relied on a subordinated person to carry out these actions or that he solicited the illegal miners and land grabbers to engage in such illegal activities. However, an argument could be made that President Bolsonaro induced these people to commit such crimes by influencing them with his anti-indigenous policies and statements. The President's decision to dramatically weaken the measures in place to safeguard the land rights of indigenous communities and the impunity enjoyed by those who have invaded and exploited their ancestral lands have certainly emboldened these invaders. Another interesting opportunity for prosecution could be presented by the fact that the illegal loggers, ranchers, and miners at times carry out such attacks while by superior officers or chiefs. While holding superior agents accountable would be beneficial for structural change, it could be difficult to establish they knew or should have known.

Persecution of indigenous peoples in Brazil

The widespread anti-indigenous policies and the unpunished violence perpetrated against indigenous communities could also qualify as persecution under the Rome Statute. Since 2019, there has been a dramatic increase in attacks against indigenous communities by illegal loggers and minors, with some escalating to physical assaults and ending in deaths. Most recently, in May 2021, various international organizations such as Greenpeace and Human Rights Watch reported attacks by illegal miners and land grabbers against the Munduruku People.[62] However, such violent attacks are too often followed by a lack of accountability and responsibility, as the Brazilian police has continuously failed to hold the perpetrators of such

61 GRISAFI, Lily. (2020). Prosecuting International Environmental Crime committed against Indigenous Peoples in Brazil. *International Environmental Crime in Brazil*, p.51.

62 BREENBERG, Chris. (28 May 2021). Indigenous Amazon village attacked by illegal miners. *Greenpeace*. Accessed at https://www.greenpeace.org/international/story/47984/indigenous-amazon-munduruku-attacked-illegal-miners/.

crimes accountable due to their poor investigations or the lack thereof. Out of the more than 300 killings registered by the Pastoral Land Commission since 2009, only 14 cases have eventually been brought to trial until now.[63]

The Brazilian government's failure to tackle the unlawful and arbitrary deprivation of life perpetrated against indigenous people, together with President Bolsonaro's anti-indigenous hate speech and continuous support of the violence against the indigenous community, could fall within the scope of this provision.[64]

Genocide

Article 6 of the Rome Statute provides for a number of acts that, if committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, can amount to genocide. Among these acts, there is the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part (Article 6(c) Rome Statute). In principle, the provision could apply to environmental damage, as the livelihood of many people is dependent on the well-being of their surrounding natural environment and attacking it could deprive them of vital resources or cause them to flee. However, Article 6 imposes the requirement that acts of genocide must be committed with genocidal intent, which does not need to be explicit but can instead be inferred from circumstantial evidence.[65]

In this regard, it could be argued that the environmental degradation caused by the illegal activities resulting in deforestation has inflicted on indigenous communities the conditions of life calculated to bring about their destruction, with these conditions being the destruction of the resources necessary for survival and the systematic expulsion from their home, namely the Amazon. However, the *mens rea* element could once again be problematic to substantiate due to its high threshold.

V. CONCLUSION

63 HUMAN RIGHTS WATCH. (2019). Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil's Amazon, pp.5-6. Accessed at https://www.hrw.org/report/2019/09/17/rainforest-mafias/how-violence-and-impunity-fuel-deforestation-brazils-amazon.

64 GRISAFI, Lily. (2020). Prosecuting International Environmental Crime committed against Indigenous Peoples in Brazil. *International Environmental Crime in Brazil*, pp.54-55.

65 Prosecutor v. Jelisić, Case No. ICTY 95-10, Judgment, para. 47 (December 14, 1999).

From the above analysis, it is clear that at first sight International Criminal Law might not seem to be the most practical tool to hold perpetrators accountable. This is due to the lack of a provision explicitly recognizing environmental crimes as falling under the jurisdiction of the International Criminal Court. The historical background on the various attempts made towards the inclusion of the crime of ecocide under the Rome Statute has brought to light the main problematic aspects of such proposals. The recurrent one is indeed state governments' fear of being held accountable for a wide range of environmental crimes, including those committed without criminal intent or during peacetime. While indeed the crime of ecocide remains excluded from the Rome Statute, important progress has been made through the 2016 International Criminal Court Policy Paper and the case of Prosecutor v. Al Bashir.

Despite the initial hesitation, when going deeper into the provisions of the Rome Statute, it becomes more evident that there are feasible options available for the indigenous communities in Brazil. Bringing a claim under Article 7 on Crimes against Humanity seems a promising opportunity, as the requirements are met. Bolsonaro's anti-indigenous policies and structural changes can indeed amount to an informal state policy and the multiple violent attacks suffered by indigenous communities can constitute a widespread attack against the population. However, the *mens rea* element could be difficult to substantiate. In this regard, the destruction of the Amazon forest putting in jeopardy indigenous people's shelter, water, food and medicine could make a strong claim under Article 7(1)(d) Rome Statute. Furthermore, the widespread anti-indigenous policies enforced by President Bolsonaro and the systematic violence perpetrated against indigenous communities could make for a valuable claim under Article 7(1)(h) Rome Statute. While these are indeed valuable claims, it must be recognized that holding the President himself accountable as a direct perpetrator could be difficult. However, his responsibility as someone openly supporting anti-indigenous acts could be assessed. Another option would be that of bringing a claim under Article 6 on Genocide. However, here the *mens rea* element could once again represent an obstacle due to its high threshold.

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THE POWER OF SOFT LAW IN REGARDS INDIGENOUS PEOPLES: A REFLEXION ON THE EXISTING LEGAL MECHANISMS, BRAZIL AS A MIRROR

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I. INTRODUCTION

The current globalization trend the world is facing carries a large-scale industrial and economic development taking place everywhere, the radical delocalization of value chains has connected remote areas to the global market. This growing interdependence has evidenced the risk certain vulnerable groups are facing due to the international dynamics of economic growth and development.

New development and extracting projects are seen by many governments as an opportunity for the states to gain economic growth, by benefiting from the impact those businesses have on the country; employment, infrastructures, access to more services… However, there are two sides to the same coin. Minorities and indigenous communities view these development models supported by many development governments as a threat to the land they live in along with its cultural and religious beliefs which are crucial for their lives and communities. (Lewis, 2012)

With the prediction of a population growth from 7 billion to more than 9 billion people by 2050, more resources will be required to maintain the level of global consumption. (Lewis, 2012) Resources nowadays are exploited by multinationals creating an economic development model largely impose from outside in many regions of the world. This intromission disregards completely the right of indigenous people residing in resourceful territories to participation in the management, control and benefit of resources and development, and leads to the expropriation of lands and resources of autochthone communities. (Guilbert, Couillard, Tugendhat, Doyle, 2009) The behaviour of the private sector in the international arena poses legal challenges in a world where business enterprises are increasing their power. Accountability has been requested as there are still no legally binding instruments regarding business and human rights. (Bijlmakers, 2007)

This essay aims to reflect the international framework protecting indigenous and tribal peoples. Firstly, the binding instruments applicable at the global level will be introduced. Having established the legal framework, soft law mechanisms will be exposed in the framework of corporate social responsibility, with a special focus on the UNGPs which will be introduced as the most relevant soft law mechanism in the new framework of business, human rights and global

governance where new non-state actors have a growing key role. The last part of this paper will deal with Brazil case study regarding the protection of indigenous communities, to analyse the legal mechanisms available and their compliance as well as the existing non-binding mechanisms and their scope of application. As a conclusion the paper develops a reflection on the capacity of soft law mechanisms to protect and respect indigenous and people's rights, comparing them to binding alternatives and arising both the good and the bad things about them.

II. HARD LAW MECHANISMS PROTECTING INDIGENOUS PEOPLE

International law protects Indigenous communities through a set of different international conventions and treaties. Under both the Covenant on Civil and Political Rights and the Economic, Social and Cultural Rights Covenant several rights are related to the protection of these vulnerable communities, the right to self-determination is one of them. Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) passed by the General Assembly protects indigenous peoples through 46 articles establishing key features of indigenous communities and introducing some rights as collective; article 9 stated that

> *¨indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. ¨*

Moreover, this Declaration introduces concepts that further protect indigenous communities in the global development context, under article 10

> *¨ Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. ¨*

The principle of free, prior and informed consent (FPIC) introduced in the Declaration requires states to take into account indigenous people concerns and cooperate with the communities and their specific representative institutions

in order to obtain free, prior and informed consent in matters and legislation that might affect them or the territory they belong to. Both the ICCPR and the ICECSR serve to legally frame the development of these principles, under the right of self-determination, the right to development or to maintain culture.

FPIC refers to *free* as no coercion nor manipulation taken place through the process of expressing consent, *Prior*, implies that the consent has been given in advance to any signature or agreement. Lastly, *informed* refers to the reliability of the information provided to the community, things like the potential risks, the location or the duration of the project must be brought to the indigenous community affected. In order for this mechanism to fulfil its aim, indigenous and tribal peoples must be included in the process, therefore, some mechanism should also be developed to assure its implementation. (OHCHR, 2013)

This International Treaty lays responsibility directly on the states for the protection of indigenous communities living within its borders, articles 8, 12 or 19 of the Declaration are some examples. Along with the UNDRIP, the main binding instrument in regards to indigenous peoples is the ILO 169 on the rights of indigenous and tribal peoples. Under article 1 of the convention, the definition of indigenous peoples is introduced, as those peoples in independent countries which distinguish themselves from the other citizens of the nation due to their specific cultural, social and economic features, they self-regulate their status through particular laws, norms, customs or traditions. Communities might be regarded as indigenous because of their offspring from a population that inhabited a region of land before the colonization process and still maintain their own political, social, economic institutions and a strong spiritual and cultural connection with the territory and the nature within it. Self-determination as indigenous or tribal is key for addressing the groups this instrument applies to. (C-169, 1989)

In the seek for universal social justice the ILO Convention 169 poses direct responsibilities to states through articles like 14.2 that states ¨Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy and to guarantee effective protection of their rights of ownership and possession¨ (C-169, 1989)

Besides the two International Covenants, the United Nations Declaration on the Rights of Indigenous Peoples and the ILO Convention 169, many other binding instruments at the regional level have been developed regarding the protection of indigenous and minorities. Jurisprudence from both the UN treaty bodies and the Inter American Court examining the role of states concerning these communities have been used to set precedents for the protection of the mentioned

vulnerable group and further bettering their defence and place at the global interconnected scenario. (Guilbert, Couillard, Tugendhat, Doyle, 2009)

One of the most recent examples of the role of jurisprudence is the Inter American Commission on Human Rights resolution 94/2020 in which the applicants demonstrated that there were third parties developing economic activities in an indigenous territory without the authorization of the community. This mining activity in the municipality of *Jacareacanga* was demonstrated to be supported by an authority in the National Foundation for the Indigenous (FUNAI). Moreover, the applicants also provided information on the alleged impact on the health of inhabitants due to the mercury contamination derived from the illegal gold exploitation. The Commission found the requirements of seriousness, urgency and irreparable harm met *prima facie*, as regarding the occupation of land by third parties, among other violations. Therefore, requesting the Brazilian government to adopt precautionary measures in order to fulfil the requirements brought to court by the applicants. (IACHR, 2020)

Another example of the clash between indigenous rights and economic activities in Brazilian Amazonia is the case brought to the Inter American Commission to stop the Belo Monte Dam. According to Amazon Watch, international and national human rights organizations filed a formal petition to the Commission to cease the construction of a Dam in Xingu River. The petition asks for precautionary measures in order to put pressure on the government to end plans to build the dam. the petition gather documentation that incriminates the Brazilian government for violations of international treaties, and for evading its responsibility towards the protection of indigenous rights. The petition also includes a jurisprudential reference, pointing out a relevant precedent regarding a 2009 case where the Commission implemented similar precautionary measures to stop the construction of a hydroelectric dam in Panama. (Recinos, 2016)

The Intern American Court of Human Rights has also many precedents regarding the protection of indigenous rights, the *Awas Tingni* case is one of the most relevant for being one of the first cases to set precedent, however, there are many other which interpretations serve as a basis to protect those vulnerable communities' rights. Case No 245 form the 27 June 2012, Kichwa Indigenous People of Sarayaku v. Ecuador. The case was related to the grating of a permit by the Ecuadorian government to an oil company to carry out exploitation activities in a territory with ancestral belonging to Kichwa Indigenous People without previous consultation with the community. The activities carried the prevention of the people to develop their subsistence activities and the destruction of sacred places which led to a confrontation between the different actors involved. The court considered

Ecuador responsible for the violation of indigenous people right to consultation, life, integrity, fair trial, and judicial protection. Moreover, the court went further in this case and developed point out prior consultation standards marking principles such as good faith or the attempt to reach an agreement, reaffirming state duty to consult. (OHCHR, 2015)

Furthermore, as has been mentioned in the above, there are other channels to arise concerns regarding indigenous rights issues at the international level, both the International Court of Justice, the International Labour Organization, or the treaty bodies. As an example, the International Labour Organization raised observation concerning the Indigenous and Tribal People Convention of 1989 regarding Brazil. The Brazilian national legislation was alleged of undermining the Quilombola communities' self-identification by not recognising them as tribal communities. The CEACR recognised the Quilombola communities as ¨tribal peoples¨ as they lay under Article 1 (1)(a) of the ILO 169.

These examples aim to reflect the relevant role of Jurisprudence in the Human rights and indigenous protection framework. In the words of the Office of the High Commissioners for Human Rights, ¨ Lessons learned from the advancement of the human rights dimensions of land, both in the context of indigenous or tribal peoples and non-discrimination against women, demonstrate that it is not necessarily explicit standards in these areas of the law that have resulted in relevant jurisprudence, but rather that concerted efforts to build upon and define existing standards have culminated in this jurisprudence. ¨ (OHCHR, 2015, 5)

III. SOFT LAW MECHANISMS PROTECTING INDIGENOUS PEOPLE

2.1 CSR as a mechanism on its own

Along with the legally binding instruments presented in the above, indigenous, and tribal peoples subjected to economic activities of business companies can be protected by soft-law mechanisms. Through Corporate Social Responsibility, private business enterprises integrate internal measures and mechanisms to ensure the business compliance with social and environmental norms as well as the protection of human rights standards in their business activity.

In 2011 the European Commission described CRS as ¨the responsibility

of enterprises to impact society¨. CSR is a mechanism to address how socially responsible is the corporate activity and the business model. (Kapur, 2020) Sustainable development, good governance, environmental protection, and social responsibility are address by private corporations through CSR. Environmental protection and conservation are given huge importance by the private sector, while social responsibility is often forgotten. The relation between Indigenous communities affected by business corporations' activities is the most urgent to be tackle, as private interests' have an excessive impact on indigenous communities, and in some cases, those interests can negatively influence governmental policies and discourses against Indigenous communities.

Generally, corporate consideration of indigenous communities and the business impact it can cause, is residual to the business operation itself, as it is a voluntary commitment. Engaging this vulnerable group in the company process affecting them and their land and upholding and protecting their rights is promoted by businesses from a CRS perspective. The integration of indigenous peoples as a part of a company's CRS framework would represent a turning point in terms of how a company deals with indigenous communities affected by their activity. Nowadays, within the new CRS approach, the ESG aims to widen the concept of corporate social responsibility into an environmental, social, and governmental criteria.

The UNGP´S

The UNGPs are the most relevant soft-law mechanisms protecting indigenous communities, being the first globally agreed standards on business and human rights. UNGPs were built on a shared understanding of the arising standards governing accountability and responsibility of enterprises for human rights, meaning that these standards were not only developed for a state positive law approach but for the system of corporate governance where non-state actors play an essential role. (Bijlmakers, 2017)

Being a framework to promote the protection of human rights in the business context they are based on three general principles. The first fundamental pillar refers to the state duty to protect human rights and fundamental freedoms, the second pillar refers to the role of business enterprises as key players in society developing specific economic functions respecting the applicable laws and human rights while performing their activities. Thirdly, the last pillar refers to the access to remedy. Within these pillars, specific principles are expressed to further develop the responsibilities the different actors face in protecting human rights within the

business context.

Regarding the first pillar, ¨ particular attention is posed on the need to address gaps in legislation and in administrative practice with regard to protection from business related human rights abuse. Here, the report identifies recognition of indigenous peoples as collective rights holders and of the rights associated with the status as the principal regulatory gap that states are required to address. ¨ (Rohr, Aylwin, 2014, 8) Under the second pillar, minimum standards and human rights due-diligence procedures are presented in relation to companies and their interaction with indigenous peoples. Lastly, the third pillar aims to recognise the existing opportunities and obstacles for obtaining effective remedies specifically for business affected indigenous communities. (Rohr, Aylwin, 2014)

UNGPs do not aim to create new legal obligations, rather they seek to drawn obligations and responsibilities from existing international law. UNGPs are part of an ongoing process of promotion of standards and practices in the new governance system where stakeholders have become relevant actors. Therefore, these guiding principles aim to acquire normative force by the acceptance of the norms by both states and non-state actors. (Bijlmakers, 2017)

UNGPs were endorsed by the UN Human Rights Council in 2011 as a Corporate Social Responsibility mechanism, therefore, the principles are recognised as a soft law instrument, they can be view as auxiliary to human rights international law as they reinforce the existing norms. Although been a soft law mechanism the UNGPs have a strong international and public role being a code of conduct for states and other actors, accepted internationally. These kind of mechanisms are linked to the strong legal authority of states, and they are considered by many scholars ¨voluntary¨ meaning that they depend directly on the state to exist and the international community acceptance and recognition to gain relevance. Not being legally binding does not mean that UNGPs don´t have any effect on their own, these norms have a decisive impact on states behaviour as many states have developed new normative following the UNGPs to protect indigenous communities in their territories from wrongful acts committed by the private sector. (Bijlmakers, 2017)

Furthermore, being a soft law mechanism built upon moral obligations and social expectations has allowed the United Nations General Principles to lay human rights responsibilities to corporations. Moreover, these kinds of instruments are known to obtain greater support from states and business companies and the consensus is generally easier to be reached due to their non-legally binding nature. Lastly, another important feature of soft law mechanism is the capacity of non-state actors such as stakeholders or indigenous communities to participate in the

law-making process, which in the specific case of UNGPs is extremely important to ensure the quality of the principles and support its effective implementation. (Bijlmakers, 2017)

Other relevant mechanism

There are many other soft law mechanisms apart from the UNGAs at the international, regional and national level, some examples are the OECD Guidelines for Multinational Enterprises, which provides a state-based non-judicial remedy mechanism that has been used several times by indigenous communities, these guidelines have no binding force over business enterprises, but they are binding to the OECD member-states that will have to comply with the guidelines through their domestic law.

Company based grievance mechanisms as well as Multilateral Development Bank´s accountability mechanisms which provide indigenous and tribal peoples with the opportunity of using their accountability mechanisms to raise concerns regarding projects affecting their community are other examples. (Rohr, Aylwin, 2014) Moreover, nowadays some leading economic institutions such as the European Bank for Reconstruction and Development (EBRD) or the International Finance Corporation (IFC) have established some standards to be accomplished by companies to obtain financing, those institutions require enterprises to obtain consent in order to get their project funded. (Lewis, 2012)

Furthermore, and following the line of banks specific measures, some of them have adopted the ¨Equator Principles¨ which are standards that serve banks as a guide for determining, assessing, and managing environmental and social risks in their financing projects. Besides these principles, the ¨Community protocol¨ is also gaining relevance as a mechanism that can be used by indigenous communities to protect themselves their land, territory, culture, and resources. The protocol can be conducted in different manners, including the community development aspirations, their rights and responsibilities under international and domestic law, transparency in regards the obtain of the community ¨free, prior, and informed consent¨ or an exhaustive description of the community formation, their values, norms and relationship with the land and resources. (Lewis, 2012)

IV. BRAZIL AS A MIRROR

Being Brazil one of the Amazonian states, it poses a great richness in terms of the indigenous communities that reside in its territory. There are around 897.000 indigenous persons in Brazil, distributed in 305 ethnic groups. Approximately, 13% of Brazilian land is designated to indigenous communities. Brazil is a signatory as the rest of the States in the region sharing Amazonian land of the most important international treaties protecting the rights of indigenous communities. Both the ILO Convention 169 and the United Nations Declaration on the Rights of Indigenous Peoples were adopted by the country. Moreover, Brazil is also part of a regional treaty, the 2016 American Declaration on the Rights of Indigenous Peoples. (Burger, 2020)

At the domestic level, national laws and the constitution protect indigenous communities. Article 231 of the Brazilian Constitution recognises the rights of indigenous communities towards their traditional lands and establish obligations for the government to demarcate and protect them. This article also gives indigenous communities the ¨exclusive usufruct ¨ a permanent possession of those territories. Thought the past 25 years legally enforceable land rights for indigenous communities have been established through Presidential Decrees preceded by different phases such as the identification of those territories and communities or physical demarcation. Nowadays around 60 million hectares are homologated. In 2012 under the Rousseff government Brazil adopted a National Policy regarding the Territorial Management of Indigenous Lands and through the National Indian Foundation, those territories are protected from third-party intervention as well as other responsibilities covered by the foundation. (Burger, 2020)

Lastly, it is important to remark the existence of two national agencies. On the one hand, FUNAI, (National Indian Foundation) is the Brazilian governmental organ that establishes and develop those policies regarding indigenous communities. This organ is also responsible for identifying and protecting those lands and territories which have been traditionally inhabited by indigenous communities. FUNAI task is also to ensure the compliance with the Brazilian constitution and the Indian Statute. On the other hand, SESAI, which is a Special Secretariat of the Ministry of Health specialized in indigenous health. (Survival, ND)

Having made a review of the hard law mechanisms a the international, regional, and national level protecting indigenous communities residing in Brazil. Soft law mechanisms that are applied for the protection of those communities in the Brazilian territory are to be reviewed to further analyse the weight of these type

of mechanisms in protecting the rights of indigenous peoples. For that matter, this paper is going to take concrete cases where violations of indigenous and minorities communities happened, concretely, in the framework of business and private corporation economic activities in their territory.

Despite the existence of those protection mechanisms mentioned above, the flow of foreign investment and private companies operating in Indigenous lands are part of an international network that aloud enormous socio-environmental crimes against those communities and the entire world, being the Amazonia a global capital. Within this economic and development framework, indigenous communities are seen by different actors as ¨obstacles to development¨ therefore, leading to exploitation, invasion and destruction of those lands and communities. (APIB, Amazon Watch, 2020)

A recent report publicised by the Association of Brazil´s indigenous peoples (APIB) in coalition with Amazon Watch has revealed the implication of six major U.S-based financial institutions such as JP Morgan Chase or the Bank of America with companies which are directly linked to destructive actions, violations of indigenous rights and conflicts in indigenous territories. From 2017 to 2020 those financial companies have invested more than 18 billion US dollars in private entities, predominantly extractive multinationals such as *Equatorial*, *Cosan* or *Belo Sun* which correspond to the energetic sector, agribusiness, and the mining sector respectively. (Business& Human Rights Resource Centre, 2020)

Those companies are part of the three most damaging sectors of Brazil´s economy as the ones posing the highest risks for Amazonian indigenous communities by perpetuating, illegal deforestation, land grabbing, production and export of conflict commodities or weakening environmental protection mechanisms among many other crimes. The concrete case of *Anglo American* is going to be used by this paper to reflect the different soft law mechanisms promoted by indigenous communities and human rights and environmental defenders to counterbalance the disability of the state under the scope of international law to protect those vulnerable communities.

Anglo American is one of the most important mining companies in the world, with a turnover amounting up to 10 billion U.S dollars in 2019. The company counts on many mining projects in Brazil, highlighting the Minas-Rio operation which includes the largest slurry pipeline existing, occupying the length of almost 500 km along the states of Rio de Janeiro and Minas Gerais. This case is specifically controversial and relevant for the matter being discussed, as it has strong implications for the territories and the inhabitant where the economic

activity is being developed. Even knowing the existing restrictions for extractive companies to operate in territories inhabited by indigenous peoples, Anglo America has requested up to 300 authorizations to survey in areas where 18 indigenous territories lay. The company relies on the new political wave headed by the former president to allow the operation in those territories. (APIB, Amazon Watch, 2020)

In this scenario, the *Pariri* indigenous association which represents the *Munduruku* people of the Middle Tapajós has systematically opposed the process through different means. The *Munduruku* people meet in December 2020 to discuss the threats to their community and drafted a declaration demanding recognition of the community rights and territory, condemning illegal exploitation of resources, and accusing the Federal Government of allowing those practices. In this first assembly where 200 participants from 47 *Munduruku* villages from the different regions where its territory extends attended, as well as different *Munduruku* associations. In the letter, other issues are also claimed, such as the anti-indigenous character of the government, the corruption of national governmental associations like FUNAI, the risk indigenous communities will be facing if bills like 191/2020 are approved or the effect that other extractive companies will have for different indigenous communities, such as *Vale*. (Business& Human Rights Resource Centre, 2021)

As a response, *Anglo American* stated that they had given up all requests for exploitation in indigenous lands. However, according to another source (infoAmazônia news agency), Brazil´s National Mining Agency had granted 27 permits within indigenous lands to the company. The private entity also stated that their mining activities follow the principle of Free, Prior and Informed Consent (FPIC). However, it is crucial to remark that there is not still a legal basis for allowing mining on Brazilians indigenous lands. Therefore, FPIC cannot replace Brazil´s constitutional protection of indigenous territories for economic activities. (Amazon Watch, 2020)

To finish framing the case, Alessandra Munduruku, a leader of the *Munduruku* people stated:

> *¨Mining is causing a great deal of severe impacts. It pollutes our drinking water, contaminates our fish, and leaves only destruction. And the guilty parties are the countries that are buying the iron, gold, and soy. Today we have a government that is encouraging the invasion of our*

> *territories. And the 'first world' countries with interests in exploiting the Amazon have the blood of Indigenous people on their hands. These big companies come to our towns and say nice things, like they are going to bring water and schools to us, but it is all a lie. Because as soon as they arrive, they start to trample on the rights of traditional peoples, both Indigenous and riverine.* ¨ (APIB, Amazon Watch, 2020)

This case is the live representation of the important role of organizations such as Amazonian Watch, APIB as well as indigenous associations which have addressed the necessity to take actions in order to protect vulnerable communities from the extractive industries. The actions taken by the different civil society organisms go from mere association and discussion to an active request of applicable soft law mechanisms through declarations, as has been mentioned in the above. Asking companies to comply with OECD guidelines and follow international law through declarations and complaints to the international community are the soft law initiatives that those organisms have been forced to carry out in absence of a strong state response in regards to the protection of indigenous communities.

Despite not being binding mechanisms, soft law can be a key element for indigenous communities to open different channels of communication, as a new way to fight for their rights directly with the corporations. In *Anglo American* case, the company is required by the declaration of the indigenous community to ¨make a public commitment to refrain from carrying out any mining activities on indigenous lands in Brazil¨. However, in other cases, it has been seen different requests regarding the internal policies of multinationals. Transparency in the supply chain or new mechanisms to strengthen the analysis of the socio-environmental impact of the economic activity in a determined territory under the scope of Corporate Social Responsibility are some examples. (Amazon Watch, 2020)

Lastly, in order to understand the importance of soft law mechanisms for Indigenous and minorities groups nowadays, it seems relevant to mention the current scenario indigenous communities must face with the hostile Bolsonaro administration. According to Human Rights Watch Brazil´s congress is going to vote a Bill (490/2007) that ¨ would prevent indigenous peoples for obtaining legal recognition of their traditional lands if they were not physically present there on October 5, 1988 – the day Brazil's Constitution was enacted – or if they had not

initiated legal proceedings to claim it by that date. ¨ which would represent a major setback to indigenous people´s rights in the country, especially those mechanisms regarding Land Rights recognition, and would also increase the vulnerability of those communities. (APIB, Amazon Watch, 2020)

Moreover, the Bill also contains many other problematic provisions ¨ It impedes Indigenous people from claiming additional land to expand already demarcated territories. It would also allow the government to eliminate Indigenous reserves government land provided to Indigenous people to guarantee their livelihood and cultural survival when it deems that land is no longer "essential" for those purposes due to changes in their "cultural traits" or other factors due to "passage of time." These overbroad terms could lead to forced removals… The bill would also allow the government to explore energy resources, set up military bases, and expand strategic roads in Indigenous lands without any consultation with Indigenous peoples. ¨ (Human Right Watch, 2021) Therefore, this bill goes against international standards, diminishing the capacity to achieve an effective consultation with the communities in order to respect the free, prior and informed consent, one of the most relevant rules regarding the protection of those vulnerable communities. (APIB, Amazon Watch, 2020)

Furthermore, following data collected from the Indigenous Missionary Council (CIMI) since Bolsonaro legislation started, there has been a relevant increase of the cases of violence against Indigenous Peoples in Brazil as well as an increase in the category related to land invasion and illegal exploitation. Furthermore, under Bolsonaro´s rule mining on indigenous territories might be permitted as bill no 191(2020) has been sent to congress for approval. This bill will also permit the cultivation of genetically modified seeds, promotion of oil and gas projects or tourism in traditionally indigenous lands among many other new measures which directly attempt indigenous and minorities rights and violate international agreements. (APIB, Amazon Watch, 2020)

In addition to the new proposed bills, there are many more that have not been mentioned which reflect the new current under Bolsonaro´s watch, the federal government has also announced the Mining and Development Plan (PMD) which priorities the advance of new mining areas as well as the relaxation of environmental standards while favouring the violation of indigenous people's rights. (APIB, Amazon Watch, 2020) Bolsonaro presidency has also weakened those federal agencies presented in the above which oversee the protection of indigenous peoples and their lands, being the openness of indigenous lands to mining and other commercial activities one of his legislative initiatives and a key point in his political discourse.

This political wave that prioritizes the economic activity over the socio-

environmental welfare of a nation has weakened the standards under which indigenous and minorities peoples are protected. The new destructive trend promoted by the president of the country has had devastating effects on compliance with international law. This violation of international and regional treaties has evidenced soft law mechanisms as an alternative way of fighting for minorities and indigenous rights. As an example, due to the failure of the government in consulting indigenous communities to develop a ¨safe¨ regulatory framework for indigenous communities. Those communities started to elaborate their own culturally respectful consultation protocols, that could serve as guidelines for the state. However, no positioning has been heard from the government. (APIB, RCA, DHESCA, 2016) Therefore, it is important to be aware that, despite the need to value soft-law mechanisms and to appreciate the opportunities they bring, by achieving the same goals through non-binding means. It is important to consider that compliance is what matters, and voluntary vs binding measures are still a David vs Goliat game.

V. CONCLUSIONS

With increasing interdependence, the world we live in is going through a delicate time in terms of human rights protection. The entry of new actors into the international scene has made both the dynamics of power and the priorities of those different actors change. This globalization process has also put at risk many vulnerable groups showing the unequal development the world is facing. Indigenous and tribal peoples are one of the most vulnerable groups and the role of the international community is to safeguard them and mitigate as possible the effects of the process by protecting their rights and freedoms. The relevance and impact of business enterprises and multinationals in the globalised world are undeniable, therefore, the relationship between business and human rights needs to be assessed for it to be the most respectful and protective, especially to those vulnerable groups.

In the concrete case of indigenous communities, as it has been seen, they are protected through several international binding documents. However, those treaties are not always enough to protect those communities from the bad practices of private businesses, as states do not always comply with what they have signed and there are no monitoring mechanisms available. The incapability to access national legal procedures for those who have seen their rights violated by a development or extractive project, the ineffective judicial systems of many countries, internal conflicts, week governance and the different economic interests of the state result in a lack of protection of the most vulnerable communities. (Lewis, 2012)

In the absence of means to ensure compliance with international law by companies and states, soft law mechanisms appear to try and limit the actions of those businesses putting indigenous human rights at stake. With a growing relevance of the principle of corporate responsibility in the business panorama, new means of ¨doing business¨ are starting to gain ground. Characterized by the creation of new channels and spaces for communication between the different actors that are involved in the development or extractive processes. Thus, reflecting that development and sustainability, concretely in terms of the respect for human rights, do not have to be mutually exclusive, but rather converge in a sustainable development model.

Thanks to the soft law mechanisms that have been exposed in this paper, new means for the protection of indigenous communities had arisen. Placing the responsibility of protecting those vulnerable groups both in the state and the company which is conducting the economic activity. However, despite this growing engagement by private companies to ensure human rights protection in their practices, significant violations are still happening daily. The non-binding nature of these mechanisms as well as the inexistence of enforcement means results in a systematic violation of indigenous and minorities rights. (Lewis, 2012)

Therefore, there is still a long way to go in terms of reducing the impact produced by the economic activities happening in indigenous and minorities territories. According to the Report on the state of the World´s Minorities and Indigenous Peoples of 2012, a need of bringing together and empowering indigenous communities so they can rise their voices is irrefutable. Through the development of community protocols where they commonly express their culture and traditions as well as their natural bond to the land, assuring that every affected member can participate in the process is key to limit the impact those projects happening in their land have on them and their communities. Besides, the role of civil society is also relevant, as the revindication of more inclusive processes might lead to the creation of new legislative standards, judicial and non-judicial mechanisms, new corporate responsibility means at the corporate level…

Regarding the role of companies, the strengthen of report and grievance mechanisms in terms of their commitment to respect the rights of indigenous and minorities groups is also essential as well as the increase of relevance given to the social impact in their corporate report by further understanding the situation in which those communities are. Furthermore, states should strengthen the domestic mechanisms to comply with international law protecting indigenous communities through transparent, accessible, and effective legal instruments. The knowledge and awareness about the different indigenous peoples and minorities existing in their territory and their specific cultural background, traditions and needs are also

crucial for the states to take active action in protecting those vulnerable groups. Lastly, there are many other agents that still have a great path to achieve the optimal protection of those communities; on one hand the UN and its different agencies and programmes such as the UN working group on Business and Human Rights or the Special Rapporteur on the rights of indigenous peoples. On the other hand, the different international, national, and regional financial institutions, which have the power to condition the economic activities of companies through standards, requirements, and obligations, with the possibility of including monitoring mechanisms. (Lewis, 2012)

As a final conclusion, it seems important to remark the important role of soft law mechanisms in protecting indigenous and tribal peoples and demand reinforcement of them. Through soft law mechanisms, both states and multinationals have guidelines to implement norms, conducts, behaviours or even new legislation to protect those communities and include them in every matter or decision that might affect their community. The capacity of creating common grounds for negotiation is key to achieve the participation of indigenous peoples in processes regarding the land, territory, or resources they rely on, which is crucial to address the possible human rights violations and develop strategies both from the state and the corporate perspective to mitigate the impact.

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PROTECTION OF INDIGENOUS VENEZUELAN REFUGEES ARRIVING IN BRAZIL AS A RESULT OF THE HUMANITARIAN CRISIS

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Abstract: The humanitarian crisis in Venezuela has forced many families to migrate to different countries in the Americas. Brazil is one of the countries in the region with the greatest openness to migration. The paper will analyze Brazil's response to the Warao migratory flow within the framework of international protection standards for indigenous refugees. It will also identify the challenges posed by the management of human mobility of Venezuelan indigenous people who move from Roraima.

Keywords: Warao, Refugees, Indigenous, Venezuela, Brazil, Roraima

Resumo: A crise humanitária na Venezuela forçou muitas famílias a migrarem para diferentes países das Américas. O Brasil é um dos países da região com a maior abertura à migração. O documento analisará a resposta do Brasil ao fluxo migratório Warao dentro da estrutura das normas internacionais de proteção aos refugiados indígenas. Também identificará os desafios colocados pela gestão da mobilidade humana dos povos indígenas venezuelanos que se deslocam de Roraima.

Palavras claves: Warao, Refugiados, Indígenas, Venezuela, Brasil, Roraima

I. INTRODUCTION

Venezuela is the country with the second-highest number of international displacement situations, only behind Syria [1]. According to the Coordination Platform for Refugees and Migrants from Venezuela, more than five and a half million Venezuelans have crossed international borders to other countries. As of September 2020, Brazil hosted nearly two hundred and sixty-one thousand Venezuelans and is the second country (after Spain) to have recognized more than forty-six thousand refugees [2].

Venezuelan indigenous people have also been affected by Venezuela's

situation and have been moving towards Brazil and Colombia over the years. According to UNHCR protection monitoring, the native Venezuelan Warao community is moving to the Pará region on the route to Brazil. The main groups at risk are children, pregnant teenagers, and children's marriage. [3]. This situation generates a risk in two dimensions, the first in terms of children's rights and the second in terms of community rights such as land, territory, natural resources, and development. COVID-19 pandemic has intensified this context.

Instead of that panorama, Brazil is betting on local integration for the Warao indigenous refugees. Local integration has three spheres of realization. In line with Jeff Crisp, the first dimension is at the legal level, the second dimension is to provide the population with sustainable livelihoods and, finally social integration without discrimination [4]. In that sense, it is necessary to visible the problem of displacement of Venezuelan indigenous people to Brazil and provides a timely response to follow international protection standards and try to propose alternatives to the indigenous crisis.

Therefore, this paper consists of three chapters that seek to develop the above objectives. The first section deals with the exodus of Venezuelans, focus on indigenous people moving to Brazil. The second chapter concerns of international protection of indigenous refugees. Mainly, the association of the concept of "indigenous refugee" and the protection standard. The last chapter is about local integration for indigenous Waraos and the responsibility of the Brazilian state to develop the three of Crisp's spheres of realization.

II. INDIGENOUS MIGRATIONS FROM VENEZUELA TO BRAZIL

Migration flows to Brazil

The Working Group of the Organization of American States on the Crisis of Venezuelan Migrants and Refugees in the Region identified five main reasons that forced Venezuelans to flee: 1) Humanitarian emergency 2) Human rights violations 3) Widespread violence 4) Collapse of public services and, 5) Economic collapse [5]. The content of each of these reasons adds humanitarian components to the crisis in Venezuela. In other words, it is not exclusively an economic crisis but is accompanied by other humanitarian elements such as widespread violence and human rights violations.

These reasons have forced people to flee the country and seek international protection. Venezuelan emigration accelerated in 2013 as the country's economy began to contract. The following years witnessed different demographic variants of migration. According to the International Crisis Group, at first, the rich left, then middle-class families (2016-2017), and since 2018 the outflows were on foot, without money or documentation of the most vulnerable families [6]. The population with the least resources was the most affected and the least likely to be able to leave. However, when the crisis worsened, the walkers began to leave in increasingly precarious and vulnerable situations.

Vulnerable people are the most affected by the humanitarian crisis. Not only because they do not have the resources to leave, but because those who leave, have to walk to many parts of the continent. "Venezuelan migrants and refugees walk about 4,000 kilometers (2,485 miles) across the continent to obtain basic needs" [5]. This situation shows the precarious situation in Venezuela and the several risks in the migratory route from their homes to their destination.

Brazil is the second-largest destination of Venezuelan migration flows, in contrast to other land borders such as Guyana. Although this border hosts the Brazilian jungle in the states of Amazonas and Roraima, migration flows have increased instead of decreased. Nor has the Portuguese language become a limitation when the people choose Brazil as a destination. Brazil is an attractive destination for thousands of migrants and refugees seeking a better future for their families.

As reported by the Migration Policy Institute, global migrants from Venezuela in 2020 were 5,415,000 [7]. UNHCR has noticed that the flow of Venezuelans in the Americas has been directed to Peru, Mexico, and Brazil [1]. In keeping with Silva et. al. in 2020, there were 28.899 asylum applications in Brazil and more than 60% were people from Venezuela [8]. The region with the most increasing figures was Roraima. In consonance with Simões et. al., the non-indigenous Venezuelan flows to Roraima in 2017 and 2018 were mostly composed of young people of working age [9].

> "The Venezuelan population in Roraima is mostly of working age (15-64 years old), creating a visible change in Roraima's population pyramid […] This has implications for policies related to education, training, and employment to take advantage of the productive capacity of Venezuelans and facilitate their integration in Brazil" [10].

The influx of Venezuelans brought Roraima's population to 631,000, a figure that was estimated 10 years later [11]. It is because Roraima is a region with high migration flows and it is not an exit route for the indigenous population, but rather for the non-indigenous population. It has become evident that there is a need to implement public policies that consider Venezuelans, such as facilitating the process of verification and validation of certificates and skills, increasing language training for teachers and professionals, as well as expanding the capacity of schools, especially in the northern region [12].

Another worrying factor in Venezuelan migration to Brazil is the situation of minors. According to Ceja et. al., there is a presence of undocumented children and adolescents, both indigenous and non-indigenous. Cases of unaccompanied minors separated from their parents have even been reported. [13]. That is, minors traveling alone without parents or companions and, in the second case, minors without parents, but traveling with a relative or stranger. In 2019, there were 529 unaccompanied Venezuelan children at the border of Roraima, however, contact is lost after the entry interview, because there are no follow-up mechanisms [14].

As we have seen, the presence of minors has also been reported in Roraima, as well as other conditions of vulnerability. The combination of ethnicity and nationality continues to be a determining factor in the migratory context in Brazil. Especially on the northern border where the most affected people are indigenous people such as the Warao. In this sense, the following subsection will develop this invisible migratory dynamic that is becoming more and more present in the Brazilian reality and invites the State to adopt adequate measures for the protection of indigenous people in its territory.

The case of indigenous Warao

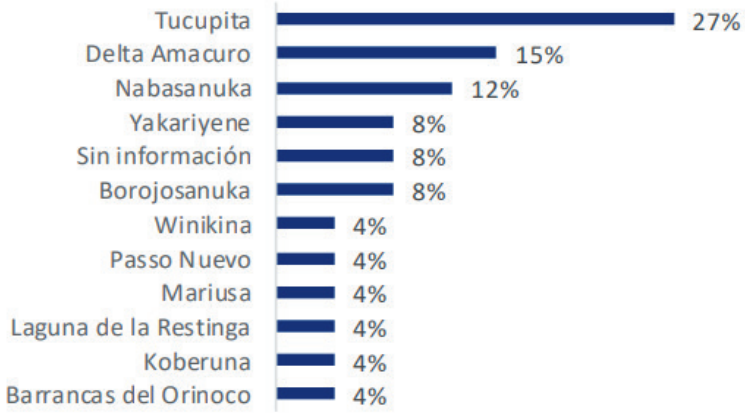
The Warao community is located in the Orinoco Delta region of Venezuela, on the Maguari River banks. This community's origin dates back to eight or nine thousand years ago, being the oldest community in Venezuela. Warao is the second largest indigenous people in Venezuela. Warao means "People of the Water." They are characterized by their life on rivers, mangroves, palm trees, among other resources. Precisely, their subsistence activities are linked to fishing, hunting, and gathering. As a consequence of the Warao population growth and the limited resources of their community, they are forced to migrate to urban centers, where they are marginalized and discriminated against because of their indigenous status.

Migration flows are also reflected at the international level towards Brazil. In the case of the indigenous people, the lack of opportunities in the cities, cuts and reforms of public policies for indigenous people, difficulties in obtaining food, work, and medical care promote displacement to Brazil's northern region, which has increased since 2016 [15]. The indigenous people are more vulnerable and more fragile in the face of the humanitarian crisis in Venezuela. Besides, there are more difficult barriers to overcome to integrate, such as cosmovision, customs, or language.

One of the first reports of Venezuelan indigenous migration to Brazil dates back to 2015, where the Brazilian press covered the deportation of 68 people in Roraima [16]. Since that time, migratory flows have increased and people's problems have become more critical. The Warao are moving to the Brazilian border to subsist. It is estimated that in 2019 there were "[…] in Pintolândia, more than 500 members of the Warao ethnic group and 30 members of the E'ñepá ethnic group live in dozens of tents and hundreds of hammocks, most of them set up on what used to be a sports field" [17].

According to UNHCR data "(…) in Brazil, there are about 5,000 displaced Venezuelan indigenous people, mainly from the Warao ethnic group, but also from the Eñapa, Kariña, Pemon, and Ye'kwana communities" [18]. However, the communities where the Warao emigrates the most are usually Tucupita, Delta Amacuro, and Nabasanuka. These places are the most neglected areas of the Venezuelan government, where there is a shortage of food and medicine, as well as the proliferation of diseases due to the shortage and neglect of the State [19].

Figure 1: Communities of origin in the Warao's migration



Source: IOM [2]

According to information from the IOM, the profile of the Warao who migrate to Brazil is characterized by a young population up to 40 years of age, with a predominance of 77% of males. The international organization also recorded that family groups are composed of an average of four people and single-parent families. Only some of the original family members migrated to Brazil [20]. Regarding the last point, it is understandable because of the level of rootedness and family identity that the Warao have for the members of their community, which is why migrating becomes a desperate option in the face of the crisis.

On the other hand, there is a high number of illiteracies among the Warao population. This situation is concentrated in the minors, who do not have the possibility of going to school or leave school at an early age to support their parents in different tasks, work that is concentrated in handicrafts, or begging due to the lack of opportunities [13]. The conditions of migrant children are another concern not only at the level of education but also at the risk of migration routes and other risks to which they are exposed.

The stigmas of migration are reinforced by discrimination against the indigenous population. According to García-Castro, the indigenous population's profile is associated with marginal minorities, discriminated against because of their origin, as they have no formal education and are often monolingual Warao and poorly adapted to urban life. [21]. The situation generates conflict with the Brazilian population. In 2018, there were acts of violence against Venezuelan migrant camps in Roraima. Hundreds of people

fled to the other side of the border to avoid being attacked. [22]. The violent situation stills until now.

In the context of COVID-19 pandemic, forcibly displaced people have been reduced, with 306 persons in the Janokoida area and 182 relocated to the BV-8 transitional isolation zone. UNHCR has delivered hygiene kits to avoid contagion in the shelters. As of May 2020, there were more than 3,000 indigenous asylum seekers, so it will be essential to define this population's legal protection instruments. [23]. However, in 2021 the figures have increased. Some media report that more than 300 Warao have left Venezuela through the border in the first months of the year.

Fleeing in Brazil in seeking better living conditions has not been a sustainable solution for the Waraos. This is due to the context of the pandemic, as Brazil is the Latin American country with the highest number of people infected and killed by COVID-19 [24]. Facing the migratory crisis of the Waraos is a complex process that is not limited to transferring them to shelters in Brazil, where there is also a collapse of institutions. The protection to be provided by the State has to take into account the particularities of the indigenous flow, so it is necessary to discuss these criteria in the following paragraphs.

III. INTERNATIONAL PROTECTION OF INDIGENOUS REFUGEES IN THE CONTEXT OF HUMAN MOBILITY

Who are indigenous refugees?

The term "indigenous" is not defined in international law. Nevertheless, this word has several connotations. "According to the UN, the most fruitful approach is to identify, rather than define indigenous peoples" [25]. The fact is that the term "indigenous" can refer to many assumptions such as aboriginals, tribes, nomads, first people, uncontacted people, and others. In some cases, it may even have a negative meaning "(…) and some people may choose not to reveal or define their origin" [25]. In other words, indigenous people are ethnic groups who are original inhabitants of a given region.

International instruments for the protection of Warao indigenous people are concentrated at the universal level, as well as at the Inter-American level. In the case of the universal system, there is the ILO Convention related to Indigenous and Tribal Peoples in 1989 in force in Brazil since 2002. On

the other hand, in the Inter-American sphere, there are soft law instruments that intend to guide the actions of the States. One of these instruments is the American Declaration on the Rights of Indigenous People in 2016, which reaffirm the right to self-identification as indigenous.

The crisis in Venezuela has forced the displacement of indigenous people, the most alarming case being the situation of the Waraos in Brazil. Thus, the vulnerability of indigenous people is aggravated when they are displaced. The I/A Court H.R has ruled in the case of Chitay Nech et al. v. Guatemala that forced displacement forces, indigenous people, to abandon not only their communities but also their traditions [26]. This situation worsens the vulnerability of indigenous people, as they are forced to leave ancestral places they have inhabited for centuries.

The I/A Court H.R in the Case of the Members of the Village of Chichupac and neighboring communities of the Municipality of Rabinal vs Guatemala has pointed out that a direct consequence of displacement is the destructive consequences on the ethnic and cultural fabric, which generates a clear risk of cultural or physical extinction [27]. There is a latent risk that indigenous people could be absorbed by the majority culture and thus lose their traditions, customs, or languages.

Once we have identified who the indigenous people are and what the applicable law is, it is important to reflect on whether these indigenous people in turn can be included in the category of refugees and apply for international protection under the terms of international refugee law. In this sense, the following lines aim to develop the concept of "indigenous refugee" as a legal category of special protection, taking into account the situation of vulnerability of people in the context of mobility.

The leading international instrument to protect refugees is the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. Article 1-A of this Convention defines a refugee as a person who:

> "(…) owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" [28].

It is essential to identify some elements in this definition, such as 1) owing to a well-founded fear of being persecuted 2) Reasons of persecution: race, religion, nationality, membership of a particular social group, and political opinion 3) is outside the country of nationality. If a person identifies with these criteria, it is up to the State to recognize the status of refugee. A State's recognition of a refugee does not make the person a refugee but only declares or recognizes this status. In other words, a person does not become a refugee by recognition but is recognized because he/she is a refugee [29].

Nevertheless, can these elements be applied to the Warao indigenous in the context of displacement? First, regarding well-founded fear, this section is made up an objective (persecution) and subjective (fear) elements [29]. With this in mind, fear means the subjective element because human beings have different fears. On the other hand, persecution depends on a case-by-case scenario and the circumstances. There are reports of repression of indigenous people protesting against food or medicine shortages in Venezuela. There is a fear of protesting, as many of those who have protested have been killed or disappeared, so the fear is both objective and subjective that others will suffer the same fate [30].

Second, concerning persecution only for race, religion, nationality, membership of a particular social group, or political opinion. In many cases, persecution is not evident, and some acts disrupt the rights of displaced people. "It is evident that the reasons for persecution under these various headings will frequently overlap" [2]. In the case of the indigenous Waraos, there are reports of persecution for political opinion and for being part of the indigenous community (social group). This situation was denounced by the Office of the United Nations High Commissioner for Human Rights (OHCHR), which expressed concern about the militarization of indigenous territories and the death of young Waraos killed by the FAES [31].

The last criterion for determination is to be out of the country on nationality or residence. It means a person applying for asylum outside their nationality or residence may not do so within the country where they live. In the case of the Warao, they are fleeing the humanitarian crisis in Venezuela and are requesting international protection in Brazil, so they are outside the geographic territory. Even in terms of historical territory, when crossing into Brazil they move outside their country of nationality.

The elements described in the 1951 Geneva Convention are fulfilled in the case of the Warao indigenous, although there is still discussion on the

consideration of the Warao as refugees rather than economic migrants. In line with García-Castro due to their "(...) displacements in country of origin, their massive character and expectations of persistence, we must consider them no longer as migrants, but as refugees" [21]. Besides, there are sufficient elements to believe that there is a systematic violation of human rights in Venezuela.

On the other hand, the 1951 Geneve Convention does not extend its interpretation to other types of situations such as human rights violations, environmental pollution, failed states, among others. However, a regional definition was proposed in the Americas in 1984. Its regional definition stipulated in the *Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama*, also known as the Cartagena Declaration, defined as a refugee "(…) who have fled their country because their lives, safety, or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order" [32].

Regarding Brazilian law, Article 1 of Law No. 9474 of July 22, 1997, defines a refugee in terms of the 1951 Convention Relating to the Status of Refugees and its Additional Protocol and the definition of the 1984 Cartagena Declaration concerning the severe and generalized violation of human rights. The expanded definition is critical as it helps to focus international protection to the new contexts in the Americas. This international instrument is also binding on States Parties based on Advisory Opinions OC 21/14 and OC 25/18 and regional custom [33]. In other words, Brazil includes the conventional definition, as well as the definition expanded by the Cartagena Declaration.

International protection for indigenous refugees

Considering the complexity of the migratory phenomenon, it is increasingly difficult to distinguish between a migrant or a refugee and the international instruments in force. According to Pijnenburg & Rijken, it would be appropriate to refer to the term "people on the move" which, despite its absence as a legal category, is useful to guarantee the rights of people in this situation [34]. In this sense, the response to the displacement of indigenous people must be comprehensive, without making distinctions between migrants and refugees, because both categories are affected by the crisis in Venezuela.

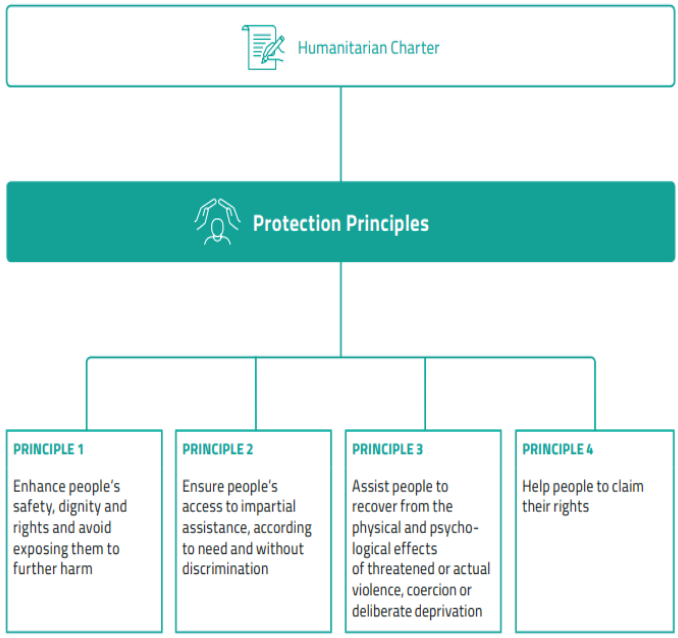
As portrayed by the Inter-American Commission on Human Rights or the Office of the High Commissioner for Human Rights, there are human rights violations in Venezuela. Therefore, Venezuelan refugees have recognized the right to seek asylum and non-refoulment, which emanate directly from the asylum system. Additionally, they must be guaranteed all other rights such as access to public education, work, health, association, intellectual property, and housing. In the specific case of indigenous people, the rights that correspond to them as a specific group, for example, cultural identity, self-determination, intellectual property, collective property, and those stipulated in ILO Convention 169.

In this regard, the I/A Court H.R in the Sawhoyamaxa v. Paraguay case has established that States have special duties based on the subject's protection needs due to his or her condition, specific situation, extreme poverty, or marginalization [35]. According to the Court, it must be of particular interest for the State to protect the most unprotected rights. Not only does it have the obligation not to violate them, but also to guarantee them. This protection is directed to all the communities in its territory, without distinction by race, ethnicity, or nationality.

As reported by the I/A Court H.R in the Advisory Opinion OC-21/14, international protection is destined for foreign people who have not received protection from their home countries, or its response has not been accessible, available, or effective [36]. Brazil has to base its policies on the principles of humanitarian action. It is possible to identify four of them in the Sphere Handbook such as improve people's rights and dignity, non-discrimination, recover from physical and psychological harms and claim indigenous rights.

The first principle is related to the dignity of people on the move. The State must provide a response based on the context of each case. Concerning the Warao population, it must take into account their worldview, customs, and idea of territory, so that the settlements where they arrive are conducive to being sheltered. Likewise, the response must be oriented to minimize the threats and vulnerability, but not in a welfare sense, but rather to provide the necessary tools so that the population can generate their income through the activities they used to carry out in Venezuela. Finally, it is necessary to establish a community protection mechanism that allows the development of the new Warao community in Brazil.

Figure 2: Protection principles



Source: Sphere Handbook [3]

The second principle is based on equal treatment without discrimination. The State must guarantee impartiality in the treatment of the population. However, it must prioritize the humanitarian response based on the needs and situation of vulnerability. As has been developed, indigenous people are in a situation of vulnerability, but their condition is aggravated by the health crisis in Venezuela due to HIV or COVID-19. Likewise, this equal treatment should establish equal conditions for people, for example, providing information in the Warao language and Spanish for a better understanding of the population on access to services or immigration advice.

The third principle is about assistance for recovery from harm. Forced displacement leaves after-effects on the population, especially due to the levels of violence experienced. Likewise, due to the lack of food and medicine, people's health worsens, which generates various traumas and desperation in the population. That is why the State, through its institutions, must provide access to physical and psychological health for the indigenous

people who need it. Regarding health, always respecting the cosmovision and ancestral knowledge to combat diseases. It is necessary to monitor and report on the progress of humanitarian assistance.

The last concern access to rights and the defense of those rights. The State must promote respect for the human rights of all people in its territory under equal conditions. Therefore, information must be accessible and documentation must be provided to people, so that they can access a series of services such as education, health, social security, among others. Documentation is fundamental since it not only gives access to economic rights but also civil rights such as freedom of transit, work, among others of similar importance.

These principles must be applied to guarantee the rights of indigenous people and stipulate some actions such as legal counseling, housing, land and property rights, child protection, and so on. The response should also implement the State's action in the event of a mass influx of people. According to the Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, it is possible to grant refugee status to a large number of arrivals in a country for a short period [29]. This action would ensure access to residency documentation in Brazil and would contribute to access to the previously mentioned rights.

IV. ALTERNATIVES FOR DURABLE SOLUTIONS: LOCAL INTEGRATION FOR WARAOS IN BRAZIL

Documentation

The Federal Government has been adopting several mechanisms for the protection of refugees. In recent years, Brazil has been applying the collective recognition of refugees through the Cartagena definition. The most crucial measure of durable solutions was the adoption of refugee status through *prima facie* recognition [38]. Brazil also established accelerated and simplified procedures to recognize refugee status. This measure is essential for refugees to document themselves and thus materialize their rights such as work, education, or health.

Some scholars stated two decisive factors explain the phenomenon of massive regularization. The first is the shift to the right in Brazilian foreign policy following the election of President Bolsonaro, and the second

is the alignment with the United States, which identifies Nicolás Maduro as a common enemy [39] This political response to the humanitarian crisis in Venezuela is reflected in Brazil's pull-out from the Global Compact for safe, orderly and regular migration. President Bolsonaro feels it is important to set national rules for the entry of people to control migration [40]. The approach of internal security, as well as xenophobic discourses, has been a characteristic of Brazilian migration policy in recent years.

Whatever the main reason for the collective recognition of refugees, Brazil has been playing an important role in the region. The recognition of refugee status to the indigenous population guarantees them the right not to be returned to their country of origin, as well as the right to obtain a residence permit to stay in the territory. The documentation is of utmost importance since it allows access to other rights such as work, education, health, among others. It also allows the family to have access to such documentation and to be able to settle in Brazil and integrate with the host community.

On the other hand, it is essential to emphasize the necessity of the implementation of specific legal frameworks since there is no regulation about indigenous refugees. It would be appropriate to design a legal instrument that identifies the indigenous refugee problem. Also, this instrument could provide common elements of protection to offer relevance to the phenomenon and specialize it and make available answers that can combat uprooting, language preservation, self-determination, and other issues. Identifying indigenous people is also useful for the State since it knows who is in the State and where they are. Based on this approach, it is possible to start creating public policies to protect the rights of indigenous people and guarantee their inclusion within the host society.

These regulations can be complemented with protocols for the actions of officials towards indigenous people. The Brazilian government should capacitate CONARE officials who will be documenting the Warao population so that they can guarantee a human rights approach to care, as well as cultural belonging. Likewise, and in a complementary manner, it would be important to implement a specific protocol at the border, to attend to people based on their needs, and to be able to document them from the beginning.

Sustainable livelihood

The livelihood criterion is intended to enable the person to fend for him or herself within the host country. In other words, the State must provide equal opportunities for the local population and the migrant population. This stage involves a process of equalization of opportunities, where the State must level the playing field between a foreigner and a local so that they can compete on equal terms. In this sense, the tools are provided so that the person can launch a business idea or even the documentation process is part of it so that they can also pay taxes and contribute to society.

In 2018, the Federal Government implemented in Brazil the so-called "Operação Acolhida," whose essence was to receive Venezuelan migrants and refugees with dignity. Within the work proposal, the government emphasized the Warao and Eñepá communities, victims of forced displacement. Thus, the program provides essential services, shelter, and food at the borders of Venezuela [41]. The program has been so successful that the IACHR has recognized the Brazilian experience and congratulated the federal government for continuing with "Operação Acolhida." However, the Commission also expressed its concern for migrants in street situations and those waiting to be received by these care centers [42].

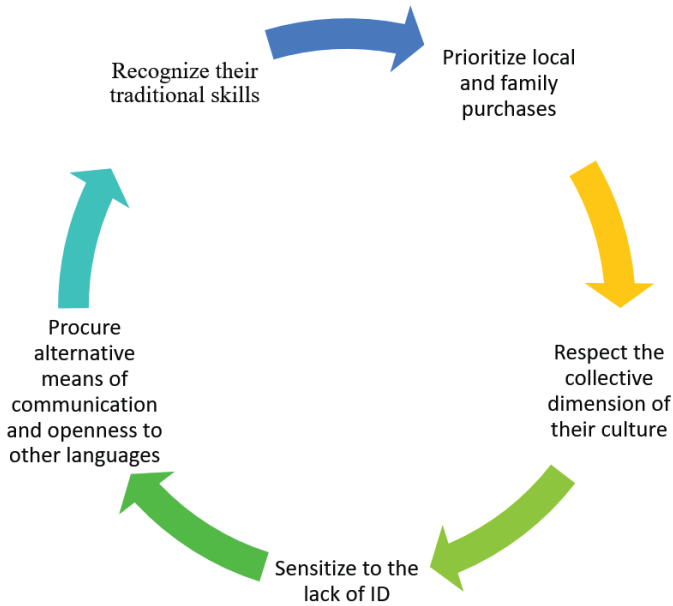
On the other hand, it is indispensable to continue with social support programs to stabilize and generate their resources. Greater emphasis must be placed on indigenous refugees since they are in a situation of inequality even concerning other refugees, either because of language or customs. As reported by Karla Revelés: "The Warao are positioned at a disadvantage compared to the actions that link other Venezuelan refugees, for example, to carry out the Unified Registry with which to access the "Bolsa Familia" Program [...] and in the Interiorization Operation that began in March 2018 in which thousands of refugees were taken to other states with the possibilities of being employed" [43].

The social integration of Warao refugees is another essential axis. Initially, not being able to request basic documentation and access to basic public services was a limitation since they have no formal education and are often monolingual Warao. However, it should be noted that these difficulties are currently being addressed in the shelters according to the social assistance measures and plans of each municipality, but this does not mean that these difficulties have been solved.

Social integration

Local integration is a central component for people who intend to stay in Brazil since the State should adopt its public policies towards groups of special protection such as indigenous people. On the other hand, the social integration of the foreign population has a different dynamic and another difficulty is added when the migrants and refugees are from vulnerable groups or indigenous populations. In this sense, an adequate response to the social integration of people must be considered, to reduce the risk of xenophobia or discrimination.

Figure 3: Local Integration of indigenous people



Source: Prepared by the author based on IOM information [4]

The above graph shows five elements to guarantee the local integration of indigenous people. Respect for their rights begins with the recognition of their traditions. In addition, it is also relevant to respect the collective dimension of the Warao, not to individualize the migratory flow, but to provide answers based on the Warao collective, so that they can associate and maintain their traditions. Finally, other complementary actions stem from the central ideas mentioned above, such as encouraging the identification of people or attending to people in their native language.

Precisely, for the identification of the person, the right that they can be assisted before their consulate is violated. There are many documents issued by the consulate that help the person to prove whom they say they are. However, this has to be interpreted delicately, since, depending on the level of persecution, it can be counterproductive and other ways of refugee determination have to be determined. In July 2021, it has been reported that the Waraos do not receive assistance from their consulate. In consonance with Kapé-Kapé civil society association, more than 6500 indigenous have not been assisted. In consequence, they don't have access to education in Brazil because of the lack of documentation [45].

Brazil has to implement the corresponding measures to influence the local population and the indigenous refugees to interact with each other. However, provisions must be made for other ethnic groups and the new settlement in the Warao territory. Brazil will also have to assume the preservation of the Warao language and respect it to access services. According to García-Castro:

> "This adaptation to the urban environment is causing some changes, and although the Warao language, with more than 40,000 speakers and considered independent, because it is not related to other indigenous languages of the region [...], seems to be out of danger, in Venezuela, it has been seen that some Warao parents do not encourage their children to learn their language, but only Spanish, because they have reached the wrong conclusion that it would impede learning the official language of the country." [4]

The latter is a significant point to continue promoting the existence of the Warao language. Its use since the analogy could be made that it is better to learn Portuguese than Warao, which would generate the language's disappearance. Another difficulty is in the family appeal since the Warao people understand the family as the whole community. The reunification of asylum is usually for the Western nuclear family, which represents another difficulty. However, the I/A Court H.R in Chitay Nech et al. v. Guatemala has ruled on family vision among indigenous people and it includes not the only family nucleus, "(…) but also includes the distinct generations that make up the family and includes the community of which the family" [26].

V. CONCLUSIONS

- The displacement of the Warao people has been increasing in recent years due to the humanitarian crisis in Venezuela. Indigenous people are concentrated in the Roraima region of Brazil. There is currently a situation of overcrowding, and not all people have access to social programs. People live with a lack of drinking water, health care, medicines, and violence, and xenophobia from the local population.
- The Federative Republic of Brazil is implementing durable solutions regarding the reception of Venezuelans in the country. Through "Operação Acolhida," there is a specific plan at the borders to assist the indigenous population, providing shelter and food to those in need. However, there are challenges in terms of livelihoods and social integration of the indigenous population.
- It is recommended to implement specific instruments for indigenous refugees since international law does not focus on this particularly vulnerable group. It is crucial to define protection mechanisms related to preserving identities, language, self-determination, collective property, etc. Having specific instruments allows for providing adequate protection.
- Local integration of the Warao must take into consideration the elements of documentation, sustainable livelihoods, and social integration without discrimination. Each of these components is necessary to reduce the risk of discrimination and xenophobia, as well as to equalize the disadvantaged conditions of the migrant population with the local population so that they can build on equal terms.

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