JURACI MOURÃO LOPES FILHO
FELIPE GÓMEZ ISA
DENISE ALMEIDA DE ANDRADE
EMILIO JOSÉ ARMAZA ARMAZA
JAN KRIMPHOVE
PAULA SALEH ARBS

HUMAN RIGHTS AND VULNERABILITY

2nd Edition
Revised and Expanded

Universidad de Deusto
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PROLOGUE

We are glad to present the 2nd edition of this e-book, which is the result of a fruitful cooperation between the Law School of University of Deusto (Bilbao, Basque Country, Spain) and the Law School of Unichristus University in Fortaleza (Ceará, Brazil).

Our collaboration started during the pandemic of Covid-19 and has been a great and productive experience for both students and faculties, especially because we have been discussing and reflecting about an important and urgent theme, which is Human Rights.

Fortunately we have been able to share many insights and researches about the Human Rights contemporary challenges and our latest event proved that the continuous effort of these two institutions has been worth it.

The contributions that we introduce now were presented at the II Congress of Master's Students from the International Legal Studies course – LLM (University of Deusto) and the Master's in Law (Unichristus University), that was held on May 30th and 31st in 2022.

Following the central themes that are addressed in our respective Master's programs, there were two thematic axes for the Congress: Human Rights and Indigenous People and Human Rights and Vulnerability.

As we said in the first edition´s prologue: "We hope to continue taking steps to make university higher education an instrument of social transformation to create a fairer, more humane, and more sustainable world".

Coordinators

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INTERNATIONAL DOCUMENTS ON WOMEN'S REPRODUCTIVE HUMAN RIGHTS: A REFLECTION ON WOMEN'S REPRODUCTIVE VULNERABILITY AND SELF-DETERMINATION

Denise Almeida de Andrade

Doctorate and Master in Constitutional Law
Professor at Christus University Center - UniChristus

Karla Patrícia Matos Correia

Master of Laws student at Christus University Center - Unichristus

Abstract

This paper aims to expose a reflection on the vulnerability and reproductive self-determination of women through the rescue of the construction of the concept and legal contours of women's reproductive rights, the understanding of the function of motherhood for the construction of women's identity and the provision of their place in society after the advent of reproductive rights, regarding the rights not to have children as provided. We used bibliographic and documental research as the central methodology in the elaboration of this study. In the bibliographical analysis, we examined the Brazilian infra-constitutional legislation regarding the theme, the updated doctrine, from the reading of articles published in indexed bases and book articles. We also researched and ascertained international documents that deal with women's rights to raise essential elements to delineate and understand the concept of Gender Justice and Reproductive Rights. We also analyzed the importance of international documents and women's human rights for the legitimization of women's reproductive self-determination.

Keywords: International Documents. Human Rights. Women's Reproductive Rights. Vulnerability. Reproductive Self-Determination.

Introduction

Based on the principle of human dignity and responsible parenthood, the right to family planning is asserted in the Brazilian constitutional text of 1988, in article 226, §7, and embraces all people, without any distinction, which authorizes, *a priori,* stating that the exercise of this right is of the couple's free will, as well as prohibiting the use of any form of interference from public or private institutions (BRASIL, 1988), except those freely and directly demanded by people.

To develop the work, we used bibliographic and documental research, through which texts from international documents that enable the investigation of elements to compose the construction of the research object of Gender Justice and Reproductive Rights were also researched and analyzed.

In Brazil, Law 9263, known as the "Family Planning Law", published in 1996, aimed to regulate the above constitutional provision. This law establishes the actions that must be taken to care for women, men, and couples within a context of "global and integral health care" (BRASIL, 1996), a premise aligned with international documents and institutions that deal with reproductive human rights.

When law 9263/96 was passed, the Brazilian social, legal, and political context was different from what it is today. Regarding the legal aspect: we currently have norms that recognize and ensure the Rights of Women, such as law 11.340/06 - Maria da Penha Law (BRASIL, 2006); law 13.104/15 - feminicide law (BRASIL, 2015); law 12.650/12 - Law that changes the statute of limitations in crimes against sexual dignity committed against children and adolescents (BRASIL, 2012). This legal framework proves the legislative advance in respect for fundamental rights.

Following what Costa (2020) states, after two years of the COVID-19 pandemic, Brazil is facing an increase in inflation, the number of unemployed people, the number of non-formal jobs (fewer guarantees to workers), which compromises people's quality of life and the effectiveness of fundamental rights, such as food security, housing, health, etc., which affects the entire Brazilian population, but more strongly, vulnerable groups such as women.

However, the Pandemic COVID-19 was not the only cause for the current situation, in 2016, Constitutional Amendment No. 95/2016 was enacted, which froze public spending for the next 20 years. Bringing it to the core of this work, this amendment reflected directly on the care of the maintenance

expenses of public health, as well as made it impossible to make investments to improve the public health service in the country (COSTA, 2020).

In the political scene, we are experiencing polarization between relevant political figures at the same time as we observe an escalation in the discourse of disrespect for the democratic-republican pact in a presidential election year.

We emphasize that we understand that the realization of human rights in the wake of the realization of fundamental rights is directly associated with the robustness of democratic institutions and the stability of institutional relations, which imposes on us a greater responsibility in the quest to implement measures useful to the protection, promotion, and respect of women's reproductive human rights.

1 Women's reproductive rights and reproductive self-determination: a brief historical reflection

It is understood that the State has to ensure full access to reproductive rights, regardless of gender, sexual orientation, or the predilection of the family model experienced by the individual, this perspective was mentioned by Mendes (2019), who also found that the importance of women's reproductive rights has been ignored, almost entirely until the end of the twentieth century, may have collaborated to the existence of misconceptions or misrepresentations on the matter, entailing a reflection on the relevance given to this right.

It is relevant to mention that reproductive rights are characterized by being an "individual, free and responsible exercise" (VENTURA, 2009, p.19) of each person, in the same way, that deciding with whom to have children, the number of children, the interval between them, as well as having sufficient means to exercise their reproductive autonomy is configured as a private act of each human being.

In this sense, we emphasize that the reproductive self-determination of women, when the option of not having children is materialized, presupposes the availability of scientifically accepted contraceptive methods, information of technologies that enable women to choose freely and without obstacles that hinder the full exercise of this right (MENDES, 2019).

In the characterization of the concept and the construction of the legal contours of Reproductive Rights, the International Covenants and Conventions on Human Rights have been of extreme importance. The

Universal Declaration of Human Rights (UN, 1948), 1948, assured that no one shall be subject to interventions in his private life, in his family, or his home (art. XII). It also ensured that men and women have the right to marry and start a family, without any outside resistance except the minimum age requirement (article XVI).

Seventeen years later, in 1965, the International Convention on the Elimination of All Forms of Racial Discrimination ensured the right to liberty, (article 5, letter b) to equality in access to health care (article 5, letter e, n. A year later, in 1966, the principles of equality and freedom, which are intended to compel states to recognize the right to special protection for mothers during the time before and after childbirth. Thus, the International Covenant on Economic, Social, and Cultural Rights (UN, 1966) ratified the right of working mothers to paid leave (and social security rights, article 10, item 2), access to health care (article 12), protection against unlawful interference with privacy, family, and home (article 17), and the right to marry and form a family (article 23).

In the same year, the International Covenant on Civil and Political Rights (UN, 1966) affirmed a series of extremely important rights for the full exercise of reproductive and sexual rights, such as the right to life and liberty in article 6, item 1; to privacy in its article 17, item 2; to marriage and the constitution of a family as well as the safeguarding of honor and reputation in article 23, item 4; and to equality between men and women, as stated in article 3 of the aforementioned diploma.

Between the 1980s and 1990s, access to contraception, the exercise of motherhood, and reproductive technologies were included in the conceptual framework of reproductive rights. To illustrate the 1980s, in 1984, the International Convention on the Elimination of All Forms of Discrimination Against Women (UN, 1979) corroborated the extremely important principle of equality between the sexes, as well as determined the adoption of affirmative practices to provide such equality.

For Côrrea and Ávila (1999), the expression "reproductive rights" came to public knowledge at the First International Meeting on Women's Health, held in Amsterdam in 1984. Later, it was agreed that this would be the most coherent and complete term to refer to women's reproductive self-determination, thus the expression substituted the previously used one, "women's health".

After that, researchers started a lapidating work regarding the conceptualization of what reproductive rights are to specifically delimitate the theme, following the contributions of Lynn Freedman and Stphen Isaacs (1993), who defended reproductive choice as a universal human right.

This movement gained strength and in 1994, in Cairo, Egypt, the International Conference on Population and Development took place, during which reproductive rights received their due recognition, having been conceptualized in the Plan of Action throughout Chapter VII, which meant a great historical milestone in the recognition of the existing relationship between reproductive rights and women's rights (VENTURA, 2009).

It is worth mentioning, at the outset, what is understood by reproductive health, as stated in Chapter VII, paragraph 7.2,

> Reproductive health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes. Reproductive health implies, therefore, that a person can have a safe and satisfying sex life, has the capacity to reproduce, and have the freedom to decide when and how often to do so. Implicit in this last condition is the right of men and women to be informed and to have access to effective, safe, permissible, and acceptable methods of family planning of their choice, as well as other methods of fertility control of their choice which are not contrary to law, and the right of access to appropriate health services that enable women to safely go through pregnancy and childbirth and give couples the best chance of having a healthy child (UN, 1994, p.62).

Therefore, paragraph 7.2 strengthens the idea that to have reproductive health, the person must be provided with well-being in the exercise of the right to reproduction, being indispensable the complete attention to mental and social aspects, with interdisciplinary areas regarding the reproductive system, its functions, and processes. Then, in paragraph 7.3, the concept of reproductive rights is expressed (UN, 1994).

> [...] Reproductive rights encompass certain human rights already recognized in national laws, international human rights documents, and other treaty documents. These rights are based on the recognized basic right of every couple and every individual

> to decide freely and responsibly on the number, spacing, and timing of their children and to have the information and means to do so, and the right to enjoy the highest standard of sexual and reproductive health. It also includes their right to make decisions about reproduction free of discrimination, coercion, or violence, as expressed in human rights documents. (UN, 1994, p. 62).

In the aforementioned provision, we have the recommendation of the performance of the reproductive right, considering the needs of the current and future children, as well as the responsibilities with the community, which aligns us with the need to create public policies and government programs in the area of reproductive health, encouraging the implementation of bonds with respect and equality between the sexes (at the time of the publication of the document the nomenclature gender was not used) satisfying the educational needs of adolescents to instruct them to take care of their sexuality positively and responsibly (UN, 1994).

The Plan of Action of the International Conference on Population and Development recognizes in the same regulation, that reproductive health is a reason for frustration in many nations and points out some causes

> [...] inadequate levels of knowledge of human sexuality and inadequate or poor quality reproductive health information and services; the prevalence of high-risk sexual behavior; discriminatory social practices; negative attitudes towards women and girls; the limited power that many women and girls have over their sexual and reproductive lives. Adolescents are particularly vulnerable because of their lack of information and access to relevant services in most countries. Older men and women have different reproductive and sexual health problems, often inadequately treated. (UN, 1994, p.62)

The Plan of Action implemented at the International Conference on Population and Development has a date for its execution by participating countries, which is assumed as an official commitment to achieve the goals contained in the document. The nations would have twenty years to carry out the policies and measures in compliance with what was described in the Plan of Action (UN, 1994).

At that time, developing countries paid two-thirds of the cost of contraceptive methods, "which was intended to raise the level of education and employment of women" (BAUMAN, 2005, p.60) and the remaining one-third would be paid by developed countries. However, the pact was not fully honored and it is estimated that 122 million (one hundred and twenty-two million) women became pregnant between 1994 and the year 2000 (BAUMAN, 2005).

In the early 1980s, the social context was unemployment, violence, and poverty. There emerges a new look on demographic policies, even the Catholic Church reduced its advocacy on pro-natalist ideas and based its discourse on the "quality of life of Brazilians" (ALVES, 2015, p.29).

Even without a concrete policy to control fecundity, the press played an important role in informing middle-class women, as at the same time they talked about the wonders of the pills, they also warned about the dangers of their use (PEDRO, 2003). In the same way, family models with a maximum of two children were shown in the media, which indirectly strengthened the idea of reducing the number of children resulting from marriage (PEDRO, 2003).

This agenda was gaining strength, which led to increased demand for effective contraceptive methods, there was a consensus that the regulation of fertility was an agenda of Public Health Policy in Brazil (ALVES, 2015).

1.1 The advent of the Family Planning law in Brazil

The policy of fertility control has not only promoted the use of oral hormonal contraceptive methods, but it has also encouraged the practice of compulsory sterilization, as evidenced by report n.2-1993 (BRASIL, 1993). This report originated from the CPMI, created through Application 796/91-CN, in which it was found the practice of compulsory sterilization in masses of women in vulnerable situations. According to data from the IBGE (BRASIL, 1986), in 1986 there were 5,900.238 (five million, nine hundred thousand, two hundred and thirty-eight) women who were sterilized to avoid having children, which is equivalent to 15.8% (fifteen point eight percent) of Brazilian women between 15 (fifteen) and 54 (fifty-four) years old and 27% (twenty-seven percent) of Brazilian women who had any kind of marital relationship, whether legal, informal or past union (BRASIL, 1993, p.117).

However, what substantiated the situation of compulsory sterilizations was how these procedures occurred, as no other reversible contraceptive option was made available to the women, nor was there information about the

risks of the procedure and post-procedure, nor the possible irreversibility of sterilization (BRASIL, 1993). There was also a relevant number of sterilizations performed during cesarean sections that were indicated with the sole and exclusive purpose of sterilizing the woman (BRASIL, 1993). This context, as a rule, occurred with women in situations of greater vulnerability: poor, with little education, very young, unaccompanied, from indigenous peoples, etc.

In addition, there was a considerable amount of women who regretted the surgical sterilization procedure, which revealed that they were not offered information or time to consider the option of the procedure. The disrespect for women's reproductive self-determination to limit their right to have children is proven.

In 1996, Law 9263 was published, known as the Family Planning Law, which prohibits the practice of surgical sterilization in people under 25 years of age or who do not have at least two living children. In the same way, it has reserved a single provision for the practice of inducement and instigation to surgical sterilization and equated it to genocide if the crime is committed against the community. Penalty - confinement, from one to two years. Sole Paragraph - If the crime is committed against the community, it is characterized as genocide, applying the provisions of Law Nº 2.889, of October 1, 1956.

2 The role of vulnerability and reproductive self-determination in perpetuating the cycle of women's economic fragility

First, it is necessary to understand what is meant by vulnerability, for Sanches (2014), the origin of vulnerability is the result of political and economic foundations, strengthened by an unreasonable historical development that simultaneously encourages benefits and privileges to be to certain groups at the expense of others.

In an international context, the Universal Declaration on Bioethics and Human Rights (UDHR) stated in Article 8 that human vulnerability should be given importance in the application and progress of scientific knowledge, as well as possible technologies and medical practices.

In 2004, the regulation of the National Policy for Social Assistance (PNAS) was initiated, and throughout the document, there is, among other issues, the concept of the expression "social vulnerability", which is not only linked to the economic character, but also to the lack or insecurity of access to income and which, in turn, is linked to the instability of family and affective

relationships and the difficulty in accessing goods and services:

> The public that uses the Social Assistance Policy is made up of citizens and groups that find themselves in situations of vulnerability and risk, such as families and individuals with loss or fragility of affective, belonging, and sociability bonds; life cycles; stigmatized identities in ethnic, cultural, and sexual terms; personal disadvantage resulting from disabilities; exclusion due to poverty and/or in the access to other public policies; use of psychoactive substances; different forms of violence coming from the family nucleus, groups, and individuals; precarious insertion or non-insertion in the formal and informal labor market; differentiated survival strategies and alternatives that may represent personal and social risk. (BRASIL, p.31, 2004)

This policy corroborates what Sanches (2014) understands as vulnerability, a situation that allows the individual to experience social injustice, which in itself is an ethical problem, since it is the result of structural problems existing in a society that can even be overcome, but this will require a great effort by the community.

One factor that contributes to the situation of vulnerability is teenage pregnancy (from 12 to 19 years old), which is in itself one of the biggest causes of school dropout; at least 75% of teenage mothers drop out of school, impacting women's professional qualification (PAHO/UNICEF, 2017). To confirm this perspective, Dias and Teixeira (2010) state that there is an association between teenage pregnancy, school dropout, the context of poverty and vulnerability, unemployment, and susceptibility to the various types of violence against women that currently exist.

However, one should not believe that adolescents get pregnant only because of the non-use or failure of contraceptive methods, motherhood in some cases is used as a strategy for life change, economic escape, or as a way to be recognized and respected in the family or where they live (UNICEF, 2017).

This scenario contributes to the perpetuation of socioeconomic problems because once this adolescent drops out of school, she will not be able to qualify professionally. As a result, we have a direct impact on her insertion in the labor market, which contributes to the perpetuation of women's economic fragility.

Having briefly discussed the relationship between the influence of vulnerability, body self-determination, and the perpetuation of women's economic fragility, we realize that the absence of public policies for women's reproductive health added to the lack of a life perspective can compromise women's economic development, exposing them to domestic violence for example (UNICEF,2017).

The inconsistencies found throughout the research in normative documents that provide for bodily and reproductive autonomy, for example even the Code of Medical Ethics (2019), which despite assuring the doctor the right to conscientious objection, allows him to refuse reproductive health care for example,

> Chapter I
>
> Fundamental Principles
>
> VII - The physician shall exercise his profession with autonomy, not being obliged to render services contrary to the dictates of his conscience or to whom he does not wish, except in situations of absence of another a doctor, in case of urgency or emergency, or when his refusal could bring harm to the patient's health. (BRAZIL, 2019)

In the same way that it allows, it also prohibits making it difficult for the patient to access the contraceptive method, in a way that safeguards the patient's bodily autonomy,

> Chapter V Relationship with patients and families. The physician is forbidden:
>
> Art. 42 - Disrespect the patient's right to decide freely about the contraceptive method, always clarifying the indication, safety, reversibility, and risk of each method. (BRAZIL, 2019)

In the Brazilian Civil Code (2002), article 13, it is stated the right to bodily autonomy, when it results in a permanent reduction of physical integrity, as well as when it also goes against what is understood as good manners.

> Except for medical requirements, the act of disposing of one's own body is forbidden when it implies a permanent diminution of physical integrity or is contrary to good morals.
>
> Sole Paragraph. The act foreseen in this article will be admitted

> for transplant purposes, in the form established by special law. (BRASIL, 2002)

The device contains the expression "good customs", which is not possible to measure since there is no consensus on the materialization of this expression, and it may vary according to what is individually credible.

As already mentioned, the art.226, **§7º disposes** that it is of the couple's free decision the exercise of the right to family planning, however, the understanding should be to the couple or the person. If there is no consensus between the couple, how can the possibility of the right to family planning be understood?

This controversy is materialized in the content of paragraph 5 of article 10 of law 9263/96, where voluntary sterilization surgery is conditioned to the express acceptance of both spouses. Although it mentions that the requirement will be bilateral, the law is silent in what refers to man and woman, thus ignoring the visible individuality, as well as the reproductive autonomy of both man and woman. For example, if one of the spouses does not agree with the surgical procedure, it cannot be performed, which means the inexistence of reproductive autonomy of either the woman or the man. Moreover, added to the controversy existing in the legal documents described, we have a vulnerability, which, as mentioned in the National Policy for Social Assistance, generates a worsening in the woman's life condition once she will have difficulties in accessing goods and services, among them, those related to reproductive health.

According to a study conducted by the World Health Organization from 2005 to 2014, in 36 (thirty-six) countries in the Asia-Pacific region, it found that the high rates of unplanned pregnancy prevailed among women with less education (76%), poorer (63%), however, the non-use of contraceptive methods was also high among women with more education, the indicators also had significant result (33.3%), among richer women (47.3%), so it is noticeable that this situation must be addressed in some way, either informing or making women aware of the importance of family planning.

Also, in a study conducted by the World Health Organization (WHO, 2019), approximately 74 (seventy-four) million women living in developing countries had unplanned pregnancies per year. This has resulted in twenty-five (25) million unsafe abortions, forty-seven (47) thousand maternal deaths, as well as reduced prenatal care and delivery assistance sought by these women

who have had unplanned pregnancies, and has also contributed to two point seven (2.7) million neonatal deaths.

Reflecting on the mentioned indicators, and considering that family planning is part of a set of health care actions for women, men, and couples, and should be guided by preventive and educational activities (BRASIL, 1996), it is noticeable that the lack of these directly impacts both the rates of unsafe abortions and maternal and neonatal deaths cited by the World Health Organization study (WHO, 2019).

To understand the relationship between family income and the number of children, Santos and Kassouf (2007) published a study using the database of the National Household Sample Survey (PNAD), produced by the IBGE (Brazilian Institute of Geography and Statistics) in 1999. The results showed that there is a reduction in family income for *"poor" families, which* probably comes from the demand for childcare, which is incompatible with work and leads to a reduction in the workload or even leaving the labor market.

3 Women's reproductive self-determination and the need to fulfill the function of motherhood

From the perspective of Federici's work (2019), there exists in domestic work a kind of *"hidden work",* which goes beyond house cleaning, food preparation, and supermarket shopping, it also encompasses the performance of physical, emotional, and sexual functions, this is unpaid and is in some situations added to paid work.

Part of this work is the functions of reproduction, that is, motherhood, which will suffer a variation according to the country, in some the woman is driven to reproduction, and in others, she is subjected to reproductive control, especially if the woman is black or lacks government aid, or, in the words of Federici (2019), "if we tend to reproduce people who cause trouble" (FEDERICI, 2019, p.69).

On the other hand, the role of motherhood in the construction of women's identity deserves to be highlighted. Motherhood and the image of women have a symbiotic relationship, cultivated by patriarchy and the need for male domination. Contrary to what has been claimed (BADINTER, 2011), there is no scientific proof that a woman is born exactly to be a mother, this being the only irremediable destiny of women (BADINTER, 1985).

However, this idea managed to survive over the years, from the 18th to the 21st century (BADINTER, 2011), and currently, there is still disrespect for women's reproductive self-determination, despite the existence of a constitutional provision and in federal legislation that recognizes the right to family planning, as well as, the right to decide about their reproduction according to their life planning.

For Badinter (2011), until the 1970s, the child was the expected result of marriage, and all women should be prepared for motherhood and should do it without many questions.

Procreation had multiple facets, while it was an instinct, something natural, it was also a religious obligation, exercising motherhood would be like settling the deficit with the survival of the human species (BADINTER, 2011). But with the advent of contraceptive methods, what was once an essential desire of women, began to be seen with reflection and using reason, after all, now it was possible to choose, therefore, no longer an instinctive desire (BADINTER, 1985).

The understanding that a woman is conceived solely (or at least primarily) to be a mother and to love the sufferings that accompany her vocation was used by Michelet in 1859. Years later, the moralistic sense became sharpened by *"feminologists*" and the indispensability of maternal sacrifice silenced the suffering of mothers, justifying that this was a condition for the true happiness of her child so that between Rousseau and Freud, there was a consensus that woman's nature was essentially masochistic (BADINTER,1985).

There is no way to debate autonomy of the will without mentioning the historical perspective, confirming the argument of oppression experienced by women, the philosopher Mill (2006) states that from the earliest childhood, women have been brought up in the belief that their nature is completely contrary to that of men who possess personal will, as well as an ability to head their lives, while women possess the subordination and are dominated to the control of others (MILL, 2006).

In item II of this paper, we mentioned the World Health Organization study (2019), which linked unplanned pregnancy and the economic fragility of families. Corroborating then to this argument, Badinter (2011) cites that as women become educated, fewer are active in domestic work while they intensify their professional lives.

For Badinter (1985), motherhood has acquired, throughout history, a new meaning, obligations were added, the "*maternal work*", then by the fault of psychoanalysis the woman was placed in the role of "great responsible for the happiness of her offspring" (BADINTER, p.238, 1985) and everything was just a ruse and that in some moments will go beyond and will be a "great alienation" (BADINTER, p.238, 1985).

Similar to what we experience today, the maternal function and its endless activities were acclaimed as well as glorified, while women who could not perform these functions with due perfection were sentenced to condemnation by society, "from responsibility to guilt" (BADINTER, 1986, p. 238).

Moving forward to the 1960s, we highlight the feminist positions of women, which coincided with the advent of the first contraceptive pill in the United States. But not everything was perfect for women to achieve the reproductive autonomy they had not had for a long time, for Badinter (2011) the second wave of feminism realized that femininity is a quality from which maternity results as the core, contrary to Beauvoir's vision that propagated political equality and "co-education by virtue of their similarities (what unites us is more important than what distinguishes us)" (BADINTER, 2011, p. 71).

The duality of discourses in the feminist movement in the same period may have somehow hindered the achievement of women's reproductive autonomy, according to Badinter (2011). While differential feminism exalts women and their autonomy, naturalist feminism considers motherhood a fundamental experience for women in the construction of a fairer society, and even though the duality is notorious, in the philosopher's view there are points of convergence between both theories.

Conclusion

Despite the normative evolution and the progress in social relations, we realize that there is still a need for normative updates, especially in the context of women's reproductive rights and fundamental rights, to provide the right to not have children.

The recognition of reproductive rights in an international context is not enough to provide the proper exercise of self-determination. The performance of this exercise is compromised when difficulties persist that discriminate and intervene in the decisions of individuals, either by hindering them because of their gender.

A public policy must be implemented that implements what law 9263/96, the Family Planning law, stated that informs and makes women aware not only about the right to contraceptive methods but also in the sense of reproductive health care, as stated in the legislation and the Federal Constitution of 1988.

Thus, discussing women's reproductive human rights is a complex task, especially when related to the historical discrimination experienced by women, which imposes on us the task of critically analyzing the conceptual and normative paradigms to build paths that, in fact, in the future may contribute to the realization of these rights.

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THE REPERCUSSION OF FAKE NEWS IN THE POLITICAL SPHERE FROM HANNAH ARENDT'S PERSPECTIVE

Antonia Georgelia Carvalho Frota

Master of Laws (LL.M.) at Christus University Center - UniChristus

Alexandre Antônio Bruno da Silva

Professor at Christus University Center - UniChristus

Doctor of Laws (LL.M.) in Pontifícia Universidade Católica de São Paulo

Abstract

Digital media are present in people's daily lives, enabling infinite possibilities of communication. They have transformed the relationship models and, more indispensable for the present discussion, have changed the ways of political articulation among individuals. The speed and immediacy of communication through social networks have conceived new ways of spreading information, making communication immediate. On the other hand, the devices that have democratized the efficiency and dissemination of information have also made it possible for individuals to categorically attack certain social groups, as well as to influence them in an oppressive and tyrannical way, especially when lying methods are used. Nowadays the media has influenced the political and social spheres, even conceiving regimes with authoritarian inclinations. Starting from the conception that the dissemination of *fake news*, by denying or altering the reality of facts to adapt it to ideological conceptions, implies the functioning of social media as a public space. The purpose of this essay is to analyze the implications of *fake news* in the political spectrum and its repercussions on democracy from the point of view of Hannah Arendt's studies.

Keywords: Fake News. Democracy. Politics.

Introduction

With the optimization of the technological apparatus associated with the exorbitant use of the Internet and social networks, the spread of *fake news* has become a matter of concern for democracy. With each passing day, social networks become strongly present in people's lives, and with just one click, the

news is spread through social networks, which quickly reach several countries and millions of people.

Since the 2016 U.S. elections and the referendum on Britain's exit from the European Union (BREXIT), the word and use of *fake news* have become routine. In Brazil, in the 2018 presidential elections, the practice was intensely present, lasting until today. It is essential to discuss how the spread of fake news, understood as false news, can affect the exercise of democracy while promoting disinformation, and even the destruction of the image of people, companies, and institutions.

Based on this assumption, it was verified, initially, the need to conceptualize the expression *fake news*, then analyze how digital platforms are fundamental to the rapid dissemination of *fake news*. And, finally, approach the repercussions of the propagation of fake news in the political arena from the perspective of Hannah Arendt's studies.

It should be noted that it was in the late 60's that the philosopher reverberated about the use of lies in politics, a time when digital media did not exist and, therefore, the power that new media have to propagate false news was not subject of Arendt's studies. However, for this essay, it is of interest to demonstrate how Hannah Arendt's thought is relevant to elucidate current issues about the use of *fake news* in social networks as an instrument of manipulation for political purposes as well as violation of human rights.

From this point of view, this essay aims to analyze how digital platforms are fundamental to the rapid dissemination of *fake news*, especially the repercussions of the spread of fake news to the political arena and its impact on contemporary democracies.

The methodology used was the qualitative approach, through a deductive investigation and conceived in a bibliographical analysis. The text was constructed starting from the current scenario of the use of *fake news* and the violation of human rights, contextualized with the consequent analysis of the studies of the philosopher Hannah Arendt.

1 Conceptualization of the term fake news

To understand the term *fake news*, the version of the English language dictionaries, the Lexicon, and the Cambridge Dictionary, will be pointed out.

The Lexicon[1] defines *fake news* as "false information that is transmitted or published as news and that has fraudulent or politically motivated purposes". In close context, the Cambridge Dictionary[2] defines such an expression as a "false story that appears to be news, disseminated on the Internet or using other media, usually to influence political views or as a joke.

In Brazil, the dicio[3], uses the concept closest to the Cambridge Dictionary, considering fake news as "false news; any false or untrue news and information that is shared as if it were real and true, disseminated in virtual contexts, especially on social networks or message sharing applications.

It should be noted that disinformation caused by the spread of false news did not emerge with social networks, nor is it a specific element of the present period. It refers, in fact, to a long-standing fact, however, with technological progress this phenomenon has taken on unimaginable proportions.

The internet has provided autonomy of communication because as people connect to the net, they can express themselves at the time and in the way they see fit.

Based on this conception and as mentioned elsewhere, currently digital media are the most used means for the dissemination of false news[4], specifically with the advancement of the technological apparatus associated with the intense use of the internet. Diogo Rais highlights that the Internet has changed the parameters of space and time, incorporating the virtual world into the real one[5].

1 Lexicon dictionary meaning, available at: https://www.lexico.com/definition/fake_news. Accessed on: 30 Jul. 2022.

2 Meaning taken from the Cambridge Dictionary. Available at: https://dictionary.cambridge.org/pt/dicionario/ingles/fake-news. Accessed on: 30 Jul. 2022.

3 Meaning taken from Dicio, an online Portuguese dictionary. Available at: https://www.dicio.com.br/fake-news/. Accessed on: 30 Jul. 2022.

4 Mounk (2019, p. 170-171) notes that "in recent years, several journalists and writers have compared the invention of digital technology - and especially social media - to the invention of the printing press. In the words of Clay Shirky, "Before, you needed access to an Internet café or a public library to get your thoughts out. Heather Brooke made the same point even more concisely: "Our printing press," she wrote, "is the Internet. Our coffee shops are the social networks."

5 RAIS, Diogo. Disinformation in the democratic context. In: **Fake News and Regulation**. Org. ABBOUD, Georges; NERY JR, Nelson Nery; CAMPOS, Ricardo 2 ed. rev. e amp. São Paulo: Thompson Reuters, 2019. Kindle E-book (loc. 8000).

On the one hand, the Internet and social networks were seen as an important democratic potentiality, in that they allowed individuals to be empowered, enabled new forms of deliberation, and could be seen as an independent public space, open to participation by all.

On the other hand, in a few years, the situation has changed, social networks have become a space marked by disagreement, polarization, and extremism, an occasion that autonomy in communication is corrupted by facts that prevent effective dialogue, at this point attention is drawn specifically to the dissemination of fake news, supported by the model of transactions that predominate on the Internet, where a particular page, from the views and clicks, gets more financial return, regardless of the reliability and quality of the content propagated. Consequently, this fact denotes a threat to the promising functioning of democracy.

With the various platforms used by society, there is an intensification and speed in the spread of fake news, as never seen before. Mounk points out:

> On Facebook and Twitter, a post created by any user can be quickly relayed by someone with whom that user is connected. If the content created is new or interesting enough, even someone with few contacts can reach a wide audience in a matter of minutes[6].

It is important to emphasize that individuals and groups have the autonomy to forward messages to countless other individuals in a biased and fraudulent way, moreover, what is received by the networks follows an algorithmic mold that is unknown but is rigorously conducted to keep the attention of users and the dissemination of content, as detailed in a specific topic.

Although the use of fake news as a political tool is not a new event in history, Macedo Júnior warns that the new form of dissemination, through social media, corroborates the concern demonstrated by scholars and researchers, who have intensely addressed this issue[7].

6 MOUNK, Yascha. **The people against democracy**: why our freedom is in danger and how to save it. São Paulo: Companhia das Letras, 2019, p. 172.

7 MACEDO JÚNIOR, Ronaldo Porto. Fake News and the new threats to freedom of expression. In: **Fake News and Regulation**. Org. ABBOUD, Georges; NERY JR, Nelson Nery; CAMPOS, Ricardo. 2 ed. rev. e amp. São Paulo: Thompson Reuters, 2019. Kindle E-book (loc. 7467).

It is possible to consider that we live in the era of 'post-truth' and 'self-truth', where the professional press has become the 'enemy' while the 'uncle of zap' has national credibility. Fake news, whether it is incorrect information, that does not have the power to cause damage, misinformation, considered confidential and disseminated to cause damage, or even disinformation, which is known to be false and also disseminated to cause damage, stimulates a force that drives individuals to extremes, where debate with different conceptions is almost impossible.

The Internet and social media have been used both for the rapid expansion of *fake news and* for the articulation of the issues. The consequence is the accumulation of fake news that reaches out to certain individuals. The result is an increase in dissent; those who think differently become the enemy to be attacked.

Considering that the use of fake news as a political tool is not new, it is relevant to address, at the appropriate time, the studies of Hannah Arendt, since the author highlights characteristics seen as distinctive of lying in her time and, consequently, can be extended to today.

Moreover, digital platforms such as Facebook, Youtube, Instagram, Twitter, and WhatsApp, among others, are fundamental for the rapid dissemination of *fake news.* Besides them, in this practice, there is wide use of computer algorithms, based on Artificial Intelligence. This context, by itself, shows the complexity for a more complete understanding of how the system of circulation of fake news works.

2 Algorithmic governmentalization and the filter bubble

The acceleration of new technologies in the information age[8], produces modes of subjectivation in individuals, resulting from relevant programs that capture their digital devices, and behaviors, momentarily.

Manuel Castells, among others, reiterate that the Internet has enabled a continuous and immediate flow of information, allowing instantaneous communication, data sharing, and access to any information in the virtual environment.

8 Term coined by Manuel Castells in his book **Redes de indignação e esperança**: movimentos sociais na era da internet. Rio de Janeiro. Zahar. 2017.

It is important to mention that this facility brought by the internet makes individuals more and more dominated by algorithms, based on what they do, what they want, what they search for, and the decisions they make. Clarifies Castor:

> Behavior, more and more, is increasingly crossed by algorithmic technologies. We are not mere users of technologies, but as we use them more and more extensively, we also become strategic objects to be directed and governed in behavior. We are thus confronted with a central aspect of the relationship between algorithms and human life, namely, the strategic tendency of algorithms to influence behaviors, seduce motivations, induce behaviors, direct preferences, guide decisions, and ultimately manage to govern as much as possible the behavior of individuals[9].

This strategy to govern as much as possible the behavior of individuals was conceptualized by Foucault as the governmentalization of behavior. In the author's words, governmentality is understood as

> [...] a set constituted by the institutions, procedures, analyses and reflections, calculations and tactics that allow the exercise of this rather specific and complex form of power, which targets the population, its main form of knowledge is political economy, and its essential technical instruments are security devices[10].

The domination over the lives of individuals through the new social media has proven to be relevant to the effectiveness of the governmentalization of behaviors. For Castor, "the algorithms, through the traces that we leave on electronic devices, permanently perform a massive extraction of data, the so-called Big Data".[11]

The author Shoshana Zuboff mentions that nowadays information is provided spontaneously and works through the logic of exchange, social

9 CASTOR, Bartolomé Ruiz M. M. **Algoritmização da vida**: a nova governamentalização das condutas. Cadernos IHU ideias / Universidade do Vale do Rio dos Sinos, Instituto Humanitas Unisinos. year 19, nº 314, vol. 19, 2021, p. 7.

10 FOUCAULT, M. **Governmentality**. In: _____. Microphysics of power. Rio de Janeiro/ São Paulo: Paz e Terra, 2019, p. 429.

11 CASTOR, Bartolomé Ruiz M. M. **Algoritmização da vida**: a nova governamentalização das condutas. Cadernos IHU ideas / Universidade do Vale do Rio dos Sinos, Instituto Humanitas Unisinos. year 19, nº 314, vol. 19, 2021, p. 9.

media being the main stores of personal information[12].

However, the individual himself does not refrain from providing personal information, which is then collected and categorized for various possible purposes.

Ruiz portrays that through

> of algorithms, data mining can get a detailed knowledge of us, so much so that it can be said that algorithms know more about us than we know about ourselves. They can know what our main social relationships are, the people we interact with most, the topics we are most interested in, the purchases we make, the places we visit, the reading we do, the news we read most, the movies we watch most, among many other things. With this data, they draw up an individual profile, which becomes the "raw material" to design efficient strategies through which the algorithms themselves lead us to search for products, news, movies, objects, purchases, and relationships, that they understand are of our preference[13].

In this sense, to clarify the above, the documentary "The Networking Dilemma" portrays how social media becomes increasingly attractive and brings about the compulsion of its users to share their personal life, as well as exposes the function of algorithms in social networks and how they serve to personalize these media due to the profile of each user.

Thus, as users make personal choices, such as watching videos or buying products on the platforms, the algorithms store this information and develop a profile of each individual.

Eli Pariser calls attention to the concentration of information by algorithms resulting from the profile of each user, the author mentions a kind of "invisible filter". This is a mechanism in which algorithms have the function of collecting as much information as possible from each user and

12 ZUBOFF, Shoshana. Big Other: surveillance capitalism and perspectives for an information civilization. In: BRUNO, Fernanda; CARDOSO, Bruno; KANASHIRO, Marta; GUILHON, Luciana; MELGAÇO, Lucas. **Technopolitics of surveillance**: perspectives from the margin. 1. ed. São Paulo: Boitempo, 2018, Part I, pp. 17-68.

13 CASTOR, Bartolomé Ruiz M. M. **Algoritmização da vida**: a nova governamentalização das condutas. Cadernos IHU ideias / Universidade do Vale do Rio dos Sinos, Instituto Humanitas Unisinos. year 19, nº 314, vol. 19, 2021

then drawing up a profile and forwarding only content and information that will please this individual.[14]

Therefore, in political analysis, such practice is dangerous, due to the ease of surrounding the user with information capable of reinforcing a controversial belief about reality. Knowing that the use of social media by society is increasing, numerous pieces of information found in the virtual environment can be misrepresented, and as a result, these platforms become effective channels for the dissemination of *fake news*.

Thus, in the next topic, we will address, from Hannah Arendt's perspective, the repercussions of the spread of fake news in the political sphere.

3 Fake News and the exercise of politics in Hannah Arendt

In the work *Origins of Totalitarianism*, Hannah Arendt addresses the search for truth in the information disseminated in society. Campos Melo mentions that the complexity in verifying the truth or falsity of certain information is based on the construction of narratives, which are disseminated by the networks, and also taken into credit by individuals.

The recurrence and continuous fluidity of information lead individuals to accept it as if it were true. In the words of Silva, "even more disturbing is the acceptance of these lies by a large part of the public"[15].

In the view of the "construction of narratives", presenting totalitarian propaganda as an example, Hannah Arendt portrays that

> The effectiveness of this kind of propaganda highlights one of the main characteristics of the modern masses. They believe in nothing visible, not even the reality of their own experience; they do not trust their eyes and ears, but only their imagination, which can be seduced by anything at once universal and congruent in itself. What convinces the masses are not the facts, even if they are invented facts, but only the coherence with the system of which these facts are a part.[16]

14 PARISER, Eli. **The invisible filter**: what the internet is hiding from you. Rio de Janeiro: Zahar, 2012.

15 SILVA, Ricardo George de A. **Truth and Politics**: considerations from the work of Hannah Arendt. Cardenos Arendt, v. 01, n. 02, 2020, p. 6.

16 ARENDT, Hannah. Origins of Totalitarianism: Anti-Semitism, Imperialism, Totalitaria-

The predominance of ideology conceives the erosion of the democratic precepts of dialogue, which take rational predilections away from individuals, leading them to bubbles that lead them to decide according to their emotions and inner beliefs, even if far from a cohesive and true foundation.

Hannah Arendt points out characteristics considered distinctive of lying in her time, which can be extended to today:

> The traditional lie concerned only particularities and never aimed to deceive all people; it targeted the enemy and aimed to deceive only him. These limitations of his restricted the damage inflicted on the truth so much that, to us, in retrospect, it may seem almost innocuous. The second limitation concerns those in the service of the activity of deception. These belonged, as a rule, to the narrow circle of statesmen and diplomats, who, among themselves, still knew how to preserve the truth and could do so. They were not likely to be victims of their falsehoods and could deceive others without deceiving themselves. These two extenuating circumstances of the old art of lying are notably absent from the manipulation of facts that we encounter today.[17]

As pointed out by the author, the traditional lie dealt with secret facts or intentions, while the modern lie deals with facts that are publicly or easily known, simply by searching. The philosopher seems to predict one circumstance of *fake news*, which is that most of them, through a google search, can be disproved.

Nowadays, lying in politics is based on a marked manipulation of opinions and facts. For Arendt, manipulation is intended to replace reality and not just to deny or hide a given fact. The organized lies, alluding to the present moment - *fake news*, lead to the elimination of the capacity for political action in the public space. [18]

In this view, Hannah Arendt states that "the political sphere is deprived not only of its main stabilizing force but also of the starting point for

nism. Translation Roberto Raposo. São Paulo: Companhia das Letras, 2012, p. 485.

17 ARENDT, Hannah. **Between the past and the future**. Translation Mauro W. Barbosa. São Paulo Perspectiva, 2016 - [Electronic book].

18 ARENDT, Hannah. **Between the past and the future**. Translation Mauro W. Barbosa. São Paulo Perspectiva, 2016 - [Electronic book].

transformation, for starting something new" [19]. There is intense subjection of political thought and action to factual truth. In the absence of respect for factual truth, it is unlikely the construction of a valid and efficient political opinion for social edification, therefore, society, through public opinion, will not have the aptitude to regulate the State.

It is important to mention that talking about *fake news* requires pondering its social repercussions in the exercise of politics. For Arendt, factual truth is translated into inconsistent knowledge concerning the object, knowledge that anyone can assimilate. Therefore, truth is susceptible to manipulation.

According to Silva

> Factual truth is that which can subsist only under the reach and view of the public world. For since its content is of interest to the political community, its facts must always be available. In this direction, anything different from this threatens the integrity and legitimacy of factual truth, since its legitimacy lies precisely in the possibility of plural views.[20]

Although it is not feasible to link factual truth to journalistic information, for Arendt, it would be an important relationship, since the media, by democratizing access to information, would give effect to information according to factual, unmanipulated truth.

However, it is not about impartiality, but about not characterizing factual truth with personal opinion. Considering that one of the pillars of the Democratic State of Law is freedom of expression, this cannot be confused with impartiality or with manipulation. Therefore, to intervene for the factual truth corresponds to intervening for freedom in its purest form. For Arendt, it is based on dialogue that debates in the public arena are possible[21].

19 ARENDT, Hannah. **Between the past and the future**. Translation Mauro W. Barbosa. São Paulo Perspectiva, 2016 - [Electronic book].

20 SILVA, Ricardo George de A. **Truth and Politics**: considerations from the work of Hannah Arendt. Cardenos Arendt, v. 01, n. 02, 2020.

21 SILVA, Ricardo George de A. **Truth and Politics**: considerations from the work of Hannah Arendt. Cardenos Arendt, v. 01, n. 02, 2020.

Nowadays, as Silva points out, "the expedient of lying, falsifying facts and even their systematic manipulation has been favored by technological implements; programs, algorithms and the like to distort reality and manipulate opinions".[22]

It should be noted that Arendt's studies are significant for the understanding of *fake news* and its implications in the political arena. It is known that the dissemination and propagation of *fake news* suppress the factual truth of ideological discourses, leading to a scarcity of dialogue. For Arendt, truth should be discursive and not ideological.

The fake news carried by ideological biases has the purpose of instituting a Manichean social conjuncture, keeping pluralism away; we can allude to the digital bubbles, created by a kind of invisible filter, a term coined by Pariser and elucidated in the previous topic.

Thus, with individuals in digital bubbles, the scenario of social discourse, peculiar to the public sphere, is vanishing, implying the substitution of dialogue in repression and the possibility of opening for authoritarian regimes, because it is possible to elect authoritarian politicians.[23] This fact gives rise to an intense expansion of hate speech, causing a serious violation of human rights.[24]

22 SILVA, Ricardo George de A. Truth and Politics: considerations from the work of Hannah Arendt. Cardenos Arendt, v. 01, n. 02, 2020, p. 2.

23 Fake news influenced the election of Donald Trump in the US in 2016 and dominated the 2018 elections in Brazil (Fabio et al., 2020).

24 Marked by political polarization and incitement to hatred, the 2020 elections have already shown unprecedented rates of political violence. According to monitoring conducted by Terra de Direitos and Justiça Global, the electoral period of the last election registered an increase of almost 200% compared to the other months of 2020. With a balance of discrimination and prejudice that has not dissipated after the elections, the elected representatives of women, black people, peripheral populations, LGBTQIA+, quilombolas, and indigenous peoples have been, since then, growth targets of intense political violence due to the dispute and contestation of the dominant powers (Organizations denounce to the IACHR the current scenario of rights violations and risks to democracy in this election year. Terra de Direitos. Curitiba. 30/05/2020. Available at: https://terradedireitos.org.br/noticias/noticias/organizacoes-denunciam-a-cidh-cenario-atual-de-violacoes-de-direitos-e-riscos-a-democracia-neste-ano-eleitoral/23742. Access on: 27 Jul. 2022.

It should be noted that when *fake news is* created, it has certain purposes and, from an exercise of power, it tends to build or destroy something, and is, therefore, a likely instrument for the realization of violations against the most varied people, companies, and democracies, leading to irreversible results, such as violation of human rights, compromised reputation, risk of losing an election, serious attacks on the democratic process, among others.

The collapse of traditional democracies occurs legally, inside, currently, democracy does not end with a violent rupture, the rise of authoritarianism occurs with the slow exhaustion of institutions.

As Levitsky and Ziblatt point out, "the tragic paradox of the electoral route to authoritarianism is that the killers of democracy use the very institutions of democracy - gradually, subtly, even legally - to kill it."[25].

It should be noted that most of the time politicians do not reveal their authoritarianism before ascending to power, Levitsky and Ziblatt portray this point well, stating that

> Some adhere to democratic norms early in their careers, only to later abandon them. Think of Hungarian Prime Minister Viktor Orbán. Orbán and his Fidesz party began as liberal democrats in the late 1980s; and in his first term as prime minister, between 1998 and 2002, Orbán ruled democratically. His authoritarian turn after returning to power in 2010 was a genuine surprise.[26]

In light of the above, authors Steven Levitsky and Daniel Ziblatt have developed four elements to facilitate the recognition of authoritarianism in politicians who do not display anti-democratic biases. The presence of any of these elements is a cause for concern. These are: 1) reject, in words or actions, the democratic rules of the game; 2) deny opponents legitimacy; 3) condone and encourage violence; and 4) give indications of a willingness to restrict the civil liberties of opponents, including the media[27].

25 LEVITSKY, Steven, ZIBLATT, Daniel. How Democracies Die. Translation: Renato Aguiar. 1 ed. São Paulo: Zahar, 2018 (DIGITAL BOOK).

26 LEVITSKY, Steven, ZIBLATT, Daniel. How Democracies Die. Translation: Renato Aguiar. 1 ed. São Paulo: Zahar, 2018 (DIGITAL BOOK).

27 LEVITSKY, Steven, ZIBLATT, Daniel. How Democracies Die. Translation: Renato Aguiar. 1 ed. São Paulo: Zahar, 2018 (DIGITAL BOOK).

However, it is important to reflect that there is a certain constancy in populist outsiders presenting some of the elements mentioned above. Populists can be understood as those politicians who claim to be the representatives of the voice of the people. To paraphrase Levitsky and Ziblatt

> Populists tend to deny the legitimacy of the established parties, attacking them as undemocratic and even unpatriotic. They tell voters that the system is not a real democracy, but something that has been hijacked, corrupted, or fraudulently manipulated by the elite. And they promise to bury that elite and return power "to the people." This discourse should be taken seriously. When populists win elections, they often attack democratic institutions.[28]

Corroborating with what the aforementioned authors address, Mounk states that "to understand the nature of populism, we must admit that it is both democratic and illiberal - that it seeks both to express the frustration of the people and to undermine liberal institutions"[29]. Thus, as populism advances against democratic institutions, the regime becomes more authoritarian. To strengthen this logic, "the promise to give free expression to the voice of the people is the central feature of populism.[30]

Analyzing the current Brazilian conjuncture, it is possible to list several attitudes and statements of Jair Bolsonaro, president of the country, elected in a democratic regime and who, already in office, frequently attacks democracy. On April 19, 2020, in an act held in Brasilia, in front of the Brazilian Army Headquarters, Bolsonaro is received by his supporters with posters and banners confronting the other powers, and when speaking he expressed that

> We don't want to negotiate anything. We want action for Brazil. What was old is now behind us. We have a new Brazil ahead of us. Everyone, without exception, has to be patriotic and believe and do their part so that we can put Brazil in the place of prominence it deserves. The time for crookedness is over. It is now the people in power. [I am here because I believe in you. You

28 LEVITSKY, Steven, ZIBLATT, Daniel. How Democracies Die. Translation: Renato Aguiar. 1 ed. São Paulo: Zahar, 2018 (DIGITAL BOOK).

29 MOUNK, Yascha. **The people against democracy**: why our freedom is in danger and how to save it. São Paulo: Companhia das Letras, 2019, p. 54.

30 MOUNK, Yascha. **The people against democracy**: why our freedom is in danger and how to save it. São Paulo: Companhia das Letras, 2019, p. 62.

> are here because you believe in Brazil. [Everyone in Brazil has to understand that they are submitted to the will of the Brazilian people. I am sure, we all vowed one day to give our lives for our country. And we will do whatever is possible to change the destiny of Brazil. Enough of the old politics.[31]

Note that in the speech exposed above, the leader is the people, who should govern is the people. Disinformation is the driver of the deterioration of democracy, in Brazil, the president himself watches and supports acts that call for the closing of the national congress, the Supreme Court – STF, and that call for military intervention.

The 2018 elections were marked by the war of information against misinformation, which spread through social media. Following the damage caused by the spread of fake news, in 2019 the STF opened the *Fake News* Inquiry, with Justice Alexandre de Moraes as rapporteur.

Robots were used, in the 2018 elections, to gain support for specific causes, affronting opponents, spreading *fake news*, and manipulating society, thus conceiving a polarized environment, with harmful repercussions for democracy.

> One of the most evident conclusions in this sense is the concentration of these actions in political poles located at the end of the political spectrum, artificially promoting a radicalization of the debate and, consequently, undermining possible bridges of dialogue between the different political camps. Another flagrant element is the 'swelling' of political movements that are, in reality, of a much smaller size. Taken together, these risks, and others represented by robots, are more than enough to shed light on a real threat to the quality of public debate in Brazil and, consequently, to the political and social process defining the years to come.[32]

31 COLETTA, R., ONOFRE, R. **We do not want to negotiate anything, says Bolsonaro in pro-military intervention act in front of the Army HQ**. Folha de São Paulo, São Paulo, 19 Apr. 2020. Accessed July 26, 2022, available at: https:// www1.folha.uol.com.br/poder/2020/04/nao-queremos-negociar-nada-diz-bolsonaro-em-carreata-anti-isolamento-em-brasilia.shtml. Accessed on: 10 Nov. 2020.

32 RUEDIGER, M. A. **Robots, social networks and politics in Brazil**: a study on illegitimate interference in public debate on the web, risks to democracy and the 2018 electoral process. Fundação Getúlio Vargas, Public Policy Analysis Directorate. 2018. Accessed July 26, 2022. Available at http:// dapp.fgv.br/robos-redes-social-e-politica-estudoda-fg-

To that end, the spread of fake news in the 2018 elections mostly occurred through the WhatsApp app[33]. Reports in El País cited the spread of fake news as the core of the WhatsApp groups of supporters of then-candidate Jair Bolsonaro. The *fake news* disseminated in these groups said that the PT candidate, Fernando Haddad, would have defended, in a book, the sexual relationship between parents and children; that certain personalities would have confirmed support for the PSL candidate[34, 35] ; (Benites, 2018; Oliveira & Blanco, 2018), videos circulated still imputing to the candidate Fernando Haddad, Lula's former minister of education, the creation of the gay kit for children. In August 2018, in an interview with Jornal Nacional, Jair Bolsonaro claimed that a book called "Sexual Apparatus and Co." was within the material distributed by the gay kit. An image of Haddad's vice-presidential candidate Manuela D'Ávila (PCdoB) wearing a T-shirt with the words "Jesus is a transvestite" was spread on social media, among many other false news stories.

It is observed that in Brazil, the occurrences of *fake news* have similar peculiarities to those that occurred in the USA.[36] Given the above, the difficulty posed is to implement measures that can control the harmful effects and, in parallel, promote the dissemination of true news and the autonomy of the virtual field.

Since the presidential elections are approaching, the Superior Electoral Court (TSE) has created the Permanent Program to Combat Disinformation to reduce the harmful effects of disinformation.

vdapp-aponta-interferencias-ilegitimas-nodebate-publico-na-web/, p.8.

33 CRUZ, F., MASSARO, H., & BORGES, E. **'Santinhos', memes e correntes**: an exploratory study on spam received by WhatsApp during elections. InternetLab: São Paulo.2018. available at: http://www.internetlab.org. br/en/informacao-e-politica/santinhos-memes--ecorrentes-um-study-about-spams-nas-elecciones/. Accessed 26 Jul. 2022.

34 BENITES, A. (2018, September 28). The 'fake news' machine in pro-Bolsonaro groups on WhatsApp. El País. Available at https://brasil.elpais.com/brasil/2018/09/26/politica/1537997311_859341.html. Accessed on: 26 Jul. 2022.

35 OLIVEIRA, J., & BLANCO, P. (2018, October 28). The 'Whatsapp' of a poisoned campaign. El País Brasil. Available at https://brasil.elpais.com/especiais/2018/eleicoes-brasil/conversacoes-whatsapp/. Accessed on: 26 Jul. 2022.

36 On this, see Giuliano da Empoli. **The engineers of chaos**. São Paulo: Vestige, 2019.

Conclusions

Although Hannah Arendt's studies date back to the 1960s, they are relevant to contemporary times. Freedom of expression is under constant debate due to the internet, social networks, technological apparatus, and invincible freedom of opinion.

Contemporaneously, lies have taken the place of truth. There is the dissemination of untrue opinions and news, called in this essay *fake news*. As demonstrated, the dissemination of *fake news* has been effective and fast with the use of various social networks, such as Facebook, Instagram, Youtube, WhatsApp, and Twitter, among others.

The propagation of *fake news* corroborates a hostile environment, endangering democracy, given the execution of wide dissemination of ideological content with excesses in the freedom of opinion that violate individual rights.

The public environment and political life need factual truth. Discourse concerning reality, guided by factual truth, must conform to the facts.

Arendt's proposal to rescue dialogue proves to be coherent with the contemporary need since society needs to be aware of the accountability of the information disseminated, which must be based on the functioning of democracy.

Therefore, the awareness of responsibility requires the building of dialogue, so that it is possible to contain the dissemination of *fake news,* as well as the manipulation of society, above all, to reject hate speech, strengthen democracy, and ensure individual rights.

Contemporary times point to opportunities for improvement and the adoption of combative measures. Undoubtedly, the task is arduous, since it involves the union and performance of institutions and society in general. In this sense, the proposal of this essay enables an understanding of the dissemination of fake news on the Internet through social networks.

Therefore, tackling the problem of *fake news* should be a priority. Some proposals are being implemented and they may bring some results in the future.

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CRITICAL ANALYSIS OF LAW N. 14.020/2020 FROM THE PERSPECTIVE OF FLEXSECURITY

Stéfani Clara da Silva Bezerra

Master of Laws (LL.M.) in Centro Universitário Christus

Alexandre Antônio Bruno da Silva

Doctor of Laws (LL.M.) in Pontifícia Universidade Católica de São Paulo

Abstract

Starting from the debate about the flexibilization of labor guarantees, the article proposes to critically analyze Law n. 14.020/2020 and related devices from the point of view of the flexicurity institute. The methodology adopted is quanti-qualitative, an occasion that contemplates doctrinal discussions on the subject and demonstrates with data, obtained from the Federal Audit Court, aspects of the Brazilian labor reality, in particular, of formal and informal labor relations and their consequent connection with the object under debate, Law No. 14,020/2020 which instituted the Emergency Program for the Maintenance of Employment and Income. It also analyzes the Provisional Measure n. 936/2020, the Declaration of Unconstitutionality Action n. 6.363 and the mentioned normative device under the aegis of the fundamental guarantees of workers. It addresses flexicurity and its relationship with the compensatory policies adopted by the federal government to mitigate the socioeconomic consequences arising from the flexibilization of labor rights. In the end, it concludes that flexicurity is not compatible with the welfare policy guidelines implemented by the federative entity, since such measures have a provisional character and do not protect workers from the erosion of their rights as the institute does.

Keywords: Law 14.020/2020. Labor Flexibility. Flexicurity. Emergency Benefit. Compensatory Policy.

Introduction

The time frame of the present work is the years 2020 and 2021 since they were marked by exceptional social, economic, political, and public health situations that had repercussions in the labor field. The negative consequences in question were caused and aggravated by the pandemic caused by the new coronavirus that spread through all the countries of the world. Since this is a global problem, the World Health Organization (WHO) has stipulated some protocols to be followed by all nation-states to prevent and combat the proliferation of the virus. Among the main measures signaled is social isolation. In Brazil, the adhesion and consequent standardization of the WHO recommendations gave rise to Law 13.979/2020. This normative device, in addition to establishing measures to restrict movement, provided the types of economic activities that could continue to operate during the quarantine period[37]. These, in turn, were classified into essential activities.[38]

In this sense, on April 1, 2020, the President of the Republic issued Provisional Measure (PM) 936. This PM established the emergency program to maintain employment and income to face the state of public calamity. Despite being the object of a Direct Unconstitutionality Action (DUA n. 6.363), soon after its issue, its constitutionality was ratified by the Federal Supreme Court (FSC). Therefore, it was converted into Law n. 14.020/2020.

Based on the assumption that Law 1420/2020 removed certain fundamental labor guarantees due to the economic crisis faced by the country at the time, this article aims to critically analyze the normative provision in question from the standpoint of the flexicurity institute[39].

To prepare the research, the method adopted will be inductive, since it will start from the impacts suffered by workers as to the fundamental guarantees that were suspended by Law No. 14.020/2020 due to the economic recovery of private entities. The article will be produced from a bibliographical survey, which will present doctrines, scientific articles, and monographic works obtained from the scientific journal bases of the Scielo platform and the Brazilian Digital Library of Theses and Dissertations (BDLTD). It will also be documental since it will consult the federal legislation in question and the

37 Cf. art. 2, II, Law 13.979/2020.

38 Cf. Decree 10,282/2020, which regulates Law 13,979/2020, defines the public services and essential activities listed in the aforementioned legal provision.

39 A coordinated set of social and employment policies, of a permanent nature, to guarantee economic and social security for the entire community.

DUA now being discussed on the official websites of planalto.gov.br and the Federal Supreme Court (FSC). It will present data on the number of formal and informal labor relations and their respective incomes in Brazil, obtained from the Monitoring Panel of employment and income preservation actions maintained by the Federal Audit Court (FAC) whose website will be made available at the end of the article.

1 Flexibilization of Constitutional Labor Guarantees: provisional measure n. 936/2020

The constitutional labor guarantees are essentially outlined in Chapter II of the Federal Constitution under the heading of Social Rights. The insertion of these rights in the Magna Carta gives them a broad axiological scope, and they are seen as principled parameters for the concretion of material rights without the necessary judicialization.

The central objective of fundamental rights is to safeguard human dignity. In this way, it should be emphasized that their application is not conditioned, and the State must act to fully realize fundamental rights, and their mere recognition is insufficient.[40] There is, therefore, a need for effective protection and promotion of these rights by state entities.

On the other hand, it should be emphasized that the positive or negative provision maintained by the State concerning the concretion of the rights of the community is based on the logic of costs.[41] These costs, in a situation of economic retraction, tend to be reduced. From the point of view of Labor Law, the flexibilization of some norms fulfills the purpose of making it feasible and giving continuity to labor relations under the economic order.

It is known that Brazil began a policy of economic recovery in 2016, under former President Michel Temer when he assumed the presidency due to the removal and subsequent *impeachment of* former President Dilma Rousseff. Seeking to mitigate the effects of the crisis and recover the country's economy, the former president adopted a policy with austerity traits, inaugurated by the Public Spending Ceiling Amendment (Constitutional Amendment No. 95).

40 MOLINA, Ananda Elisa dos Santos Sommier. **Labor citizenship and the effectiveness of fundamental rights in labor relations**. 2019. 95fl. Dissertation (Master's Degree in Labor Law) - Pontifical Catholic University of São Paulo, São Paulo, 2019.

41 On the cost of rights, see Stephen Holmes and Cass Sunstein's "The Cost of Rights: Why Freedom Depends on Taxes".

Such measures were implemented under the austerity policy, whose purpose would be the economic recovery of the country. Among the guidelines agreed upon, the so-called "austerity package" stands out, which is in line with the Expenditure Ceiling Amendment, the Labor Reform, the Social Security Reform, the Tax Reform, and the Administrative Reform. The object of this paper will focus only on Labor Reform.

In addition to the aforementioned EC n. 95, other measures were undertaken to boost the economy. Among them are the Labor Reform of 2017 and the Outsourcing Law, which authorized outsourcing of end activities. Such normative devices were harshly criticized, as they directly impacted the working class and the labor guarantees, hard-won over the years. However, the justification given by the government was that such sacrifice was necessary for an economic recovery. Flexibility was needed to increase the number of hirings.

Such measure can be better seen in article 611-A, which specifically deals with the prevalence of agreements or conventions, formulated between employers and unions, over the legislation itself. The sections brought by the device deal with issues that are inseparable from the employee's lack of sufficiency, since they provide for hypotheses of negotiation on working hours, remuneration, and work environment. According to Bezerra[42], a weak or non-existent union representation that can guarantee minimum protection and compliance with indispensable rights can compromise the legal security and, especially, the autonomy of these individuals to negotiate with the employer.

This point about the Labor Reform is indispensable to the analysis and criticism of PM 936 and, then, of Law 14.020/2020, since, as pointed out by Arruda and Bezerra[43], "flexibilization is a format that fits the market's needs". This opportunity, following the cyclical logic of the capitalist system described by Arrighi[44], leads the capitalist system to always seek more appropriate methods of maintaining its competitiveness.

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

43 ARRUDA, Gerardo Clésio Maia; BEZERRA, Stéfani Clara da Silva. Flexibilization of labor relations in Brazil: a reflection in the light of the uncertainty of complex modernity. **Revista Argumentum**, eISSN 2359-6889, Marília/SP, v. 20, n. 2, p. 539-562, May-Aug. 2019, p. 552.

44 ARRIGHI, Giovanni. **The illusion of development**. Translation by Sandra Vasconcelos. Petrópolis: Vozes Publishing House, 1998.

Now, in the context of Labor Reform, we see, at first, the insertion of an article that provides for the possibility of negotiation between employee and employer, under the representation of the union, to deal with sensitive issues. While in Provisional Measure no. 936, based on the assumption of art. 611-A, of Law no. 13.647/2017, the employer's negotiation margin is broadened and part of the legal security available to the employee is removed.

From the plan, it is possible to observe that Law 13.467/2017 contributed to the reduction of labor rights due to the economic order. For Graça Druck[45], the erosion of these rights, when imposed in a crisis scenario, becomes understood as an "economic fatality" from which workers cannot escape. Based on this, it is possible to understand, three years after the Labor Reform, the creation of Provisional Measure 936/2020, was a new normative device that reduced labor guarantees due to the economic situation in the country. The PM had as its main role the relaxation of labor relations in force when social isolation measures were being carried out due to the pandemic. The Provisional Measure focused on two points: the proportional reduction of working hours and wages, and the temporary suspension of the labor contract.

To execute such hypotheses foreseen in the rule, the employer had to follow the criteria exposed in the arts. 7th and 8th, both from PM no. 936. What calls attention to the referred legal provisions how such negotiations could occur. The flexibilization of the employment agreement could be "agreed upon [through] an individual written agreement between employer and employee"[46]. One can see, therefore, the absence of a union entity to mediate such negotiations. The presence of the union remains in the background as a simple "check".

In addition to the possibility of discussing the proportional reduction of working hours and wages and the temporary suspension of the labor agreement, the MP also allowed employers and employees to dispose of "[...] the collective labor agreements or conventions previously entered into [that]

45 DRUCK, Graça. Work, precarization, and resistances: new and old challenges? **Cadernos CRH**, Salvador, v. 24, n. spe 01, p. 37-57, 2011.

46 BRAZIL. **Provisional Measure n. 936, of April 1, 2020**. Institutes the Emergency Program for the Maintenance of Employment and Income and provides for complementary labor measures to face the state of public calamity recognized by Legislative Decree no. 6, of March 20, 2020, and the public health emergency of international importance resulting from the coronavirus (covid-19), referred to in Law no. 13,979, of February 6, 2020, and makes other provisions. Brasília-DF: Presidency of the Republic, [2021].

may be renegotiated to adjust their terms [...]"[47]. Now, one observes, once again, legal security under a tenuous balance.

Conceiving such legal provisions as an affront to the constitutional guarantees of the labor class, the political party Rede Sustentabilidade filed, on April 2, 2020, a Direct Action of Unconstitutionality. Claiming that such PM would have the same defects as its predecessor that had been repealed and pointing serious offense to labor rights since such rule would compromise labor security by not allowing the participation of trade unions in the stipulation of measures to relax labor relations in the context of the pandemic.

One of the most critical points and targets of Direct Unconstitutionality Action (DUA n. 6.363) was the dispensability of the unions in the labor negotiations regarding the legal provisions inserted in items II and III of art. 3 of PM 936/2020. Since these are situations in which the employee would be in a vulnerable situation with the employer, the DUA sought the Federal Supreme Court (FSC) to attack such provisions.

Just as it happened with the Labor Reform, the MP also brought up the debate about the worker's vulnerable situation in the labor relationship. Even if private entities were subjected to deficit conditions due to the effects of the pandemic, employees should have been allowed to maintain a certain balance in negotiations.

This lack of legal guarantee in the treatment of individual employment agreements with employers can compromise the labor class to a greater extent. The normative ratification functions as a continuous precedent and, when confirmed by the Federal Supreme Court (FSC), will hardly return to the *status quo*, even if the economic crisis is transitory[48]. The dispensability of the union entity and the provision for individual agreements affront the constitutional guarantees listed in the aforementioned articles indicated in the petition of the plaintiff.

47 Ibid.

48 MARQUES, Gérson. Incidente de uniformização de jurisprudência na atual sistemática do Processo do Trabalho. **ConsCIÊNCIA labor**, doctrina, jun. 2019.

2 The enactment of law n. 14.020 and the ratification of the flexibilization of Constitutional Labor Guarantees

Before the events caused by the pandemic, the Brazilian social and economic situation was of a timid economic recovery. According to the Institute for Research and Applied Economics (IRAE), Brazil was showing a moderate recovery with an annualized rate of 2% in the last quarter of 2019[49]. However, the Gini Index reveals another reality. According to the Brazilian Institute of Geography and Statistics[50], "the Gini Index of per capita household income was 0.543 in 2019, retreating compared to 2018 (0.545) and increased compared to 2015 (0.524), the lowest index in the PNAD Continuous PNAD series." Therefore, an economic recovery does not necessarily imply a reduction in social inequalities. Therefore, it is necessary to be careful when adopting certain policies that aim to combat the economic deficit at the expense of relativizing and even eroding social rights.

As can be seen, the viability of labor rights cannot be separated from social reality, i.e., the measures taken by the State cannot seek only an economic recovery based exclusively on the Gross Domestic Product (GDP), but rather, as well pointed out by Amartya Sen[51], the Human Development Index (HDI), and the Gini Index, capable of attesting to the socioeconomic reality more appropriately.

Now, based on the assumption that Provisional Measure 936 aimed to make negotiations between employers and employees viable without the intervention of labor unions to speed up such negotiations, its ratification in the core of Law 14.020/2020 reinforces the dispensability of labor unions and, therefore, the employee's vulnerability before the employer. As pointed out in previous lines, the flexibilization of labor rights due to the Brazilian economic situation because of the pandemic was done to preserve labor relations and commercial activities. However, the criticism made here is that such flexibility measures cannot be implemented in any way and without a guaranteed counterbalance.

49 SOUZA JÚNIOR, José Ronaldo de C.; LEVY, Paulo Mansur; SANTOS, Francisco Eduardo de L. A.; CARVALHO, Leonardo Mello de. Section IX: Overview of the conjuncture. Carta de conjuntura IPEA, n. 46, 1st quarter 2020.

50 BRAZILIAN INSTITUTE OF GEOGRAPHY AND STATISTICS. Synthesis of Social Indicators: in 2019, the proportion of poor fell to 24.7% and extreme poverty remains at 6.5% of the population. Agência IBGE [site], news, 12 nov.2020.

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

Another issue that deserves to be highlighted is the fact that there is a kind of reverse progression in the labor context, that is, since the Labor Reform, we have seen an increasing precarization of the worker. According to Elísio Estante[52], this "'stage in the professional trajectory' [can] assume a 'permanent state' [and, therefore], a 'regular' record of work organization."

For Forrester[53], society needs to become aware that the labor environment is undergoing a mutation. That is, the mercantilist logic demands, from time to time, a readjustment of the labor condition that, at first, is seen as a transitory exceptionality. However, over time, it ends up consolidating and being ratified.

Now, the successive alterations perpetrated to the labor legislation cannot continue to suppress guarantees without a compensatory payment from the State. If the erosion of the rights of the labor class is done under the justification of the viability and continuity of labor relations, private entities should not be the only ones to benefit from such flexibilization.

As an example, in a similar situation, Castells[54] talks about a crisis in the Netherlands, where it was necessary to adopt flexible labor relations measures, such as the signing of temporary labor contracts and the reduction of the workday for auxiliary activities. To this end, the author states that the negotiations were made with the intermediation of the unions and counted on a state counterpart in relation to compensation for such measures adopted[55]. The result was successful and, therefore, replicated in Sweden, Denmark, and Norway.

In this sense, it can be stated that Law n. 14,020/2020 itself guaranteed a pecuniary consideration to all workers affected by the measures provided for in the Emergency Program for the Maintenance of Employment and Income, namely, "the proportional reduction of working hours and wages; and [...] the temporary suspension of the employment contract.[56] Such a compensatory

52 ESTANTE, Elísio. **Classe média e lutas sociais**: Ensaio sobre sociedade e trabalho em Portugal e no Brasil. Campinas-SP: Editora da Unicamp, 2015, p. 83.

53 FORRESTER, Viviane. **The economic horror**. Translation by Álvaro Lorencini. São Paulo: Paulista State University Press, 1997.

54 CASTELLS, Manuel. **The network society**. São Paulo: Paz e Terra, 2017.

55 Ibid.

56 BRAZIL. **Law n. 14.020 of July 6, 2020**. Creates the Emergency Program for the Maintenance of Employment and Income; provides for complementary measures to face the state of public calamity recognized by Legislative Decree no. 6, of March 20, 2020, and the public health emergency of international importance resulting from the coronavirus, dealt with by Law no. 13.979, of February 6, 2020; amends Laws 8.213, of July 24, 1991, 10.101, of December 19, 2000, 12.546, of December 14, 2011, 10.865, of April 30, 2004,

policy may come to fulfill the logic of the flexicurity institute. Although the reduction of labor rights represents, a *priori,* harmful effects to the worker, when such measures are accompanied by a reparatory/compensatory policy, the socioeconomic reality of the employee may not be totally compromised.

3 Flexicurity as an institute of compensation to the flexibilization of labor constitutional guarantees

Still, in the 1990s, some European countries carried out reforms in labor legislation with the purpose of making labor relations more flexible. The intention was the same that underlies any and every discourse of flexibilization: to create alternative models of contractual relations with the purpose of expanding competitive advantages and, therefore, increasing the number of the active labor force[57].

The flexicurity institute can be conceptualized as a coordinated set of employment and social policies with the purpose of ensuring economic and social security for the entire collectivity, including companies and workers[58]. The assumption that governs this institute is that flexibility and security are complementary elements and not contradictory[59]. There is no unified concept in the doctrine. For flexicurity to be implemented, it is only necessary that the "*trade-off*" logic be respected.[60]

According to Mesquita[61], flexicurity is based on flexibilization with a guaranteeing state counterpart. This institute comprises the articulation of several sectors, such as, political, social, and economic.[62] Therefore, in order

and 8.177, of March 1, 1991; and makes other provisions. Brasília-DF: Presidency of the Republic, [2021].

57 COMMISSION OF THE EUROPEAN COMMUNITIES. **Green Paper**: Modernizing labour law to meet the challenges of the 21st century. Brussels: 2006.

58 VIEBROCK, Elke; CLASEN, Jochen. Flexicurity and welfare reform: a review. **Socio-Economic Review**, v. 7, n. 2, p. 305-331, 2009.

59 Ibid.

60 MESQUITA, Amélia Cristina Santos Pinto Queiroz. **Flexicurity applied to microenterprises**: a critical view on labor law when applied to the Portuguese reality. 2017. 110fl. Dissertation (Master in Business Law) - University Institute of Lisbon, Lisbon, 2017.

61 Ibid.

62 MESQUITA, Amélia Cristina Santos Pinto Queiroz. **Flexicurity applied to microenterprises**: a critical view on labor law when applied to the Portuguese reality. 2017. 110fl. Dissertation (Master in Business Law) - University Institute of Lisbon, Lisbon, 2017.

to enjoy a certain efficacy and reach the intended end, it needs to count on the coordination of the mentioned sectors. Otherwise, what we can see is a clear erosion of labor rights and guarantees in favor of a mercantilist logic, benefiting exclusively the economic actors.

Another point worth mentioning is the coordination of social, political, and economic actors, through public-private partnerships, in the role played by market forces, in fiscal measures (tax incentives or benefits) among others that comprise the public-private relationship. This would allow the maintenance of a certain balance between the working class and employers.

It should be noted that, within the labor class, there is a complex and diverse mass of workers. This heterogeneous contingent demands special attention because it cannot be included in the same package of flexibility measures without any compensatory policy that reaches its extent.

The policies that involve flexibilization practices in the labor market cannot privilege the safety of some groups to the detriment of others, since, within the group of workers itself, there is a portion that is more vulnerable than another.[63] Therefore, some measures that take advantage of a certain group may have negative repercussions on another.

The idea of flexicurity must be understood and implemented with attention to these various factors in order for it to achieve its intended purpose, and it must consist of a permanent compensatory measure. Otherwise, it may imply unregulated flexibilization and exorbitant damage to the workers' class.

Under the aegis of the institute presented, Provisional Measure n. 936 created the Emergency Program for Preservation of Employment and Income, relaxing certain labor rights. In return, it provided for "the payment of the Emergency Benefit for Preservation of Employment and Income, [...] the proportional reduction of working hours and wages [...] and the temporary suspension of the labor contract.[64] Such prerogative was maintained in Law n. 14,020/2020.

63 VIEBROCK, Elke; CLASEN, Jochen. Flexicurity and welfare reform: a review. **Socio-Economic Review**, v. 7, n. 2, p. 305-331, 2009.

64 BRAZIL. **Provisional Measure no. 936**, of April 1, 2020. (2020b). Creates the Emergency Program for Maintenance of Employment and Income and provides for complementary labor measures to face the state of public calamity recognized by Legislative Decree No. 6, of March 20, 2020, and the public health emergency of international importance due to the coronavirus (covid-19), referred to in Law No. 13,979, of February 6, 2020, and makes other provisions. Brasília-DF: Presidency of the Republic, [2021].

On one hand, the legislation attempted to relax certain constitutional labor guarantees and, on the other hand, provided for the concession of a financial benefit to the workers affected by the measures taken. Despite the legal provision, it is necessary to check whether this has the power to mitigate the consequences suffered by the working class due to the suppressed guarantees.

The Federal Audit Court (FAC), through Judgment 2.025/2020-Plenary, followed the Emergency Program for the Maintenance of Employment and Income. But before analyzing the effects of such a compensatory policy, it is important to explain the characteristics and target audience of this benefit.

The BEm was conceived with the purpose of financially compensating the workers who formalized an agreement with their employers, during the pandemic period, to suspend the work contract or to reduce the workday proportionally, according to Law 14.020/2020. It consists of a monthly financial aid, operated by the Ministry of Economy that, through the Special Secretary of Social Security and Labor, assesses the eligibility requirements of individuals subject to the provisions of Law No. 020/2020, namely, formal employees who have made agreements for temporary suspension of the contract or proportional reduction of working hours and those with intermittent work contracts who have also signed an agreement under the terms of that law.[65] Once everything is in order, the payments are sent to the financial institutions linked to the Government (Caixa Econômica Federal and Banco do Brasil).

Are excluded from the BEm, in the terms of art. 6 of the referred law, those employees that "are occupying public office or employment, position in the commission of free nomination and exoneration or holder of elective mandate, [...] receiving the benefit of continued benefit of the Social Security System [...], unemployment insurance [...] or professional qualification scholarship.[66] On the other hand, it is possible for the employee, with more than one formal employment relationship, to accumulate a benefit for each employment relationship that has adhered to the conditions set forth in art. 3, II, and III, of Law n. 14.020/2020.

At first glance, employees who have a regular employment contract enjoy greater coverage than those under the intermittent regime. In this sense, it is noted that policies involving flexibilization practices should not make a distinction in

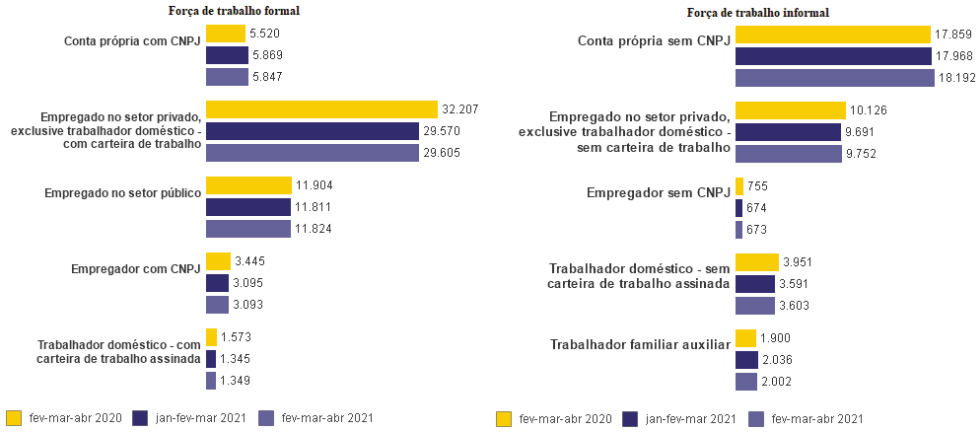
65 BRAZIL. Federal Court of Accounts (Plenary). Monitoring Report (RACOM). Judgment Process n. 016.769/2020-1. Rapporteur: Bruno Dantas. Date of the session: 5 Aug. 2020.

66 Ibid.

the treatment of a certain group of workers to the detriment of another. This would compromise the socioeconomic purpose intended by the measure. This is what can be observed in a brief analysis of the Brazilian labor force scenario, which has a population of 212.2 million, where 51.7 million Brazilians have a formal job and 34.2 million work informally.[67] This reinforces the speech of the mentioned authors, since the BEm's compensatory policy does not effectively reach the entire class of workers who suffer from the socioeconomic effects of the pandemic, leaving out all those who are in informality.

Another important point is the reduction of formal workers in the period from January to March 2021, when the flexibility measures foreseen in Law n. 14.020/2020 are already in effect. From February to April of the same year, there is only a derisory recovery in the number of formal jobs, which discredits the economic recovery policy due to the flexibilization of labor guarantees.

Figure 2 - Comparison of the labor force by formal and informal occupation (thousands)



Source: FAC.[68]

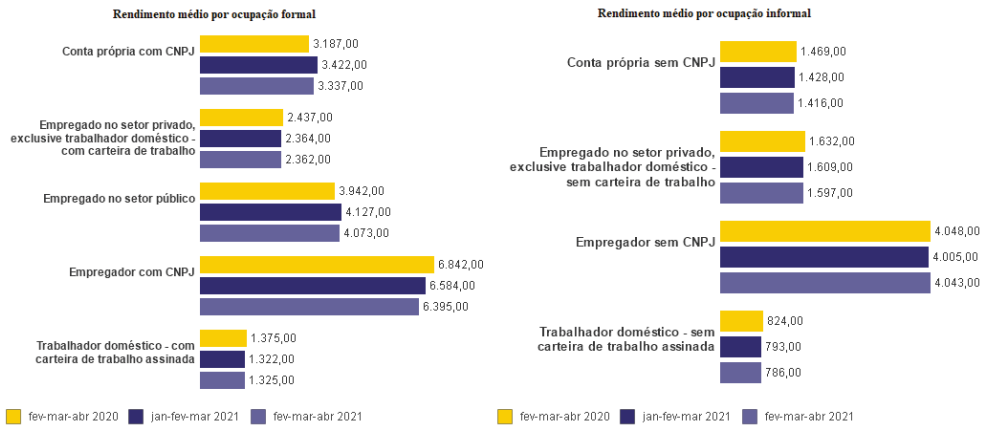
67 COURT OF AUDITORS OF THE UNION. **Follow-up of actions to preserve employment and income**. TCU [site], Employment and Income Panel, May 2021.

68 SECOM TCU. **TCU verifies that the Emergency Benefit has achieved good results**. Portal TCU [site], news, 20 Apr. 2021.

When comparing the percentage of formality among the 51.7 million Brazilians who have a formal job with the 34.2 million who don't, the scenario becomes a little more worrying, especially when observing the salary ceiling of each sector. Considering that the most varied categories were affected by the restrictive measures due to the pandemic, however, only those individuals able to demonstrate formal employment were contemplated by the benefit granted by the Federal Government.

According to a survey conducted by the Federal Audit Court (FAC), the Emergency Benefit for Preserving Employment and Income achieved satisfactory results in terms of combating the significant increase in layoffs that occurred at the beginning of the pandemic.[69] According to the report issued by the FAC, during the period of validity (04/01/2021 to 12/31/2021), around 3.6 million requests for unemployment insurance and around 19.9 million agreements to suspend or reduce the working day were registered[70]. In all, 33.4 billion in aid was provided to 9.5 million workers.[71]

Figure 3 - Comparison of average income by formal and informal occupation (R$)



Source: TCU.[72]

69 SECOM TCU. **TCU verifies that the Emergency Benefit has achieved good results**. Portal TCU [site], news, 20 Apr. 2021.

70 SECOM TCU. **TCU verifies that the Emergency Benefit has achieved good results**. Portal TCU [site], news, 20 Apr. 2021.

71 Ibid.

72 COURT OF AUDITORS OF THE UNION. **Follow-up of actions to preserve employment and income**. TCU [site], Employment and Income Panel, May 2021.

On the other hand, figures 2 and 3 show that the percentage of individuals in informal jobs is also significant and concentrates most of the income of the employed Brazilian population. This reveals that, in a macro context, the compensatory policy contained in the Emergency Benefit for the Preservation of Employment and Income (BEm) does not have a broad scope, since it was limited to workers with formal jobs.

The FAC's report proves to be successful, in fact, because the objective outlined, i.e., the mitigation of the economic consequences of the pandemic in order to avoid the closure of companies and, consequently, the worsening of unemployment, was achieved to a large extent. However, making a more detailed analysis of the data on existing labor relations in the country, it is possible to affirm that such measures undertaken by Law n. 14.020/2020 were intended to categorically benefit private entities and not the workers in general.

Furthermore, with regard to the general population, which includes individuals in informal jobs, the Federal Government, in April 2020, stipulated Emergency Aid through Law n. 13.982/2020. This benefit was part of the package of compensatory measures in view of the socioeconomic consequences aggravated by the pandemic.

According to art. 2 of Law 13982/2020, monthly emergency aid in the amount of R$ 600.00 would be paid to workers who meet the cumulative requirements set forth in the mentioned law. Among those contemplated would be informal workers, the unemployed, beneficiaries of Bolsa Família and individual microentrepreneurs (MEI), and individual taxpayers of the General Regime of Social Security.

At first glance, it is possible to affirm that informal workers have not been abandoned by the State, since the emergency aid would fulfill the purpose of transferring income to those people who were unable to work. This benefit, by plan, would have a transitory character, ending, therefore, in 2020. However, with the issue and consequent renewal of Provisional Measure (PM) 1.039/2021, it was extended until October of the current year. Besides its extension, the MP also revised the value and the criteria for granting the benefit. The benefit is now R$250.00, which can reach R$375.00 in the case of women who are heads of household and raise their children alone.

Regarding the individuals contemplated, contrary to Law 13.982/2020, PM 1.039/2021 brought an extensive list of exclusion[73], which, in turn, no

73 Cf. art. 1, § 2º, of MP 1.039/2021.

longer contemplates some individuals who had benefited in the first moment. It can be noticed, therefore, that, differently from the flexibilization policy adopted by the Government for the purpose of balance due to a "transitory" economic crisis, the welfare policies do not seem to be maintained for the same period of time. We can see that the priority of the state has been the economic actors, even if this has reverberated in the worsening of the social abyss.

The flexicurity institute is a permanent and not a transitory policy. This means that its logic cannot take advantage of the Brazilian reality in the context in which it was conceived and implemented. First, these flexicurity measures were conceived by a Provisional Measure with transitory validity. Second, the compensatory policy foreseen by Law n. 14.020/2020 and Law n. 13.982/2020 (extended by Provisional Measure n. 1.039/2021) does not have a broad reach, leaving out some individuals in vulnerable situations.

Conclusions

The constitutional guarantees, as we have seen, serve the role of protecting the dignity of human beings. In the field of Labor Law, this function is performed by Social Rights. The concretion of collective rights, in general, is based on the logic of costs, that is, it demands a certain financial resource from the State. Therefore, in a situation of economic retraction, they tend to be cut back. Since labor relations are closely linked to economic players, labor rights are one of the first to undergo flexibility measures. If on the one hand, flexibilization enthusiasts affirm that some sacrifices are necessary to view the economic recovery and, therefore, temporary measures. On the other hand, what has been observed is their permanence and consequent "normalization". As time goes by, the precariousness ends up becoming something common and is no longer an agenda for such fervent claims. In this sense, it was presented throughout this paper some examples of the erosion of labor rights due to the economic crisis at the time. The Labor Reform was one of these flexibility measures that, a priori, proved to be necessary to increase formal hiring. However, a more detailed analysis of the data surrounding this reality shows that there was a minimal recovery of the GDP to the detriment of the decrease in the Gini Index. To conceive economic growth apart from social indicators is to widen the abyss of social inequalities and postpone a more severe financial crisis that will always occur.

Otherwise, the flexibility logic has been eroding over time, translating into an increasing unbalance in labor relations. Since the Labor Reform,

the participation of labor unions in labor negotiations has been left in the background. The irrelevance of labor unions has shown itself to be even more latent in the wake of Provisional Measure 936/2020 when it disregarded the presence of this institution in the readjustment of the terms of the labor contract of employees with employers due to the pandemic caused by the new coronavirus. Fulfilling the purpose of mitigating the economic crisis experienced by private commercial entities and avoiding mass layoffs, the President of the Republic edited the mentioned PM. Some clauses were immediately subject to a Direct Unconstitutionality Action, but the Federal Supreme Court understood the emergency and indispensability of the measure, thus ratifying the legal provision that became Law n. 14.020/2020. In this sense, the position of the FSC was in favor of economic recovery and understood the necessary sacrifice of the working class in the exceptional moment experienced by the whole country. However, as discussed in due course, the position of the superior court tends to become a precedent and, therefore, the labor guarantees urged therein have a high probability of not returning to their status quo.

The main criticism of this paper concerns the compensatory state counterpart. What has the State done to mitigate or at least minimize the erosion of working-class rights? In the context of the pandemic, two types of welfare benefits were created: the Emergency Benefit (foreseen in Law n. 14.020/2020) and the Emergency Aid (initially foreseen in Law n. 13.982/2020 and extended, with due adjustments in value and beneficiaries, by Provisional Measure n. 1.039/2021). At first glance, these measures lead us to believe that Brazil agrees with flexicurity. However, with a more detailed analysis of this institute in attention to the guidelines that surround the welfare benefits, it is possible to affirm that the country goes against its precepts. This happens especially because of the transitory logic in which the two income transfer policies are in force. One cannot speak of a compensatory policy along the lines of flexicurity in Brazil when, on the one hand, there are flexibility measures that are delayed and that only tend to increase the advantages of private economic entities. On the other hand, the compensatory policy that seeks to rebalance the labor relationship is merely transitory, that is, it seems to work as a crutch for the worker while he or she relearns how to deal with the suppression of certain labor guarantees. It is, therefore, indispensable to reflect on and hold the State responsible for the adoption of flexibility measures devoid of any effective and continuous compensatory policy. Instead of being a merely programmatic norm, since it lacks its own budget, the compensatory policies must have the same strength and the same period of validity as the

flexibilization proposals. Otherwise, the working class tends to be at the mercy of capitalist logic.

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julho de 1991, 10.101, de 19 de dezembro de 2000, 12.546, de 14 de dezembro de 2011, 10.865, de 30 de abril de 2004, e 8.177, de 1º de março de 1991; e dá outras providências. Brasília-DF: Presidência da República, [2021]. Disponível em: http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2020/lei/L14020.htm. Acesso em: 29 jun. 2021.

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RIGHT TO BE FORGOTTEN IN THE STF: RE NO. 1.010.606/RJ

Guilherme Nunes de Paiva

Master's candidate in Process and Development Law at Christus University Center (UNICHRISTUS). Specialist in Civil Procedural Law from the University of Fortaleza (UNIFOR). Bachelor of Law by the University Center of João Pessoa (UNIPÊ). Bachelor of Administration from the Federal University of Paraíba (UFPB). Lawyer.

André Studart Leitão

Graduated in Law from the Federal University of Ceará (2003), Master (2006), and Ph.D. (2011) in Social Relations Law from the Pontifical Catholic University of São Paulo (PUC-SP). Post-Doctorate in Law from Mackenzie Presbyterian University, University of Fortaleza (UNIFOR), and *Mediterranea International Centre for Human Rights Research* (MICHR). Federal Attorney. Professor of the Graduate Program *stricto sensu* at Centro Universitário Christus (UNICHRISTUS) and of the Law graduation course at Centro Universitário Farias Brito (FBUni).

Introduction

In former times, especially in the "analog" era, the memory of society faded with the passing of the years. In this scenario, the forgetting of facts was a natural consequence of living in society, as long as the events did not take on proportions that transcended private interest and were of a public and/or historical nature.

Otherwise, only societies, or more specifically certain groups within these societies, keep their memory fully preserved. The rule, then, was to forget, not to keep the fact.

News broadcast by the traditional press (television, radio, newspapers, magazines, and printed periodicals) caused an immediate or mediated impact since access to it was restricted to those who purchased it, in the case of the printed media, or waiting for new broadcasts by the broadcasters, in the case of television and radio.

With the advent of the "digital" era of the press (newspapers, magazines, virtual journals), the *Internet*, and of all the digital platforms created in sequence, forgetting, then, it seems, is no longer the rule, but the exception,

because all the facts published on the world wide web are "stored" and available to anyone, at anytime and anywhere on the planet.

In this sense, it is known that publications in the press usually cause negative damage, pleasing or displeasing the parties involved. Commonly, the press remembers remote cases that caused a commotion in society or that brought a huge audience, which again, as a rule, displeases those involved and their families.

As a defense mechanism perpetrated by possible victims of journalistic editorials published in the press, the thesis of "right to forget" has been proposed, but it is not known for sure where and when it originated. The idea points Dias Neto (2019), dates back to ancient times (5th century BC) in the Greek city of Athens, where the legal system of the time provided for the possibility of exile[74] for 10 (ten) years of a citizen if he committed any infraction.

In the world, several cases have been treated taking into consideration as a central foundation the right to be forgotten, among which we highlight, among others: a) in the United States of America: *Melvin versus Reid* (*Red Kimono) (*1931), *Sidis versus F-RPublicshing Corporation (*1937) and *Briscoe versus Reader's Digest Association* (1971); b) in France: Madame *Mme. v. Landru* (*I'affaire Landru*) (1967), *Madame M. v. Filipacchi et Cogedipresse (*1983), and *Madame Monanges v. Kern et Marque-Maillard (*1990); and c) in Germany: *Lebach* (1973) and *Lebach II* (1999).

It should be emphasized that the precedents mentioned above in foreign law deal with the right to be forgotten when disclosure was made through traditional means of publishing information, unlike the *Gonzáles case* (2014), judged by the Court of Justice of the European Union (CJEU), which dealt with disclosure on an electronic platform (internet) and is, therefore, the *leading case of* the right to be forgotten in the digital age in the world.

In Brazil, too, a dilemma has naturally arisen between the rights to freedom of expression and information and the right to personality, all of which are provided for in the 1988 Constitution of the Federative Republic of Brazil (CRFB/1988) and are of a fundamental nature, a theme that will be presented in the main discussions below, especially concerning the judgment of Extraordinary Appeal No. 1.010.606/RJ by the Federal Supreme Court (STF).

74 Here, exile means that the community literally "forgot" the offending citizen. The Athenian was truly exiled.

1 Goals and Methodology

In this summary, we intend to discuss the concept, essential elements, and certain peculiarities of the right to be forgotten in Brazil, with emphasis on the STF's decision in Extraordinary Appeal No. 1.010.606-RJ, which resulted in the establishment of the thesis through Theme No. 786.

The scientific methodology used for this summary was the bibliographical-documentary type research, by consulting books, scientific articles, magazines, newspapers, virtual journals, and judicial decisions from Brazilian courts.

2 Discussions

The Federal Supreme Court (STF) analyzed and judged Extraordinary Appeal No. 1.010.606/RJ (Theme No. 786 - right to be forgotten), adopted under the aegis of the institute of general repercussion, with judgment concluded on February 11, 2021, by the Constitutional Court of Brazil, with the publication of the judgment on May 20, 2021.

At the meeting, *N.C.*, *R. C.,* and *W. C.*, living brothers of *A. C.* filed a lawsuit against Globo Comunicação e Participação S/A., because the television station produced and presented the program "Linha Direta Justiça", a reconstruction of the murder of their sister on the night of July 14, 1958.

It is said that *A.C., then a teenager, was a victim of a brutal crime.* then a teenager, was the victim of a brutal crime, after being sexually abused and thrown from the Rio Nobre building, located on Avenida Atlântica, Copacabana district, Rio de Janeiro/RJ.

The plaintiffs, in summary, alleged that[75]: a) the crime had been forgotten over time, however, the television station reopened old wounds, broadcasting again *A.C.*'s life, death, and post-mortem, including exploiting his image by broadcasting a television program; (b) after so many years, the exploitation of the case by the television station was unlawful, despite having been previously notified to do so. (b) after so many years, the network's exploitation of the case was illicit, although the network had been previously notified not to do so; (c) Globo had unlawfully enriched itself by exploiting a past family tragedy, profiting from the audience and advertising; and (d) because the report caused the family to relive the pain of the

75 The analysis of the report and judgment rendered in the judgment of RE no. 1.010.606/RJ.

past, they claimed compensation for moral and material damages and damages to their image, consisting of the commercial exploitation of the deceased.

The defense of Globo Comunicação e Participação S/A. sustained, in summary, that[76]: a) there is no duty to indemnify for lack of illegality, because the idea of the program "Linha Direta Justiça" is absolutely common in Brazil and abroad, and there are countless communication vehicles that publish journalistic programs about famous criminal cases (books, newspapers, magazines, radio, cinema, and television are routinely dedicated to publishing stories about crimes of great repercussion in the past) b) there was no harm to the privacy, intimacy, honor or image of the plaintiffs or their families because the facts being reported were already public and widely discussed in society because of the murder of their sister, and are part of the historical archive of the people. To that extent, it was a journalistic program, in the form of a documentary, about events of relevant public interest, and the network limited itself to narrating the facts as they occurred, without directing any offense to the plaintiffs or their deceased sister and d) the television network is a legal entity whose purpose is profit through journalistic, media and advertising activities, and there is no evidence of illicit enrichment, material or moral damage since there is no illicit and, consequently, no civil liability.

In the end, the following thesis was fixed for Theme # 786, with only Justices Edson Fachin and Nunes Marques dissenting:

> The idea of a right to be forgotten is incompatible with the Constitution, understood as the power to prevent, due to the passage of time, the disclosure of truthful and lawfully obtained facts or data published in analog or digital media. Possible excesses or abuses in the exercise of freedom of expression and information must be analyzed on a case-by-case basis, based on constitutional parameters - especially those related to the protection of honor, image, privacy, and personality in general - and the express and specific legal provisions in the criminal and civil spheres. (Extraordinary Appeal No. 1.010.606/RJ, Plenary, Federal Supreme Court, Reporting Justice Dias Toffoli, Date of Judgment: 02/11/2021, Court Gazette: 05/20/2021).

From the comparison between the perceptions of the doctrine and the jurisprudence, it is possible to list some requirements for the effectiveness of

76 *Ditto*.

the right to be forgotten.

First, the information or fact must be true and lawfully obtained. Consequently, *fake news* acquired or used contrary to law, cannot be forgotten. They can lead to civil penalties[77], criminal offenses[78], electoral crimes[79], among others (DIAS TOFFOLI, 2021).

Second, the invocation of the right to forgetting presupposes the elapse of a time interval. In this context, Dias Neto (2019, p. 303-304) expresses the following concern:

> (...) how much time is necessary to define if a certain past event has already exhausted its social relevance or its informative potentialities, to verify to what extent the continuous public exposure of a certain event causes it a differentiated shaking, not tolerated by the law?

In the winning vote in RE No. 1.010.606/RJ, Justice Dias Toffoli addresses this issue and states that "the passage of time constitutes the central beam" of the right to be forgotten, including in the discussions during public hearings coordinated by the reporting Justice, emphasizing the different views of the debaters on the correct minimum period.

However, it seems that this analysis of the passage of time must take into consideration assumptions such as decontextualization and/or fragmentation of information, in the sense that

> (...) has time as a central element because it would be the propeller of the degradation of the information of the past, which - even if true - would be outdated and decontextualized, because disclosed at a time significantly different from the occurrence of the facts, inducing a fragmented perception about the person involved[80].

Put another way, the "passage of time would be capable of rendering the information opaque in the spatial context, to such an extent that its publication

77 Compensation for moral damage, loss, and damage, for example.

78 Crimes of slander, defamation, and libel under the Penal Code.

79 The crime of misleading advertising is foreseen in the Electoral Code.

80 A passage from the vote cast by Justice Dias Toffoli in RE no. 1.010.606/RJ.

would portray neither the completeness of the facts nor the actual identity of those involved.[81]

It should be pointed out, opportunely, that the request for forgetfulness in a past, current or recent moment of disclosure of the fact and/or information does not deserve any shelter in the Brazilian legal system. If requested in an antecedent character, the STF's jurisprudence is pacific as to the impossibility, under penalty of committing censorship, in total prestige of the principle of freedom of expression[82]. If current or contemporary, the requirement of time-lapse would also not be present.

Thirdly, there is also the need for the fact being reported to be harmful, vexatious, or unworthy[83]. In other words, the fact or information violates disproportionately the rights of personality and of human dignity, which could cause substantial damage (material and moral, above all) if it continued to be available for consultation. Otherwise, if the fact objected to generated positive benefits, there would be no sense in requesting its exclusion.

Finally, fourth and last, attention must be paid to the public, historical or memorial interest. The idea is that information only has an "*inter partes*" effect. On the other hand, if the information belongs to society as a whole, usually integrating the very memory of that local, regional or national community, thus having an aspect that transcends the interest of private individuals, this fact/information cannot be subject to the doctrine of the right to be forgotten.

For all these reasons, the doctrine of Ingo Wolfgang Sarlet (2015) states that the right to be forgotten has as its central idea the claim that certain information, particularly information related to the personality rights of the citizen, should no longer be accessible by third parties or that, at least, barriers should be imposed to make it difficult to obtain it.

In a similar vein, Viviane Nóbrega Maldonado (2017, p. 97) refers to the right to be forgotten as "the possibility of excluding from the knowledge of

81 *Ditto*.

82 As examples, see the judgments handed down by the STF: a) unconstitutionality of the Press Law (Law no. 5.250/1967): ADPF no. 130/DF (reporting Justice Ayres Brito); b) constitutionality of the demonstration in favor of marijuana (ADPF no. 187/DF) (reporting Justice Celso de Mello); c) waiver of diploma for the exercise of the profession of a journalist (RE no. 511.961/SP) (reporting Justice Gilmar Mendes) and d) ineligibility of prior authorization for publication of biographies (ADIN no. 4.814/DF) (reporting Justice Cármen Lúcia).

83 Quoted in the doctoral thesis of Pedro Miron de Vasconcelos Dias Neto (2019).

third parties a specific piece of information that, although true and previously considered relevant, no longer holds public interest due to anachronism.

Finally, Marcelo Marineli (2017, p. 132) also "considers the right under comment an unfolding of the idea of privacy that ensures the impossibility of reproducing certain public events linked to someone's past life history."

Conclusion

In Brazil, the *leading case* on the right to be forgotten was the trial by the STF of RE no. 1.010.606/RJ, which dealt with the history of *B.C.* and resulted in the establishment of the thesis in Theme no. 786.

In this sense, the STF has understood that the right to be forgotten, in the sense of being able to prevent, due to the passage of time, the disclosure of truthful and lawfully obtained facts or data published in analog or digital media, violates the foundations of the Federal Constitution of 1988.

However, in the judgment of the case, the Constitutional Court brought guidelines for the future of the doctrine of forgetfulness in Brazil. Even though the Court affirmed the incompatibility of this matter with the Brazilian legal system, by a large majority of votes, it left an open gap, even allowing for a rediscussion in specific cases of social relevance or public interest.

This is because the thesis expressly states that the exceptions will be verified on a case-by-case basis, especially those that disproportionately violate personality rights in general.

In the decision, in a comparison between the two principles in a collision (freedom of expression *versus* personality rights), the Supreme Court gave prestige to the idea of freedom because it is a universal human right and one of the great legacies of the Charter of the Republic of 1988.

In this same vein, the democratic regime presupposes an environment of free transit of ideas, in which everyone has the right to a voice, or in the expression coined by former U.S. Supreme Court Justice Oliver Wendell Holmes, that we have a "free market of ideas", and this is only possible through freedom of speech, "representing both the right not to be arbitrarily deprived or prevented from expressing one's thought and the collective right to receive information and to know the expression of the thought of others"[84].

84 A passage from the vote cast by Justice Edson Fachin in RE no. 1.010.606/RJ.

However, as we know, there is no such thing as an absolute right, and, as pointed out before, exceptions that abuse personality rights must be admitted.

Therefore, there is no consolidated, ready, and finished understanding of the concrete and effective application of the right to be forgotten, which shows, once again, the challenging importance of the theme before the possibility of evolution in the thinking of the Brazilian Courts.

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CONSTITUTIONAL AMENDMENT 117 OF 2022 AND THE EFFECTIVE PARTICIPATION OF WOMEN IN POLITICAL PARTY ACTIVITIES

Hélio Rios Ferreira

Master's student in Process and Development Law at University Center Christus - Unichristus.

Renata Albuquerque Lima

Professor of the Master in Law at University Center Christus - Unichristus.

Introduction

The inequality of participation in political-party activities between men and women is a subject of historical debate, considering that women only achieved this position in the recent past, in Brazil, almost in the middle of the 20th century. The quantity and quality of women's participation in candidacies for majoritarian and proportional elective positions is the subject of this summary.

To this end, the study deals with feminist militancy in securing equal political rights for women and men. The result of this militancy was a political revolution for the inauguration of electoral legislative reform to recognize women's participation in party political activity. Citizenship is a fundamental human right to participate in society.

The legislative recognition was a step towards the effective participation of women. However, merely recognizing it is not enough; the quality of participation is necessary, as is real distribution of the rights recognized in the norm. The study of Constitutional Amendment (CA) 117, enacted in 2022, addresses the problem of women's vulnerability in the exercise of their right to effective and substantial participation in political party activities.

1 Objectives and Methodology

The study examined the historical struggle of women to have the right to effective participation in political party activities and its correlation with the constitutionalization of some of these rights won through CA 117/2022.

The purpose of this study was to determine the impact of the effectiveness of this constitutional norm on the reality of women's role in Brazilian politics.

The methodology used was bibliographic.

2 Results (Discussions)

The human being is unsatisfied by nature, and this dissatisfaction causes some people to seek their earthly plenitude in the conquest of objectives, ambitions, and the satisfaction of vanities. In the field of party politics, with democratic representation, the power game is brutal and follows the "anything goes" rule. It is worth eliminating competitors and especially those who no longer have much of a voice in the political arena and in the communion of efforts to achieve power in politics.

Social vulnerability is blatantly obvious in the dispute for political office. This is the case of women, already socially and economically vulnerable, who have a deficient presence in political positions. This inequality concerning men is historical and feminist militancy only came to give results in the modern era, in Brazil, in the 19th century. The transition from an eminently rural country to more active industry and commerce made it possible for women to stay with their families and have access to a more active social life. So much so that one can see the publication of articles aimed at expressing women's feelings arising from the treatment given by society regarding their role in it[85].

The white woman's existence had been reduced to her domestic role in the family, boring. Black women, on the other hand, in the 19th century, had the task of taking care of the white women's children and performing "housework" tasks and other times, depending on the workplace, joining men in more arduous activities. Because there was more contact between black and white women, there was mutual female support for the abolition of slavery, without participation in public debates on emancipation, in face of their vulnerable condition of subordination in the social context.

An important step to remove women from the vulnerable condition was to have access to books, to formal education comparable to that of men,

85 The first of them, 'O Jornal das Senhoras', had its first edition published on January 1st, 1852. This newspaper questioned the treatment given to women by their husbands, advocating that they should be more valued - which, at the time, meant recognition of the emotional and spiritual aspects of women, in the roles of mother and wife, which in fact would occur later (COELHO; BAPTISTA, 2009, p. 86).

because with this their participation in society would be more respected, with arguments based on understandable grounds to the other members and would make possible the interest of some employers in having them "under their command" in the execution of intellectual tasks previously dominated only by men. The subordinate condition would not be removed immediately, it would be a space to be conquered, previously unimagined equality. Breaking the barrier of economic dependence was a difficult step, it is still difficult, but this was an essential goal to get out of this kind of vulnerability.

As for political rights, in the Empire, it was unthinkable, and with the advent of the Republican Constitution of 1891, women were once again deprived of the most primary right of a Brazilian citizen: to vote and to be voted. The constituents of that time did not see women as capable of "coping" with a double shift, of leaving the family to work, of leaving domestic chores to exercise an active political-party life. Their militancy was not recognized by the State. Recognizing them meant a threat to the *status of* those who were already consolidated in the economically active society. The promotion of equality is more difficult when, to give rights to some, the rights of others must be taken away, even if it is to promote equal conditions. Changing a culture is difficult, especially for the privileged. It is when one thinks that this equality will entail the need for men to contribute to household chores and child-rearing; or, in the competition for a job vacancy whose candidate is better prepared to assume the position that, in the past, was easy for a man to assume. In politics, it is worse to give women weapons to promote legislative changes providing rights and guarantees equal to those of men.

The historical conception of women as fragile and vulnerable sex inexorably hindered the development of effective equality policies. Information repeated in society several times in all spheres of debate (home, school, work) ended up becoming a truth even for those who were hurt by the idea of always having to live in the same way and with the same activities. Her dreams and goals in life were a secret kept deep inside her, with no possibility of social sharing to avoid an even greater frustration than the one fate had reserved for her: being born a woman. It is a psychological prison, like the "fake news" of the 19th century regarding the role of women in society, the economy, and politics. Combating this type of informational aggression was almost impossible at the time and is currently being resisted within the National Congress itself[86].

86 The case of the Bill to Combat "Fake News" (PL n. 2.630, of 2020) that until the closing of this article has not been voted on.

To reach a position as Chief Executive, Deputy (Federal or State), Senator, or Councilwoman, was not something easy for a woman, even in the middle of the 20th century, with the acquisition of political rights after the promulgation of the 1934 Constitution. This was a time when women performed economic activities, but did not occupy leading positions.

Until then, the normative state power to exclude women from political-party activities was abusive. Thus, the woman became a Brazilian "citizen"; she became free; she was recognized by the State as an integral part of it to exercise her rights and, mainly, creating these rights[87].

In the post-World War II period, there was a regression concerning women's role in society and the family, establishing a period marked by feminism and women's fight for equal rights, even keeping the double shift as a proposal to equalize with men. This was a mistake for bringing men as a parameter of equality when women themselves should follow their own goals. This perception has matured over the years and women no longer seek to equalize themselves with men, for they are not inferior or superior.

The woman inserted in politics/economy/society must claim her effective participation in the enjoyment of her fundamental human rights. It is not enough to have a considerable number of women in the workplace, there must be quality. Leadership positions and relevant elective mandates could not only be held by women but should be. Nancy Fraser's parity of participation: "according to which justice requires social arrangements that allow all (adult) members of society to interact with each other as *peers*" (2002, p. 13). Distribution of material resources is necessary to ensure independence, "voice," and equal opportunity to achieve social consideration.

Brazil is not alone in transforming the distributive justice of women's rights and their recognition as citizens with constitutional rights and obligations. Globalization has transcended this two-dimensional conception of justice, insufficient to meet feminist struggles, but essential for the formulation of the idea of the union of these two dimensions of justice in the parity of participation

87 It is not up to the state, any religious sect or community institution, the collectivity, or even the Constitution to establish the ends that each human person must pursue, the values and beliefs he must profess, the way he must orient his life, or the paths he must follow. It is up to each man or woman to determine the direction of his or her existence, according to his or her subjective preferences and worldviews, respecting the choices made by their fellows. This is an idea central to Humanism and modern Law: the idea of private autonomy - which, as pointed out above, constitutes one of the fundamental dimensions of the broader notion of freedom (SARMENTO, 2010, e-book).

proposed by Fraser. "Just to illustrate the strong resistance opposed to women's rights, it is enough to remember that although the Charter of the United Nations (1945) affirmed 'faith in fundamental human rights and the value of the human being, in the equality of men and women (...)', only thirty of the original fifty-one signatories of the San Francisco Charter recognized women's right to vote and to hold public office" (MONTEBELLO, 2000, p. 155). The Brazilian legal system incorporated two international treaties on the subject: 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 (Convention of Belém do Pará). Still dealing with women's rights as a universal human right, there is the treaty for the Elimination of All Forms of Discrimination against Women, which was adopted in 1979 by the General Assembly of the United Nations.

The social and economic change regarding the acceptance of women in these spaces was significant between the 19th and the 21st century, as in the case of sports and military activities. However, in political party activities, the distribution of positions and the recognition of women as representatives of Brazilian citizens is still a matter of debate in the academic, jurisdictional, and legislative spheres.

A concept to be completely deconstructed to avoid the regression of gender injustice built, for example, by androcentrism: "an institutionalized pattern of cultural value that privileges traits associated with masculinity, while devaluing everything coded as 'feminine', paradigmatically - but not only - women" (FRASER, 2007, p. 26)[88].

The fight for constitutionally guaranteed rights and guarantees in favor of women, headed by women themselves, does not mean to say that after the 1988 Constitution their political-party activity grew. It was not quite like that. What we saw during the dictatorship and after the Constituent Assembly was militancy. The effective representativity, with the occupation of elective mandate, this fact was not seen expressively, in contrast with the greater number of women in the Brazilian population. "According to data from the PNAD Continuous (National Continuous Household Sample Survey) **2019**, the number of women in Brazil is higher than that of men. The **Brazilian population** is composed of **48.2% men** and **51.8% women" (IBGE, 2020, online)**.

88 In free translation, the gender injustice caused by androcentrism would be: "an institutionalized pattern of cultural value that privileges traits associated with masculinity, while devaluing everything coded as 'feminine', paradigmatically - but not only - women" (FRASER, 2007, p. 26).

The political representativeness of women in political party activities is not an exclusive issue in Brazil, "since it was one of the topics discussed by the UN (United Nations Organization) when it held, in 1995, the IV World Conference on Women in Beijing, China" (COELHO; BAPTISTA, 2009, p. 97). At this event, a recommendation was issued for countries to adopt in their legislation the prediction of quotas for women's participation in the dispute for elective positions or not. As a result of this Conference, Law 9100/1996 was issued, establishing a minimum of 20% of female candidates for legislative positions in the 1996 municipal elections. Later, it was revoked and the Electoral Code came into effect in 1997, through Law 9.504, which established a minimum of 25% for female candidates in the 1998 elections, raised to 30% as of the 2000 municipal elections (COELHO; BAPTISTA, 2009). This is a measure of the justice of the equality of quantitative distribution. With this measure alone it is not possible to feel that gender justice is being realized[89]. Parity of participation is not only about allocating a percentage of vacancies for women to run for office, it is not reduced to strict numerical equality. "For me, in contrast, parity is not a matter of numbers. Rather, it is a qualitative condition, the condition of being a *peer, of* being on a *par* with others, of interacting with them on an equal footing" (FRASER, 2007, p. 28)[90].

History shows a constant struggle of women for space in political-party activity, political militancy could not be considered a victory for still leaving women out of the major decisions of the country, the state, and the municipality. Some representatives would always speak for them and transmit their wishes without really reflecting on what is desired in the conquest of gender equality. There was a constitutional revolution in 1934 with the recognition of women in political activity and a normative reform in the 1990s with the forecast of a minimum quantity of women candidates for political positions. What was still missing was a qualitative reform to guarantee parity in participation. This was the case with the legislative changes that occurred in favor of women's participation in the distribution of the party fund and in electoral advertising time (such as Law 12.034/2009 and 13.165/2015). The Judiciary needed to intervene to make the norms effective. Pressured by court decisions, the National Congress enacted Constitutional Amendment (CA)

89 Remember that this text addresses the inequality of effective political-party participation existing between men and women, without referring to color, ethnicity, age, sexuality, or religion.

90 For me, in contrast, parity is not a matter of numbers. Rather, it is a qualitative condition, the condition of being a peer, of being on an equal footing with others, of interacting with them on an equal footing" (FRASER, 2007, p. 28).

117/2022, promulgated on April 5, 2022, originating from Constitutional Amendment Proposal (CAP) 18/2021, and gave constitutional *status to* the rules debated according to the interpretation given by higher courts (such as DAU 5617/FSC). This constitutionalization of women's right to effective political-party participation is a gain for the movement of women in politics in the face of the current political scenario that has been taking place in Brazil and the world with the proposition of counter-reforms restricting the democratic participation of vulnerable groups. This is not only in Brazil, it is a worldwide movement observed by Boaventura dos Santos and reported in the book *Epistemologias do Sul (Epistemologies of the South)*.

The fact is that it is not enough for the legislation to provide for a minimum quantity of female candidates, it is necessary to make available an entire apparatus for an equal dispute between both genders. The feminist movement was very important, according to Boaventura: "In effect, feminist criticism demanded the recognition of women's right to vote and, in this way, opened the way for female participation in public life" (SANTOS; MENESES, 2014, *e-book*).

This legislative gain needs to be marked in the history of Brazil in face of the few participation of women in positions of relevance in politics. This is the case of the position of Head of the Federal Executive Power, held only once by a woman.

In legislative positions, there was a 52.6% increase in the number of women elected in the 2018 election compared to 2014. Numbers that are still insufficient when compared to the world scenario. Brazil ranked 32nd in the presence of women in national parliaments among 33 countries in Latin America and the Caribbean (SEC, 2019, *online*). This evolution occurred due to the attempt to equalize women and men through quotas, and equal quantitative measures, where it was foreseen that 30% of candidacies were destined for women[91]. However, it was found that the registration of these women was merely decorative, proving the inefficiency of the quota provision without an effective measure of women's participation in electoral elections. Filling this gap in the effectiveness of electoral norms in favor of women candidates, the Superior Electoral Court (SEC) edited Resolution No. 23,553/2017 to allocate to women's campaign 30% of the party fund to finance women candidates. This Resolution was revoked in 2019, and in its place was edited by the SEC Resolution No. 23.607/2019 (amended by Resolution No.

91 Law No. 12.034/2009.

23.665/2021) providing for the financing of women's candidacy the percentage of up to 30% to the sum of male and female candidates of the party.

The Judiciary Branch that tries to correct this inequality of representation between men and women in top positions in the branches of government is the same one that reflects the inequality of representation in its courts. In the Supreme Federal Court, there are two women and nine men; in the Superior Court of Justice, there are six women and twenty-five men; in the Court of Justice of the State of Ceará, there are twelve women and forty-two men[92]. Even in a body hypothetically distant from party politics, where equality should be pursued by managers, the composition is, as can be seen, eminently dominated by men.

The problem of representativity can be corrected through the use of several fronts, such as information, space in the media (social, advertising), flexible working hours without loss of employment, and others. "On the status model, rather, it means a politics aimed at overcoming subordination by establishing women as full members of society, capable of participating on a par with men" (FRASER, 2007, p. 30)[93].

It is not enough to change the legislation since it is impossible for the "spontaneous generation" to take care of the theme. CA 117/2022 has as one of its main determinations the application of minimum percentages of resources from the party fund to women's campaigns and programs aimed at their participation in politics. The construction of quantitative equality is insufficient and has been showing itself over the years, since the implementation of quotas. Equality under the qualitative aspect must integrate the quantitative measures. This search for a bifocal solution in politics can be verified in this CA by having as its objective the encouragement and promotion of women's participation in popular representation; gender quota and electoral campaign through participation in campaign financing and advertising time; and, amnesty from sanctions for those who failed to comply with electoral rules before the advent of the CA.

As for campaign financing and advertising time, the CA demonstrates a concern with the other days of activities exercised by women that are

92 Two positions were vacant at the time of this research: April 10, 2022.

93 To redress injustice requires a feminist politics of recognition, to be sure, but this does not mean identity politics. In the status model, it means, rather, a politics aimed at overcoming subordination by establishing women as full members of society, able to participate on an equal footing with men" (FRASER, 2007, p. 30).

detrimental to the time of engagement in political activity. This deficient engagement is not the woman's fault, but the social position of being the provider of the home organization. The objective is the effective participation of women in the electoral process. It is not enough just to guarantee quotas of vacancies for female candidates, but the means of effective participation must be foreseen, with the allocation of electoral funds and participation in electoral propaganda.

This CA 117/2022 is another recognition of the equal rights of women concerning men in political party activities. But that alone is not enough, since this EC merely constitutionalized existing legal norms and the precedent of the Federal Supreme Court (FSC) in the Direct Action of Unconstitutionality (DAU) 5617, judged in March 2018. This recognition is now found in the constitutional text, the fruit of feminist militancy.

Just the recognition is not enough, it is necessary to distribute the right to the effective political-party participation of women by making available 5% (five percent) of the resources of the party fund for the creation and maintenance of programs to promote and disseminate the political participation of women. This value is non-negotiable and does not allow for agreements to rescue the figure of the "orange candidate". Thus, their appearance in radio and television advertising is financed by political party funds and their participation in free radio and television advertising must be at least 30% (thirty percent), proportional to the number of female candidates[94]. As the rule of the political agreement requires mutual concessions, the CA provided amnesty for political parties that failed to comply with the FSC's decision in DAU 5.617 and SEC Resolutions.

The justification presented by the creators of this constitutional amendment is that the rule contributes effectively to the increase of female participation in politics. This effectiveness stems from the misuse of the legislation in force until then, whose application allows the candidacy of "orange candidates" to meet the rule of women's quota - quantitative criterion.

94 Art. 17 of the Federal Constitution now contains the following rules: "§7º Political parties must apply at least 5% (five percent) of the resources of the party fund to the creation and maintenance of programs to promote and disseminate the political participation of women, following intra-party interests. § 8º The amount of the Special Fund for Campaign Financing and the portion of the party fund allocated to electoral campaigns, as well as the free advertising time on radio and television to be distributed by the parties to the respective female candidates, should be at least 30% (thirty percent), proportional to the number of female candidates, and the distribution should be carried out according to criteria defined by the respective governing bodies and by statutory rules, considering party autonomy and interest. "

However, they forget that the political parties of which they are a part have not been allowing time in electoral propaganda and distributive participation of the electoral fund to finance women's campaigns. If the legislation existed and was not complied with, who can guarantee that the CA will be effective?

The guarantee of effectiveness of the norm will come from the women's militancy and their representatives already elected by the people, whether with an active voice within the political context in which they are inserted or in the proposition of claims to be checked in the 2022 electoral elections. One of the political movements in the period before the decision of the FSC and the SEC was the Senate's Special Prosecutor for Women, composed of "(...) empowered women, whose daily work resonates throughout Brazil the cheer, confidence, and commitment to a future of respect and equality between genders, in favor of collective dignity as a right of citizenship (2016, p. 7)." It is a movement to fight for the effectiveness of electoral norms that deal with the equal participation of women in elections[95].

It is also worth highlighting the Federal Senate's performance in the analysis of PEC 18/2021, through Opinion no. 157, of 2021 - PLEN/SF when it understood the formal and material constitutionality of the CAP, as well as enabling moments of debate in Parliament about political viability. It is an important legal-political document to show the interpreter the *mens legis* behind the rules of EC 117/2022. It contains a respectful reference to the understanding of the FSC in the Direct Action of Unconstitutionality (DAU) 5.617, reported by Minister Edson Fachin, and to the understanding of the SEC provided in art. 22, § 6, of Resolution No. 23.604, 2019.

It can be seen that the pretension of gender equality in the sense of conferring parity of political-party participation between men and women came about through access to justice for the vulnerable. In this case, women. It was a means of pressure on the constituted powers to deliver affirmative public policies in favor of the vulnerable. Access to justice does not refer only to the filing of lawsuits before the Judiciary, it goes much further, it is the jurisdictional provision in favor of one of the parties capable of effectively

95 Both legislative changes and court decisions are part of the purposes of the Senate's Special Prosecutor's Office for Women: "In search of this change, women have undertaken a historic march, which has registered important advances, such as the achievement of quotas for candidacies; the forecast of the allocation of minimum party resources for the training and dissemination of women's political participation; and even a campaign to encourage the party affiliation of women, conveyed by the Superior Electoral Court itself" (2016, p. 10).

satisfying the ownership of the right recognized by the legislature. "Access to justice can, therefore, be seen as a fundamental requirement - the most basic of human rights - of a modern and egalitarian legal system that aims to ensure, and not just proclaim the rights of all" (CAPELLETTI; GARTH, 2015, p. 12).

It is not only the electoral propaganda that will promote, qualitatively, the participation of women in the electoral contest with the possibility of the candidate manifesting herself for a reasonable and necessary time to express her proposal and project. The party propaganda also has the role of inserting women in political activity, with the diffusion of information regarding women in politics.

The conversion of CAP 18/2021 into EC 117/2022 constitutionalized the already existing legal rules under the model of interpretation given to them by the FSC and the SEC. The legal rules and the binding precedents related to the activity of women in political-party activities promoted the distribution of equal gender rights, reducing vulnerability under the quantitative and qualitative aspects. Even in the face of this scenario, there was non-compliance by political parties, maintaining the hegemony of the effective participation of men to the detriment of women. The TSE should apply sanctions to the parties. However, CA 117/2022 provided an amnesty to sanctions for noncompliance with these rules and precedents.

The impunity of those who fail to comply with the guarantee of gender equality for the acquisition of any right is an affront to the constitutional text itself. Since this is not the original wording, it may be subject to constitutionality control.

Conclusion

The historical feminist movement regarding the effective participation of women in political party activities is important for revolution and legislative reform. It is certain that much still needs to be done to break the rule of women exercising their activities in the private and family sectors to the detriment of men occupying all spaces.

The decisions of the higher courts have promoted the proper interpretation of the electoral legislation and ensured the effectiveness of the rules in the 2018 elections, enabling an increase, albeit timid, in women's participation in party political activity. The occupation of political positions by women has grown.

The study demonstrates that CA 117/2022, by itself, is not a guarantee of constitutional recognition of women in political party activities. To substantially change the existing political scenario, it is necessary to have a qualitative distribution of this right, through effective measures in the 2022 elections. Women must actively participate and seek strength in active movements in favor of the effective participation of women in politics.

To present to society the recognition of women through the mass information media, to build an identity of occupation of strategic sectors in large private companies, and in the exercise of political-party activity. With the realization of the latter, the achievement of the others will be easier. Public policies will be more oriented to the achievement of the "diamantization" of this identity and the legislation edited to promote this recognition. Together, the distribution of rights between genders will be more equitable.

CA 117/2022 is the result of pressure from the militancy of the women's movement, of legislation recognizing and guaranteeing the effectiveness of its application by the higher courts. It is the constitutionalization of already recognized rights. Its effectiveness and efficiency depend on the promotion of public policies to eliminate this vulnerability.

Women, you are the majority in society. You represent us in private life and public life!

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THE CIVIL MARRIAGE OF PEOPLE WITH PSYCHIC OR INTELLECTUAL DISABILITIES AND THE REGIME OF (IN)CAPACITIES IN BRAZILIAN LAW, AFTER THE INTERNATIONAL CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

José de Alencar Neto

Master of Laws student at Christus University Center - Unichristus.

Jânio Pereira da Cunha

Professor of the Master in Law at Christus University Center (Unichristus). Ph.D. in Constitutional Law.

Introduction

In recent years, people with disabilities face situations of prejudice and social exclusion. These circumstances are more easily visualized when analyzing, even if briefly, the main models of approach to disability - prescriptive, medical, and social.

In the prescindence model, the premise was that disability was considered a true punishment imposed on children whose parents disobeyed religious dogmas. The medical model, on the other hand, identified disability as a pathology, therefore worthy of cure. Finally, the social standard, based on human rights principles, qualified the person with a disability as a subject of rights with the presumption of full capacity. This model classified disability as a social phenomenon, rather than a personal fact so that society - and not the person with the disability - needed rehabilitation.

In 2006, ratifying the social model of approach to disability, the United Nations General Assembly enacted the International Convention on the Rights of Persons with Disabilities (CRPD), which is based on the principles of dignity, equality, and non-discrimination.

The Convention, subsequently accepted by the National Congress, had considerable influence on the text of the Brazilian Law of Inclusion of the Person with Disability (BLIPD), Law No. 13.146/15, which changed the system of disabilities in Brazilian law. This express alteration granted people with disabilities the full presumption of capacity to practice acts of civil life,

whether of a patrimonial or existential nature.

Therefore, the criterion of discernment was excluded from the analysis of civil capacity, and the judgment of will manifestation is profiled.

In this context, and based on the principle of *in dubio pro capacitates*, marriage is presented as a civil right inherent to a capable person who expresses their will clearly and precisely. This article discusses to what extent persons with psychic or intellectual disabilities who are not interdicted are civilly entitled to marriage.

1 Objectives and Methodology

1.1 General Objective

- Investigate the civil capacity of people with psychic or intellectual disabilities in the Brazilian legal system.

1.2 Specific Objectives

- Understand the circumstance of social exclusion faced by people with disabilities;
- Identify the impacts of the International Convention on the Rights of Persons with Disabilities on Brazilian law;
- Analyze the legal possibility of civil marriage for people with psychic or intellectual disabilities.

The research herein reported is qualitative in nature, pure and bibliographical (documentary), based on the deductive method. The research techniques employed were, therefore, a survey of references in books, theses, dissertations, and articles on the specific subject of the exercise of rights by people with disabilities.

1 Results (Discussions)

The principles of the dignity of the human person and non-discrimination are outlined in the first and third articles of the Federal Constitution of 1988 (FC/88) and are considered, respectively, the foundation and objective of the

Federative Republic of Brazil. In addition to these and other fundamental principles, the Charter of 1988 provides, in Article 5, the principle of equality, also introduced in the Preamble of FC/88, as the supreme value of the Brazilian Federative Republic.

The national legal system, in its unity, therefore, follows the precepts of the 1988 Constitution and contains forecasts of equal treatment among Brazilians, regardless of race, sex, color, or any other discriminatory modalities.

In this regard, mention is made of the International Convention on the Rights of Persons with Disabilities (CRPD), approved, in 2006, by the General Assembly of the United Nations and ratified, in 2008, by three-fifths of the members of the Brazilian National Congress.

In other words, the aforementioned "Convention was created to promote, defend, and ensure living conditions with dignity and emancipation for citizens of the world with disabilities" (PIMENTEL, 2020, p. 38).

From the infra-constitutional perspective, there is the Brazilian Law of Inclusion of the Person with Disability (BLIPD), Law No. 13.146/15, popularly known as the Statute of the Person with Disability (SPD), whose precepts, based on the CRPD, provide in its articles 1, 2, 37, 79, 84, in others, the need for equal treatment and non-discrimination of this group.

Although these provisions are outlined in the national legislation, for years people with disabilities have faced situations of prejudice, social exclusion, and unequal treatment. In other words, "[...] *being a person with a disability means experiencing discrimination, vulnerability and abusive attacks on one's identity and esteem*" (PALACIOS, 2008, p. 175).

On the other hand, some Brazilian laws, while trying to protect the rights of people with disabilities, used pejorative, discriminatory, and prejudiced expressions. In this regard, the Brazilian Civil Code of 1916 (CC/16), in force until the beginning of 2002, is cited, which repeated, in several of its articles[96] in several of its articles, expressions such as "all kinds of crazy people" (or simply "insane people") when referring to people with mental or intellectual disabilities.

In addition, the referred codification provided, in Article 12, the registration of the interdiction of the "insane" in public records and their

96 United States of Brazil Civil Code of 1916 (Law no. 3071): arts. 5, II; 142, I; 446, I; 1627, II and 1650, II.

confinement to specific establishments, whenever it seemed "[...] inconvenient to keep them at home" (*IDEM*, art. 457). It should be noted, without intending to exhaust the subject, that the Civil Code of 1916 referred - equivocally and discriminatorily - to people with disabilities as "bearers" of disability (*IDEM*, art. 1611 § 3).

In transposition to the nomenclature used by the former Brazilian Civil Code, mention is also made of the expressions "people with disabilities", "incapable person", "invalids", and "cripples", among other demeaning terms of the human personality, mistakenly applied by part of Brazilian doctrine. These dictions only position these human groups at the margins of society, contributing to the reality of social exclusion faced by them, since disability is not a "door" (MULHOLLAND, 2018) or carried, much less is it feasible to classify a person as incapable by the mere fact of disability.

It is not, however, in isolation, the use of derogatory expressions - whether by doctrine or by legislation - that solely qualifies the panorama of social exclusion faced by people with disabilities. Such a problem is reflected in historical-social aspects, clearly divisible when analyzing, even if briefly, the main models of approach to disability in the course of the last decades.

At least three models of approach to disability reflect how societies viewed the rights of people with disabilities: the prescriptive, the medical, and the social.

During antiquity, the model of approach to disability called prescindence was in force and is currently analyzed from two points of view. On the one hand, the prescindence model justified the fact that disability was considered a true divine punishment, imposed on children whose parents did not correspond to the dogmas of the Church. On the other hand, according to this model, people with disabilities were seen socially as dispensable and useless, exposing the social exclusion they face (PALACIOS; BARIFFI, 2007, p. 13-15).

From the early sixteenth century to the first half of the twentieth century, the medical model took place in the world, "[...] according to which the causes of disability had scientific origins, not spiritual. (PIMENTEL, 2020, p. 29). In this mold, disability was seen as a true pathology worthy of cure, so society did not do without the person - but the disability. Thus, if the "pathology" would be removed (or treated), the person would return to the criterion of equality before the others (PALACIOS; ROMAÑACH, 2006, p. 44).

With the premise that disability is a social - and not a personal -

phenomenon, the social model of approach to disability, seen to this day, is based on the growing advances in human rights studies and qualifies people with disabilities as subjects of law, endowed with legal capacity. This pattern, which has surpassed the previous ones, is supported by the fact that society (and not the person with a disability) needs rehabilitation (PALACIOS, 2008, p.103-104).

In short, "The understanding was consolidated that disability was not in people, but was imposed by society, which, through isolation and exclusion, disabled people from participating in social life and exercising their rights" (PIMENTEL, 2020, p. 35).

The social model for approaching disability is even foreseen in the Preamble of the International Convention on the Rights of Persons with Disabilities. For the CRPD, disability is an evolving concept and "[...] results from the interaction between persons with disabilities and the barriers due to attitudes and environment that hinder the full and effective participation of these people in society on an equal basis with others" (BRASIL. Decree n. 6.949/2009).

The CRPD and the SPD, in addition to ratifying the social model of approach to disability in Brazil, have made relevant contributions to the system of disabilities in Brazilian law. These diplomas, in articles 12 and 84, respectively, provide equal conditions, recognition, and full exercise of the legal capacity of people with disabilities.

The enactment of the BLIPD in July 2015 revoked the provisions of Article 3 of the Brazilian Civil Code (CC/02) to modify the regime of incapacities resulting from disability so that in Brazil only the age criterion is now considered to define absolute incapacity, i.e., only persons under 16 years of age are considered incapable.

This change is not merely the alteration of an item of the new Civil Code. The revocation of the sections of article 3 of CC/02, in fact, "[...] is the modification of the entire system of incapacities" (LOPES; MENDES, 2021, p. 54) of the Brazilian Law, so that the criterion linked to discernment was excluded in favor of the prevalence of the declaration of the will. In other terms, adults who are not interdicted and who can express their will - clearly and precisely - are presumed capable.

In summary, the recognition of the equality and legal capacity of persons with disabilities is considered to be the primary objectives of the

UN Convention and the Brazilian Law of Inclusion (MENEZES; MORAES, 2015, p. 218) has positively influenced the Brazilian legal system, such that the civil capacity of people can no longer be modulated, under penalty of discrimination (MENEZES, 2018, p. 5) based solely on criteria of disability, be it psychic, intellectual, physical or motor.

Having as a rule, therefore, the presumption of the full capacity of people with disabilities, the principle of *in dubio pro capacitates* (MENEZES, 2015) came into effect *in* Brazil, whereby everyone - regardless of psychic or intellectual disability - is presumed capable of performing acts of civil life, whether existential acts or actions of a patrimonial nature.

In conclusive analysis, it has, therefore, that "[...] the full civil capacity is presumed from the age of majority, which can only be removed if, when and to the extent that it is not possible to communicate the will [...] so that there is no longer how to attribute the synonymy between disability and incapacity". (LOPES; MENDES, 2021, p. 55).

Starting from these premises, it is concluded, safeguarding the examination of the casuistry, by the possibility of free practice of acts of civil life of people with disabilities - not curated or interdicted - able to manifest the will clearly and accurately, including as to marriage which, by definition, is "[....] legal fact whose nuclear element of the factual support is the conscious manifestation of will" (MELLO, 1994, p. 160) and, as such, presupposes the existence of a capable agent (BRAZIL, Civil Code of 2002).

The command in article 1.550, paragraph 2, of CC/02 is clear in the sense of authorizing the marriage of a person with a disability at marriageable age by the simple fact of the direct expression of the will[97]. Once again, it highlights the personal intention criterion as the determining factor for the material recognition of civil capacity.

On the other hand, it should be noted, however, the fact that the final part of Article 1.550 of CC/02 ("or through their responsible or curator") is in disharmony with the CRPD and concerning the SPD, to the extent that the Statute of the Person with Disability, specific law and posterior to the Civil Code of 2002, when establishing the possibility of curatorship only to acts of patrimonial or business nature, is explicit in the sense that the curatorship

97 Brazilian Civil Code of 2002, art. 1.550, § 2º: "The person with mental or intellectual disability at marriageable age may contract matrimony, expressing his/her will directly or through his/her guardian or curator".

"[...] does not reach the right [...] to marriage"[98].

Finally, recourse is had to the command of article 23, 1 of the CRPD, by which the States Parties must take measures to eliminate all types of discrimination in aspects related to marriage, thus recognizing the right to marriage of persons with psychic or intellectual disabilities[99]. Furthermore, Article 6 of the SPD provides that "Disability does not affect the full civil capacity of the person, including to I - to marry and to form a stable union." (*IDEM*, art. 6).

Given these facts, and because of such norms, we conclude, based on the precepts of equality and non-discrimination established by the International Convention on the Rights of Persons with Disabilities and the Brazilian Inclusion Law, that civil marriage is legally possible for persons with psychic or intellectual disabilities who are not interdicted and who can manifest their will clearly and precisely before the competent Civil Registrar of Natural Persons.

It is up to the delegate - as it should be expressed - in the registry qualification of the qualification for civil marriage, only to receive the expression of the will of the person with a disability and the merely formal analysis (documentation) of the civil capacity of the engaged couple (besides the verification of formal criteria). This analysis should, therefore, be reduced only to the existence of interdiction of the person who is being married - a fact easily verified by consulting the birth certificates of the contracting parties.

Including, Article 83 of the SPD provides that the notaries are not allowed, under penalty of constituting discrimination due to disability "[...] to deny or create obstacles or differentiated conditions to the provision of their services due to the applicant's disability, and must recognize their full legal capacity, guaranteed accessibility". (BRASIL, statute of the Person with Disability).

The recognition of the full equality and civil capacity of people with disabilities by the UN Convention does not, however, exclude the fact of

98 Art. 85 of the EPD. "The guardianship will affect only the acts related to the rights of patrimonial and business nature. § Paragraph 1 The definition of trusteeship does not include the right to one's body, sexuality, marriage, privacy, education, health, work, and vote".

99 Art. 23, 1 of the CRPD: "States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all aspects of marriage, family, parenthood and relationships on an equal basis with others […]".

existential vulnerability that - in specific situations - is possible to exist in people with psychic or intellectual disabilities to a high degree.

Expressed in another way, the CRPD "[...] tienen como principal objetivo garantizar un nivel de protección específico de las personas con discapacidad, partiendo de la premise de que en tales situaciones existe una situación de mayor vulnerabilidad o riesgo". (PALACIOS; BARIFFI, 2007, p. 107).

In effect, "Depending on the degree of the disability, the impairment, and its functionality, from a practical point of view, the person will not be able to perform such acts autonomously, and the law will need to recognize this situation to promote its adequate protection" (TEIXEIRA; TERRA, 2021, p. 37).

In these cases (or in all of them), as a means of minimum intervention in the autonomy of the person with a disability, it is indicated the option for the use of the support system (Article 1.783-A of CC/02), by which the person with a disability legally elects two trustworthy people to assist him/her in general decisions of the civil life. It is noteworthy that, even in this institute, based on their autonomy, the will of the person with a disability must prevail, given its legitimate presumption of capacity.

Conclusion

For many years, people with disabilities have faced discrimination and social exclusion, especially when the prescriptive and medical models of approaching disability were in force.

The International Convention on the Rights of Persons with Disabilities, promulgated in 2006 by the UN and ratified by the Brazilian National Congress with constitutional rule *status* in 2008, promoted the ideals of equality, dignity, and freedom for all people, regardless of sex, color, race, or any other form of discrimination.

The CRPD and the SPD altered the regime of incapacities in Brazilian law so that the civil capacity of people with disabilities is no longer modified based solely on criteria related to disability, whether psychic, intellectual, physical, or motor. Therefore, the criterion of discernment is excluded from the analysis of civil capacity, and the basis of will manifestation is adopted.

Given the presumption of civil capacity for people with disabilities and the principles of equality and non-discrimination, the Civil Registrar of Natural Persons, when making the registry qualification for civil marriage,

must submit only to the formal analysis of capacity, that is, the existence, or not, of guardianship or judicial interdiction over that person.

It is suggested, in all cases, the adoption of the supported decision-making procedure (art. 1.783-A of CC/02), by which the person with a disability legally elects two other suitable persons to help them in the decisions of civil life. Therefore, it is important to highlight the fact that even in this procedure, the full will of the person with a disability must be respected, since human beings, for being bearers of dignity, must be treated and respected as subjects of law, free and equal, in the civil sphere.

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VACCINE PRIORITY FOR THE ELDERLY OR HEALTH PROFESSIONALS? A STUDY OF PUBLIC CIVIL ACTION NO. 0803172-50.2021.4.05.8100 IN LIGHT OF THE PRINCIPIOLOGICAL NATURE OF FUNDAMENTAL RIGHTS AND THE WEIGHTING OF PRINCIPLES PROPOSED BY DWORKIN

Harissa Castelo Brando Roque

Master of Laws student at Christus University Center

Sabrinna Araújo Almeida Lima

Master of Laws student at Christus University Center

Paulo Roberto Fontenele Maia

Master of Laws student at Christus University Center

Abstract

Based on the concrete case of a Public Civil Action in favor of vaccination of the elderly, to the detriment of health professionals who are not on the front line of COVID-19, we seek to analyze the object of this action, the decision of Federal Judge Fernando Braga, taking into consideration the protection of the fundamental rights of the elderly and the weighting of principles, proposed by Dworkin.

Keywords: Covid-19. Vaccination. Elderly.

Introduction

Since 2019, the world population has been suffering from a serious pandemic that has caused the death of thousands of people, more than 660,000 in Brazil alone (G1, 2022). Seeking to alleviate this situation, laboratories have, after much research on the efficacy and side effects, managed to conclude, and produced vaccines, making the much-desired vaccination against COVID-19 a reality.

Once already available in the state of Ceará, such vaccines should have been reserved for the elderly aged 75 years and older, and, as vaccination

progressed, between 60 and 75 years, since they are part of the so-called risk group, due to their age and all the inherent health limitations[100].

It is essential to remember that, within this number of deaths by COVID-19, the elderly occupy an expressive place, especially in the state of Ceará, where almost half of the deaths are of people over 80 years old[101]. Another priority group for this vaccination was frontline health professionals who were in direct contact with the virus due to the high probability of transmission of the disease[102]. However, several health professionals who were in their homes, far from confronting the virus, were also being vaccinated as a priority, which diverted the focus of a vaccination already scarce since its purchase, thus harming risk groups that had a greater need.

Seeking solutions to this problem, the Public Ministry of Ceará (MPCE), the Public Ministry of Labor (MPT), and the Federal Public Ministry (MPF) filed a Public Civil Action, number 0803172-50.2021.4.05.8100, against the State of Ceará and the Municipality of Fortaleza, in which they requested, including through an injunction, the transfer of vaccines, in the first phase of vaccination, to the group of the elderly and health professionals who work in hospitals with infected patients[103]. Upon having their request for an injunction denied in the first instance, the plaintiffs filed an interlocutory appeal, requesting the partial reversal of the decision, in addition to the suspensive effect inherent to the appeal:

> In light of the foregoing, the Federal Public Ministry requests that this Honorable Court hear this appeal, considering it timely and regular in all its effects under art. 1015, I, of the Code of Civil Procedure, fully grant the intended active suspensive effect, according to to art. 1.019, I, of the CPC, to reform the aggravated decision, in the sense of determining to the MUNICIPALITY OF FORTALEZA that: a) refrain from vaccinating supposed health workers who work outside the limits of the spaces and establishments for health care and surveillance, be they hospitals, clinics, outpatient clinics, laboratories, or who do not have an indispensable and frequent

100 G1 CE. (2021). *Fortaleza exceeds the goal of vaccination with the first dose in elders from 75 years old*. Fortaleza.

101 ANDRÉ, Costa. (2022). *Almost half of the deaths by COVID-19 in Ceará this year are elderly above 80 years old*. Fortaleza.

102 PREFEITURA DE FORTALEZA (2021). *Plano de municipal operacionalização da vacina Covid-19*. Fortaleza.

103 CEARÁ. (2021). *Public Civil Action No. 0803172-50.2021.4.05.8100*. Fortaleza: MPCE.

> presence (12, 24, 30, 40h) in the referred environment (such as IT technicians, members of the legal, financial and marketing sector, members of the management council, physicians and other providers of only occasional services); that is, refrain from vaccinating health professionals who are not listed in art. That is, abstain from vaccinating health professionals who are not listed in art. 1, paragraph three, of CIB/CE Resolution # 07/2021 mentioned above, or designated as "involved in the fight against the pandemic", suggestion according to the terms of the precedent mentioned above, while the priority group of the elderly is not attended[104].

The federal judge Fernando Braga, when judging the appeal, granted the request for suspensive effect, determining the suspension of vaccination for health professionals who were not in the front line:

> In light of the foregoing, **I hereby ORDER** the request for assignment of active suspensive effect to the Interlocutory Appeal to **DETERMINE the** suspension of the vaccination of those health professionals who are not in effective service in confronting Covid-19, are not prioritized, or have been expressly excluded by Article 1º of Resolution CIB/CE No. 15/2021, **until, with due technical grounds,** guided by the goal of reducing the number of deaths as much as possible, the following **are defined** a) the proportion of the vaccines that, available, will be destined to the subgroup of "other health professionals" (and the proportion of the vaccines that will be destined to those over 60 years old); and b) the specification of the order of precedence within this subgroup ("other health professionals")[105].

Since we are facing an unmistakable case of a fundamental rights collision, it is necessary to remember that, according to Brazilian doctrine, these rights have a principiological nature, that is, the weighting method will be applied in case of collision, as proposed by Dworkin, in his work Taking Rights Seriously[106].

104 CEARÁ. (2021). *Public Civil Action No. 0803172-50.2021.4.05.8100*. Fortaleza: MPCE.

105 CEARÁ (2021). *TRF-5 hears appeal from MP, suspends vaccination of health professionals outside the front line, and determines prioritizing the elderly*. Fortaleza: MPCE.

106 DWORKIN, Ronald, (2010). *Taking rights seriously*. São Paulo: Martins Fontes.

1 Objectives and Methodology

The general objective of this study is to evaluate the decision of the aforementioned judge, faced with a situation of conflict of fundamental rights, in light of the technique of weighing the principles already advocated by the famous North American jurist. To achieve this goal, three questions will be answered that arise from the relevance to preventing a disease that does not currently have universal access and needs to select priorities. Therefore, answers will be sought to the following questions: Does the transfer of the vaccination focus have enough relevance to be the object of a Public Civil Action? Did the judge act correctly when he determined that the vaccination of health professionals who were not directly confronting the virus should be suspended? How can this concrete case be related to the weighting of principles, as proposed by Dworkin?

The type of research adopted for this investigation was descriptive and bibliographic, being developed from material already prepared, as explained by A. Gil, since this article seeks to demonstrate how the subject has been understood by scholars, scholars, academics, through books, scientific articles, news, among other means[107]. Qualitative research was also conducted, which, according to C. Prodanov and E. Freitas, is the interpretation of phenomena and assignment of meanings, since they are essential, not requiring the use of statistical methods and techniques[108].

We used physical and virtual sources that deal with the theme, using a dialectic approach, by confronting the theories, information, and data obtained in the research, in an attempt to form a conviction of what is in better conformity with Brazilian fundamental rights.

2 Results

A public civil action is a constitutional action foreseen in art. 129, III, of the Brazilian Constitution:

> The institutional functions of the Public Prosecutor's Office are
>
> **III** - promote civil investigation and public civil action for the

107 GIL, Antônio Carlos. (2008). *Métodos e Técnicas de Pesquisa Social*. São Paulo: Atlas.

108 PRODANOV, Ceber Cristiano & FREITAS, Ernani Cesar (2013). *Metodologia do Trabalho Científica*: métodos e técnicas da pesquisa e do trabalho acadêmico. Novo Hamburgo: Feevale.

> protection of the public and social heritage, the environment, and other diffuse and collective interests[109].

However, the explanation of the object of public civil action is not limited to the provisions of the Federal Constitution, since it also has a specific law, no. 7.347/85. In the first article of this law, we find the cases where this action can be filed: "**Art. 1 The** provisions of this Law, without prejudice to popular action, govern the liability actions for moral and patrimonial damages caused: **IV** - any other diffuse or collective interest"[110].

E. Ferraresi is very clear when he explains that if it is a diffuse or collective interest, it may already be the object of public civil action:

> Law no. 7.347/85, in its very first article, lists the matters defended by public civil action: I) environment; II) consumer; III) goods and rights of artistic, aesthetic, historical, touristic, and landscape value; IV) in-fraction of the economic order and popular economy; V) urban order. The list is exhaustive, since any other diffuse or collective interest may also be ventilated by the instrument. The advantage of the Public Civil Action Law was to allow any kind of supra-individual rights to make use of its provisions. Notably of procedural character, the new legislation served as a reference in the process of protection of diffuse, collective, or individual homogeneous rights[111].

The elderly, being part of a more vulnerable group, need special care, offered not only by the State but also by society as a whole. Old age itself is considered a fundamental right since those who find themselves in this situation have human dignity, as stated by P. Ramos in his book Curso de Direito do Idoso (Elderly people's law course):

> Thus, old age is a fundamental human right because it expresses

109 *Constitution of the Federative Republic of Brazil (2020)*. São Paulo: Saraiva.

110 *Law No. 7.347, of July 24, 1985 (1985)*. Disciplines the public civil action of responsibility for damages caused to the environment, to the consumer, to goods and rights of artistic, aesthetic, historical, touristic, and landscape value (VETOED) and makes other provisions. Brasília.

111 FERRARESI, Eurico (2009). *Ação Popular, Ação Civil Pública e Mandado de Segurança Coletivo*. Rio de Janeiro: Forense. p. 210.

> the right to life with dignity, an essential right to all human beings. Furthermore, old age fulfills a social function of extreme importance, which is precisely to facilitate the continuity of human production in the order of values, of what can justify the advantage of living and ensure the quality of life[112].

To this end, the current Federal Constitution provides, in its art. 230, in a general way, for such care:

> Art. 230. The family, society, and the State have the duty to protect the elderly, ensuring their participation in the community, defending their dignity and well-being, and guaranteeing them the right to life.
>
> **§ The** elderly support programs will be executed preferentially in their homes.
>
> **§ Those** over sixty-five years of age are guaranteed free urban public transportation[113].

One can see, by reading the Constitution, that dignity, well-being, and the right to life are fundamental rights of the elderly, and are, therefore, permanent clauses. Complementing the text of Brazil's highest law, the Statute of the Elderly, law number 10,741, went into effect in 2003[114], detailing how the State and society should act to enforce the rights of this group. In this statute it is possible to find provisions related to health because, again, we are dealing with vulnerable people due to their age:

> **Art. 3** It is the duty of the family, the community, the society, and the Public Power to ensure to the elderly, with absolute priority, the effective right to life, health, food, education, culture, sports, leisure, work, citizenship, freedom, dignity, respect, and family and community life.
>
> **§ Paragraph 1** The priority guarantee comprises:
>
> **I**- immediate and individualized preferential service in public and

112 RAMOS, Paulo Roberto Barbosa. (2014). *Curso de direito do idoso*. São Paulo: Saraiva. p. 50.

113 *Constitution of the Federative Republic of Brazil* (2020). São Paulo: Saraiva.

114 *Law nº 10.741, from October 1st, 2003,* (2003). Dispõe sobre o Estatuto da Pessoa Idosa e dá outras providências. Brasília: Ministry of Justice.

> private organizations that provide services to the population;
>
> **II**- preference for the formulation and execution of specific public social policies;
>
> **III**- privileged allocation of public resources in areas related to the protection of the elderly.
>
> § Among the elderly, special priority is assured to those over eighty years old, with their needs always being attended to preferentially concerning the other elderly.
>
> **Art. 15** - The integral health care of the elderly is ensured through the Unified Health System - SUS, guaranteeing universal and equal access, in an articulated and continuous set of actions and services, for the prevention, promotion, protection, and recovery of health, including special attention to the diseases that preferentially affect the elderly[115].

This statute also provides, in its article 74, I, practically repeating the provisions of the Public Civil Action law, that it is up to the Public Prosecutor's Office to initiate action to protect the rights and interests of the elderly.

> Art. 74 - The Public Prosecutor's Office is in charge of
>
> I - Institute the civil inquiry and the public civil action for the protection of the diffuse or collective rights and interests, individual unavailable and individual homogeneous of the aged[116].

According to what has been stated so far, it is clear that the priority of vaccination of the elderly has enough relevance to be the object of a Public Civil Action because we are facing the rights and interests of a group that needs special attention, protected not only by infra-constitutional law but mainly by the Federal Constitution itself. Furthermore, it was clear, by the junction of the text of the Public Civil Action law and the Elderly Statute, that the rights of the elderly are considered collective and diffuse, one of the objects foreseen for this action.

115 *Law nº 10.741, from October 1st 2003*, (2003). Dispõe sobre o Estatuto da Pessoa Idosa e dá outras providências. Brasília: Ministry of Justice.

116 *Law nº 10.741, from October 1st 2003*, (2003). Dispõe sobre o Estatuto da Pessoa Idosa e dá outras providências. Brasília: Ministry of Justice.

Consequently, the second question is answered in the affirmative, that the decision by Federal Judge Fernando Braga was fair since health professionals who are not on the front line are in a more favorable situation because besides being away from direct contact with the virus, they are less vulnerable than the elderly risk group.

Faced with a clear case of fundamental rights collision, since health professionals who were not on the frontline are also holders of these rights, it is worth remembering their principiological nature, defended by Brazilian doctrine, and the weighting of principles proposed by Ronald Dworkin, in his work Taking Rights Seriously.

G. Marmelstein, in his book Fundamental Rights Course, explains this institute well, citing the German jurist Alexy:

> This phenomenon - the collision of fundamental rights - arises from the principiological nature of fundamental rights, which are almost always enunciated through principles. As we know, principles, unlike rules, instead of issuing definitive commands, on an "all or nothing" basis, establish several obligations (duty of respect, protection, and promotion) that are fulfilled to different degrees. Therefore, they are not absolute since their degree of applicability will depend on the factual and legal possibilities that are concretely offered, as pointed out by the German jurist Robert Alexy[117].

It is known that Alexy complemented R. Dworkin's theory when it comes to the differentiation of rules and principles because, according to the American jurist, when rules collide, there is an "all or nothing" situation, that is, the prevalence of one rule over the other:

> The difference between legal principles and legal rules is logical in nature. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the guidance they offer. Rules apply in an all-or-nothing fashion. Given the facts that a rule stipulates, then either the rule is valid, in which case the answer it provides must be accepted, or it is not valid, in which case it contributes nothing to the decision[118].

117 MARMELSTEIN, George, (2019). *Course of Fundamental Rights*. São Paulo: Atlas. p. 369.

118 DWORKIN, Ronald, (2010). *Taking rights seriously*. São Paulo: Martins Fontes. p. 39.

Differently, when talking about the collision of principles, R. Dworkin states that the method used will be different, from that of weighting. This is because, according to the jurist, there is a dimension contained here that rules do not have: the dimension of weight or importance, which would lead to a balancing:

> This first difference between rules and principles brings with it another. Principles have a dimension that rules do not have - the dimension of weight or importance. When principles intersect (for example, the policy of protecting car buyers is opposed to the principles of freedom of contract), the one who will resolve the conflict has to take into account the relative strength of each. This cannot, of course, be an exact measurement, and the judgment that one particular principle or policy is more important than another will often be the subject of controversy. Nevertheless, this dimension is an integral part of the concept of a principle, so it makes sense to ask what weight it carries or how important it is[119].

Therefore, with the collision of the fundamental rights of the elderly and health professionals who are not directly fighting the virus, the technique of weighting will be applied since, as already explained, each fundamental right has a weight, with the need to put them "on the scales" to realize which would have more weight between the two, but never excluding the one with the lowest weight. Consequently, the elderly would have priority, leaving the vaccination of health professionals for a later time.

Conclusion

It is perceived, through this research, that the elderly are holders of collective and diffuse rights, whose defense is one of the objects provided for filing a Public Civil Action. Furthermore, due to their vulnerability, they need to be given priority in the vaccination against COVID-19, which makes this concrete case relevant enough to be the object of this action.

The decision of federal judge Fernando Braga is also reflected, which shows to be sensible and fair to suspend the vaccination of health professionals who were not in the front line to transfer it to the elderly group due to the high risk of contracting the disease and evolving to a fatal outcome, given their limited health because of their age.

119 DWORKIN, Ronald, (2010). *Taking rights seriously*. São Paulo: Martins Fontes. p. 36.

Studying the Brazilian doctrine, one discovers that fundamental rights have a principiological nature. Therefore, with the collision of these rights, there will be the application of weighting, of balancing and not of "all or nothing", which would be applied to rules.

Finally, when evaluating the chapter "Taking Rights Seriously" about rules and principles, one notices that Dworkin proposes the technique of weighting principles in case of collision, which solves the main problem since the vaccination of the elderly would be prioritized, leaving the vaccination of health professionals who are not on the front line for a later time

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ENVIRONMENTAL REGULATION FOR AMAPÁ'S SOCIOECONOMIC DEVELOPMENT: A CRITICAL REFLECTION ON THE GREEN TREASURE PROGRAM

Gerardo Clésio Maia Arruda

Professor of the Master in Law and Access to Development at Christus University Center (UNICHRISTUS)

José Evandro da Costa Garcez Filho

Master in Law and Access to Development from Christus University Center (UNICHRISTUS)

Introduction

Amapá State, given its environmental and population characteristics, where people are spatially distributed in such a way as to constitute a low population density, as well as the inexistence of population densities that are not commercially attractive and the predominance of a subsistence economy, associated with the territorial limits that inhibit land traffic and the distances from the large merchandise producing centers, had restrained economic exploitation of the type that traditionally caused environmental damage in the Amazon region.

These characteristics have bequeathed Amapá biomes in a good state of conservation, leaving it as a *locus of* actions that can work for the creation of conservation models of intact or little-impacted forests. In this sense, it is worth investigating the scope of the Green Treasure Program, reflecting on the advances proposed in the environmental agenda, which has been formulated since the mid-twentieth century, and pondering on what can be innovated in terms of environmental public policies and regulations that enable the creation of job opportunities in line with the preservation and recovery of forests.

In short, this research seeks to verify the contribution of the Green Treasure Program to the combination of wealth production and its distribution, aiming at poverty reduction and well-being generation, associated with the preservation of ecosystems. To this end, the reflections were based on the trajectory of the construction of the understanding of the importance of social dimensions for the environmental issue; in addition, some parameters were

described that marked the emergence and development of environmental law and its reception in the national legal system.

1 Goals and Methodology

By considering the environmental crisis and the civilization crisis as constituent parts of the same phenomenon, and especially that the environmental issue is a phenomenon that demands global and unison actions, the first objective of this study is to analyze the Green Treasure Program, explain its normative and operational elements, which work to enable the socioeconomic development of the local population and, simultaneously, to make environmental preservation feasible. As a result of this objective, we intend to verify in what aspects the Green Treasure Program is a model of public policy that can be replicated in areas with similar characteristics, thus enabling the generation of jobs and income in intact ecosystems or good preservation conditions, with the presence of people living in poverty.

Thus, intending to bring to the environmental debate the experience of Amapá, from the implementation of the Green Treasure Program, it methodologically adopted a historical-structural approach, privileging the economic dimension and the political-legal field, to punctuate the intervening variables that are at the base of the normative production and the achievement of state actions instituting the Amapá program of conservation and preservation of local ecosystems. It also relied on bibliographic and documentary research for the theoretical foundation and the linkage of the founding frameworks of the environmental issue and the regulations that substantiated the state actions.

2 Results

The issue of promoting the development of peripheral and semi-peripheral countries must start from the realization that each social formation has contingencies concerning the biome, vegetation, and relief, as well as a specific stage of the well-being condition of its population strata. Indeed, considering the potential of natural resources, physical infrastructure, and human capital specific to each territory for the production of wealth, the transposition of socioeconomic development models without the necessary mediations and modulations become unfeasible.

Particularly in Brazil, the Federal Constitution of 1988 observes the principle of sustainable development, outlined in art. 225, which establishes the need to achieve a satisfactory relationship between productive activities and the exploitation of natural resources. Therein lies the proposition of maintaining the vital conditions for social reproduction, to guarantee the elements necessary for a dignified human life. Brazil and Freitas (2019) interpret that art. 174, in its §1º, prescribes the establishment of guidelines and the bases of balanced national development planning, as well as seeking the development of the nation from a harmonized development of the regions. The authors also point out that art. 205 discriminates against the development of the individual as a *sine qua non* condition for sustainable development. While science and technology are distinguished in art. 218 as essential factors for the promotion of development, considering the limits imposed by the balance of ecosystems.

The regulation on the environmental issue is based on the historical normative concerning third-generation fundamental rights. Bonavides (2015) explains that these are rights that, beyond individual or group interests, are intended to protect the common good. Therefore, similar to the right to development, peace, and communication, the right to the environment has the status of protecting the common heritage of humanity.

Cortina (2005) adds that categorizing environmental law as a fundamental right is justified by the fact that it is within the scope of a regulation that intends to protect the goods of all indistinctly, since nature is characteristically a common or social good, therefore, belonging to all members of different societies. This understanding is supported by the consensus that has been established in the international community as to the indispensability of the right to a healthy and balanced environment as a fundamental right. As Medeiros (2004) summarizes, without the guarantee of the legal protection of the environment, it is impossible to speak of a dignified life.

Finally, it is assumed in the national order that the initiatives of economic growth disconnected from the brakes capable of generating environmental sustainability compromise the freedoms of future generations, given the threat of total scarcity of natural resources. Alexandra Maciel and Marcela Maciel (2012, p. 216), when stressing the need to overcome the exclusive focus on the economy and the increase in Gross Domestic Product, call attention to the negative externalities of this model of economic growth, as seen in the example of chemical pollutants released into a river, "which is not counted as a cost from the entrepreneur's point of view, but which causes several negative

environmental impacts, which end up being borne by the collectivity and even by future generations. "

It is challenging to propose a regulation appropriate to the natural conditions and the stage of economic development of Amapá because as expressed by Tavares, Chelala, and Avelar (2018) it is necessary to consider this local reality the fact that the incipient productive sector considers that forest maintenance actions work as obstacles to growth since in their assessments they prevent wealth generation initiatives. This understanding is, in the opinion of Bercovici (2005), forged in the practice of economic exploitation historically carried out in Latin America.

Amapá is located in an area that makes possible a reversal of the development policy historically carried out in the rural areas of the country. Finally, since this state is home to great biodiversity, a large stock of native forests, and already has legally protected areas, it has a natural vocation to receive the Green Treasure Program.

This Program was regulated through the State Law Decree nº 2.894/2018. Its objectives are outlined in art. 1, which prescribes that the State of Amapá should aim to stimulate the expansion of production and employment, but following the dynamics of the green economy, therefore, favoring activities with reduced carbon emissions, with rational use of resources and seeking social inclusion (AMAPÁ, 2018, *online*).

In this sense, the regulatory framework starts from the principle that it is necessary to promote the economic development of the region; on the other hand, the environmental issue is not placed as an obstacle, because it must be appreciated as a good essential to human dignity, which is recorded in the determination the state has to mobilize efforts to effect a coherent control of the registries of assets of intangible nature and the preservation and recovery of biomes.

This normative provision is a concrete instrument of the Fundamental Right to the Environment since it subordinates economic development to environmental preservation. As explained by Viana *et al* (2014), the regulation of the Green Treasury Program leads to the attraction of appropriate investments in the rational use of natural resources and also induces a *modus operandi* in economic policy based on ecological sustainability.

The environmental conditions of Amapá's territory require state action of this magnitude. This is because, as Viana *et al* (2014) point out, reports

produced by Embrapa, IBGE, and SUDAM indicate that approximately 70% of Amapá's territory is unsuitable for agricultural use; therefore, encouraging agricultural production for local consumption and through family units shows itself as a feasible alternative for beneficial land use and population well-being, resulting in a low negative impact on the environment.

It is necessary to pay attention to the fact that the low potential for agricultural development in the region ends up working as a stimulus to the exploration of mining activities, which in the short term can generate high profits, but in the long term, as historically registered for other areas of the northern region of the country, causes irreversible environmental damage. This reality in Amapá imposes the conclusion that the forest can be more economically viable if preserved, which can be made possible via the implementation of ways to monetize the environmental heritage. Finally, the conservation and recuperation of biomes can be converted into the strengthening of environmental assets, thus becoming a substantial part of an economic policy that generates work and income.

Decree-Law No. 2,894/2018 meets relevant assumptions built in the debates and forums instituting the "green agenda" in the last three decades. Aligned with the Paris Agreement and the UN Agenda 2030, it seeks to create a collaborative network with the participation of public authorities associated with private initiatives, aiming at the use of natural resources through the issuance of assets that monetize intangible environmental assets. The Green Treasury Program is based on Article 7, which describes the Socio-environmental Compensation System (CRS), where the stages of the process of quantification of the use of natural resources and the environmental impacts caused in a specific period are defined, to be later equivalently compensated in the form of conservation of native vegetation.

It is through this legal provision that the Green Treasury Sustainability Seal can be obtained. To do so, it is necessary that the private entity registers in the system and identifies the program of its interest, thus qualifying for the purchase of the forest credit, the mechanism to access the seal. It can be seen, then, that the Program follows a logic similar to that of the carbon credit. In short, its operation is based on the "ecological footprint" indicator, which measures the impact per business unit, based on information regarding the consumption of electricity, water, and fossil fuels, among others; based on this data, the Socio-environmental Retribution Quota is defined, i.e., the impact to be compensated.

The carbon credit can be briefly defined as a title concerning the reduction of Greenhouse Gas (GHG) emissions, conceived by the signatory countries of the United Nations Framework Convention on Climate Change. The proposal sought to reach the polluting developed nations, aiming to lead them to reduce their GHG emissions in the period from 2008 to 2012. The obstacles to its implementation were due to the United States' refusal to ratify the agreement (GUTIERREZ, 2009). The operationalization of the carbon credit is based on the payment to acquire the right to emit GHGs to another entity, the recipient of the payment, which undertakes to invest in renewable energy sources or preserve native forests, thus depriving themselves of activities that cause deforestation or carbon emissions into the atmosphere. As for the value, the credit is calculated as equivalent to the warming caused by one metric ton of CO2.

Still, concerning the Green Treasure Program, it is worth mentioning that, supported by a public-private collaborative network, a forest inventory is formed, which follows international standards and the methodology registered at the UN. But differently than that usually adopted in traditional contracts for issuing carbon credits, in which the emphasis is on commitments to be fulfilled in the future, the Forest Credit or Socio-Environmental Reward Quota is issued based on work carried out in the last year.

As stated by Tavares, Chelala, and Avelar (2018), this is an approach based on a logic that generates conditions for continuous financing, so that this experience overcomes the bottleneck of the methodologies already adopted for granting carbon credits, which is the discontinuity of environmental preservation actions. Therefore, different from what happens in the carbon credit policies already in place, where non-compliance with the characteristic requirements of the green economy is frequent, in the Green Treasury Program the conditions established a priori for the entrance make possible the regal obedience to the requirements set forth by the government.

Furthermore, the Green Treasure Program innovated the transactional model in the carbon market, making an important contribution to the structuring of this market, in short, to the monetization of the preserved forest in the territory of Amapa, previously exclusively observed as an economic liability and an obstacle to the economic development of the state. However, even considering the state's efforts, via regulation and public policies, the mentality regarding the possibility of wealth production from the activities traditionally developed in the Northern region persists.

The Green Treasure Program can be associated with the so-called Sustainable Bidding, which is considered a public policy instrument that can potentially fulfill the Fundamental Right to an ecologically balanced environment. Considering that, among Amapá's economic sectors, the industrial services and civil construction sectors stand out, the acquisition of the Green Treasure Sustainability Seal is extremely attractive if associated with the proposition of a Sustainable Bidding public policy, since such sectors of the economy are potentially pollutant.

It is also important to consider the role of the state in the commodity exchange system, which demands goods and services for the implementation of services directed to family units and productive units. In this sense, as a large-scale consumer, it can function as a reference for responsible consumption, thus opting for the acquisition of products and services from private institutions that demonstrably meet the demands of the "green agenda".

Finger (2013, p. 130) considers sustainable administrative bidding and contracting to be the purchase of goods and the contracting of services and works compatible with pacified socio-environmental requirements as being appropriate to sustainable development, comprising the production matrix that adopts "suitable materials and working conditions, with maximization and rational use of existing resources and rational use and that are produced through processes that do not entail degradation of the environment. "

Finally, Sustainable Bidding is compatible with the principle of solidarity, i.e., with intergenerational commitment, by referring the state action to the appreciation of environmental responsibility aiming at the future. For Finger (2013), the public interest is focused on an extended intertemporal horizon, since choices are based on a moral commitment to future generations. Therefore, from an ethical perspective, Sustainable Bidding can work for the execution of public policies that meet the interests manifested in the present time but put in the foreground an enriched environmental legacy for future generations.

Conclusion

The environmental landscape of Amapá, which due to its characteristics makes the transit of goods and the flow of people difficult, due to the geographically rugged access and the distances between large producer and consumer markets, worked as an element that slowed the penetration of economic activities traditionally adopted in the Amazon, such as mineral

extraction and the timber industry. Consider also the extremely sparse population distribution in the state, which results in the inexistence of expressive and commercially attractive urban agglomerations, so that an economy of survival and circulation restricted to the local market and generating low profits was constituted.

These variables related to the geography, population, and economy of Amapa largely explain the existence of still intact ecosystems and large areas with reversible environmental damage. On the other hand, the fact that it became a Territory when it was separated from the State of Pará in 1943, aiming at the military defense of the border areas, and a State only after the 1988 Constitution was in effect, when the first governor was sworn in and the State Constitution was promulgated, contributed to the low attractiveness of large-scale enterprises, which moved to the areas with the promotion of public resources.

Finally, historical conditions related to the structuring of Amapá State formatted the conditions for the implementation of the Green Treasury Program, emerging from the confluence of ideas and public policy essays that started the construction of the environmental agenda in the last century and became a governance reference aiming sustainable development in the current century. Its implementation in the State of Amapá presents itself as a formula for offering work and income, compatible with the need to promote the well-being of the local population, concomitantly with the preservation of intact forests and the recovery of ecosystems damaged by economic exploitation, which has traditionally been adopted in the Amazon region.

Inspired by the instituting policy of the carbon market, that is, the issuing of carbon credit bonds backed by the reduction of Greenhouse Gases (GHG), the Green Treasury Program is based on the public-private partnership and proposes the monetization of intangible environmental assets. In this sense, it is effective in the process of quantifying the use of natural resources and the respective environmental impact, aiming at compensation through the preservation of native forests.

The Green Treasury Program has advanced concerning the carbon market policy, as originally conceived, to the extent that it is based on commitments of what is being done now so that the Forest Credit is calculated and issued based on the actions carried out in the last year. This creates a dynamic of continuous financing so that the achievements of the last year function as a parameter for what can be done next year, with an increase.

However, even considering the innovative character of the Amapa Program, constructive criticism has pointed out that it is possible to advance even further. It is necessary to add to the regulations and public policies already in place socio-educational activities, of broad and deep reach, intending to create a consensus that culturally legitimizes punitive pecuniary actions, making them de facto inhibitors of environmental damage; it is also necessary to position the state as the main agent for the promotion of development, but in contrast to what has historically been done, for sustainable development, thus effecting purchases of goods, contracting of works and services that are appropriate to the requirements agreed globally...

Such measures, besides strengthening the Program and inspiring the creation of others in environmental areas that are still intact, would contribute to consolidating the Brazilian government's credibility with international investors that support projects aimed at preserving the planet.

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THE IMPACT OF DISRUPTIVE TECHNOLOGIES ON THE LABOR MARKET AND THE DUTY OF THE STATE

Sabrinna Araújo Almeida Lima

Master of Laws student at Unichristus

André Studart Leitão

Post-Doctoral Professor of the Master in Law at Unichristus

Abstract

With the advent of technology, society is evolving. Professions will be performed by robots. In this scenario, the role of the State in the labor, economic and social spheres will be analyzed. The article aims to demonstrate the technological impact on the world of work, pondering the transformations over the years. The justification arises from the importance of the theme for society, given the violation of fundamental rights. It concludes that the role of the State is to normalize social relations through public policies of worker protection. The methodology used was descriptive and bibliographical, as well as physical and virtual sources.

Keywords: Disruptive Technologies. Labor Market. Impacts. Society.

Introduction

There is an estimate that a new industrial revolution is being experienced, defined as Revolution 4.0, which reveals to be a process of considerable changes in the technological field, directly affecting labor relations and, consequently, economic and social relations.

The main and worrying consequence of this advent is the possible extinction of jobs and functions, and even the replacement of human labor by robots. This may occur because the implementation of these technologies can bring a better cost-benefit to the business community.

Based on this premise, in the face of an imminent unemployment crisis and social impacts, the State must reorganize society, the economy, and the labor market in face of the demands that the technological era imposes.

Therefore, this summary brings a perception of the impacts of disruptive technologies on the labor market, verifying the impacts of technology in the labor, economic and social spheres. It also analyzes the State's duty regarding the theme, aiming at the balance between this technological revolution and the protection of the worker.

1 Objectives and Methodology

This summary aims to answer the following questions: what are the impacts that disruptive technologies cause in society? Have fundamental social rights been violated in recent times? What is the duty of the State before the possible social collapse caused by the technological advent?

For this summary, descriptive and bibliographical research was used, since this research seeks to present how the subject has been developed by doctrinaire, scholars, and academics through books, scientific articles, and news, among other means. We opted for a qualitative approach, seeking to interpret the phenomena under discussion.

Physical and virtual sources that deal with the subject were used, and a dialectic approach was taken, by confronting the theories, information, and data reached during the research, to form a conviction of what best conforms to the fundamental social and human rights of Brazilian workers.

2 Results

When people talk about disruptive technology, they usually associate it with something futuristic. Disruption, however, has been present in society for thousands of years. The disruption occurred, for example, when mankind abandoned the hunt for its food and started to grow and raise it. That said, Yuval Noah Harari (2018, p. 87) relates the beginning of disruption in man's life, the so-called Agricultural Revolution:

> All this changed about 10,000 years ago when sapiens began to devote almost all of their time and effort to manipulate the lives of some species of plants and animals. From dawn to dusk, humans scattered seeds, watered plants, pulled weeds from the ground, and drove sheep to choice pastures. This work, they thought, would provide more fruit, grain, and meat. It was a revolution in the way humans lived - the Agricultural Revolution.

The second historical landmark of changes and consequences in the social, economic, and labor spheres, due to the scope of concrete and irreversible transformations was the so-called Industrial Revolution. This discontinuous evolution was marked by the introduction of machinery, industry, and raw materials into the sphere of production, significantly de-characterizing man's work structure, once the newcomers to the "modern" world experience that "separation between home and business" (BAUMAN, 2007, p. 39). Soon, their workplace ceased to be their home and became a factory, and their breeding ceased to be manual and became mechanized.

Even hundreds of years ago, the adoption of disruptive technologies brought about several severe social, economic, and labor impacts. With the implementation of the machinery of the means of production, human labor became increasingly devalued, and workers had no guarantees, making them increasingly fragile in this relationship.

Despite so many advances, modernity also has a dark side (GIDDENS, 1990, p. 13). However, despite being a period that brought irreversible social consequences due to the intense changes in man's work, all the Industrial Revolutions played an essential role in the development of society.

A new way of manufacturing was instituted and new sources of energy were implemented. With the advent of electricity, it became possible to launch new technologies, products, and machines, such as the telephone, television sets, cars, and airplanes. Such technologies made it possible to optimize communication, diminishing distances, serving as disengagement mechanisms for the separation between time and space, crucial to the extreme dynamism of modernity (GIDDENS, 1990, p. 23) .

With this, information and knowledge became the milestone of the post-industrial era, an era in which there was a reorganization of men's work and the insertion of women in the labor market. There was a harmonization of the implementation of technologies and work in production. The computer was a significant product that marked this phase, having been inserted in countless business segments, optimizing communication with the world.

Society has reinvented itself with the emergence of the internet, with the main reflection being the determination of the specialization of labor in a judicious way as a requirement for entering the labor market. Given this fact, the post-industrial era has given rise to the provision of services, including those people who did not have higher education, thus giving rise to an opportunity for growth in the market as a liberal professional.

It is undeniable that computers and machines have been popularized and have become part of people's everyday lives. Increasingly accessible, they have replaced jobs previously held by humans, including in agriculture. This fact occurred based on the advent of robotics, due to machines connected to the internet that can optimize time, production, and information, such as nano and biotechnology, among others.

Technological advancement is a path with no return, and there is no doubt about the existence of its many benefits. Even with so many challenges in the most varied contexts (labor, economic, and social), new technologies have reduced distances through the means of communication, making it possible for people to connect with others on all continents of the planet and the propagation of information at high speed or in real-time, expanding and making knowledge more accessible to the less privileged, due to the lower cost. Krishan Kumar (1997) reports:

> The combination of satellites, television, telephone, fiber-optic cable, and microcomputers has bundled the world into a unified knowledge system. It has "eliminated the imprecision of information. Now, for the first time, we are a truly global economy, because for the first time we have information shared instantaneously across the planet.".

Although disruptive technologies optimize time and wealth, it also has their dark side, instability, and uncertainty. These would be the two edges of modernity (GIDDENS, 1990, p. 15).

The estimate is that a great challenge is about to be faced by the labor market, serving as a warning in the face of the new era of technological disruption. Some technologies that directly affect jobs, such as vehicle automation, the sharing economy, 3D printers, and the adoption of artificial intelligence in companies, are cited as examples. That said, it is important to analyze the role of the State with the impact of technology on fundamental rights.

It is known that the Federal Constitution of 1988 (FC/88) has in its body a range of fundamental rights, which must be guaranteed to safeguard the dignity of the human being through the existential minimum, as transcribed below:

> Art. 1 - The Federative Republic of Brazil, formed by the indissoluble union of States and Municipalities and the Federal

> District, is constituted as a Democratic State with a Rule of Law and has as foundations: (...) IV - the **social values of work** and free enterprise. (our emphasis)
>
> Art. 6 Education, health, food, **work**, housing, transportation, leisure, security, social security, protection to motherhood and childhood, and assistance to the destitute are social rights, in the form of this Constitution. (Redrafted by Constitutional Amendment No. 90 of 2015) (emphasis added)
>
> Art. 170. The economic order, founded on the valorization of human work and free enterprise, is intended to ensure a dignified existence for all, under the dictates of social justice, observing **the** following principles: (...) VIII - **search for full employment.** (our emphasis)

The rights of labor protection and the search for full employment are being threatened due to robotization which will be increasingly present in a significant way in the social context. Jobs may be substituted by some disruptive technology or functions may be extinguished, making labor relations increasingly precarious and the worker increasingly vulnerable. Marmelstein (2016, p. 18) brings his concept of fundamental rights as:

> Legal norms, intimately linked to the idea of the dignity of the human person and to the limitation of power, positivized in the constitutional plan of a given Democratic State of Law, which, due to their axiological importance, ground and legitimize the entire legal system.

In the face of so many transformations, the concretization of the fundamental social rights of worker protection is shaken. Because it gives rise to the increasing substitution of human labor by technology, due to its lower cost, the unemployment rate keeps growing.

Due to the impending social and economic crisis, the State must take a stand to avoid a collapse in labor relations, guaranteeing the social right of full employment to humans. The transformations that have occurred over the years have been crucial to the development of society as a whole. However, the perspective is that, if there is no due caution, Revolution 4.0 will bring more harm than good to the working class, valuing only the most favored and in a

superior situation in the employment relationship.

As already mentioned, the new technologies that are to come, some of which are already a reality in Brazil, but others are only present in other countries, reflect directly on the possible extinction of some job positions. And such possible extinctions affect both manual and intellectual activities. In this sense, Rodrigo Paiz Basso (2019, p. 26):

> The great changes brought by Revolution 4.0 affect and will affect the way work is developed around the world, and this can already be perceived, even if subtly, in everyday life, without people realizing how close these innovations are. Examples of this are the artificial intelligence systems that are present in several companies (Siri - Apple, Bia - Bradesco, Aura - Vivo, just to illustrate). Applications and software of all kinds are already part of everyday life: social networks, banking services, transportation (Uber), and legal process management (Themis), among many others.

Preparing the population for the future labor market is one of the possible solutions to be presented by the state. Changing the grids in schools and universities, preparing for the emergence of new professions and the search for a balance between technological insertions in the labor market and employability are the main challenges to be faced.

Preparing the country to receive first-world technologies may also be on the list of actions that should be taken, with legislative changes that do not disfavor the figure of the worker, always seeking to preserve their fundamental rights and make the constitutional text effective, emphasizing the main consequences that may occur due to this revolution.

To seek only the best that the technological advent has to offer society, as it did much during the Industrial Revolutions, separating time and space and reducing distances. However, we no longer know how individuals will behave as the years go by.

Not only the population, work, and the economy will need legislative changes, but the technologies themselves need regulation to circulate in society, and how to behave when faced with a mistake. One of the most common circumstances that will require attention from the State is, for example, the responsibility in case of an accident involving autonomous cars: will the owner of the car be punished? Or the manufacturer? Or in this case, would it be the

person responsible for the system? Or would it be the state for allowing this model of vehicle to circulate in society?

The same example applies to 3D printers. Would someone carrying a firearm from a 3D printer be liable for illegal possession of weapons? And who would be responsible? The owner of the gun? The owner of the printer that printed it? The creator of the 3D modeling file? The manufacturer of the printer that allowed such a file to be printed.And concerning copyrights on the file, piracy may be present violating the authors' intellectual property. All these would be questions to be answered by legislation.

We can see that society has always been capable of reinventing itself in moments of decision. The optimistic side is that new professions will be created, and those who previously occupied positions that have been made autonomous by technology will be prepared to exercise these new functions. It will be through education that individuals will find themselves back in the job market. Changes from elementary school to university will enable workers to face a new era.

The creation of new taxes for companies could also be an incentive for companies to replace human labor with robots. New taxes would be a kind of tax offsetting for unemployment and inequality, because since jobs are increasingly scarce, individuals, even qualified ones, submit to underemployment to guarantee the minimum.

With reduced purchasing power, due to the low salaries earned through underemployment, a more modest lifestyle may become a reality for Brazilians in the coming years. Consequently, individuals who earn less will spend less, and this impact will not only affect the social sphere but also the economy, as with fewer people buying, inflation will increase.

Preserving the fundamental social rights of labor will be a great challenge to be faced by the State and the population, due to the imminent precarization of professions and human labor replaced by robotics.

Preparing the country for this new economic scenario with effective legislation that is effective, with taxation on companies as an incentive to hire human labor, and normative changes when it comes to school curricula, from elementary school to higher education, thus ensuring the framework for the new types of professions that the market will offer, and norms that regulate the technologies inserted in the social context are just some of the points presented to be enforced by the State, exercising its role as guarantor of the Constitution.

Conclusion

This paper sought to demonstrate the historical evolution of technologies that were inserted into society over the years, what were their consequences, which mainly affected labor relations, and how was human behavior in the face of these transformations. It also demonstrated some technological innovations that are still to come, some already present in a timid way, and what their social, economic and labor reflexes would be.

The State's duty was addressed, seeking to contain unemployment and protect social rights as its main goal, in face of the predominant fragility of labor relations resulting from the adoption of the automation of professions, reflecting not only in the social but also in the economic sphere.

The reorganization of society and the restructuring of the economy in face of the new technologies that will be adopted will be crucial for the reduction of unemployment rates. Society will be able to reorganize itself by adopting measures to preserve the social rights of man through public policies to be instituted by the Public Power, such as training individuals for the arrival of new job positions, from elementary school to higher education, and regulating such tools, both for their use and their responsibilities.

Furthermore, the State should work together with private initiatives, through incentive policies for the hiring of human labor through possible taxation, always seeking to reconcile constitutional guarantees and disruptions, since we cannot delay or stagnate technological advances.

Although all the technological context inserted and its reflections have shaken labor relations, it is unquestionable its fundamental role in human evolution in face of its numerous benefits. With the preservation of human dignity in the face of the guarantee of constitutional enforcement through the preservation of fundamental social rights and the conciliatory posture with the advent of new technologies, the country will be able to receive development, not falling behind other countries. Unbridled progress is coming and all that remains is to be prepared to receive it in the future.

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REVIEW OF THE ECUADORIAN CONSTITUTIONAL COURT JURISPRUDENCE ON THE RIGHT TO FREE, PRIOR AND INFORMED CONSULTATION

Adriana ABRIL-ORTIZ

Erasmus Mundus MA in Human Rights, Policy and Practice
University of Deusto

Abstract

This article provides a systematic review of the jurisprudence of the Ecuadorian Constitutional Court on the progressive implementation of the international human rights standards of the right to free, prior, and informed consultation. It analyzes the right to "consultation" and the territories' voices in the indigenous movement's resistance to the recognition of their right to self-determination in their "body territories." For this purpose, the paper elaborates on a) the characterization of the indigenous movement in Ecuador, b) an approach from international human rights law, and c) a systematic analysis of the jurisprudence of the Constitutional Court (CC) around the right to free, prior, and informed consultation. It follows a human rights-pluralist approach to the duty to consult to frame the discussion regarding the State's accountability and the protection of indigenous peoples' human rights, considering the different stakeholders involved, including business enterprises. The paper concludes that the right to free, prior and informed consultation has been "weakly institutionalized," which has delegitimized it in the eyes of the critical stakeholders: those being consulted in a context of dependence on the extraction of natural resources. The indigenous movement has activated the constitutional system to protect the different types of consultation: free, prior and informed, pre-legislative, and the popular referendum to defend their ancestral territories. The Court highlights that the duty of the State is to carry out the consultation to obtain consent or agreement, which means there must be the possibility to "adjust" the projects according to the inputs from the dialogue process. If the State cannot "adjust" the proposal, it must be implemented following human rights standards and the best practices available. The paper highlights the lack of reference to the role of the private sector, especially when it comes to extractivist projects.

Keywords: FPIC, indigenous peoples, Ecuador, Constitutional Court, ancestral territories

Figure 1 - On-site public hearing of the Constitutional Court in the Sinangoe indigenous community.

Source: Photo taken by Julio Estrella[120]

Introduction

> "I came to talk about the territory, you must listen to our words since we are judges from the territory. We do not study, but we know when the territory is sick. We are the voice of the community" (Nihua Enqueri Waorani Kenaweno, on-site public hearing of the Constitutional Court, 2022, par. 71).

In 2021, the Ecuadorian Constitutional Court (CC) carried out an on-site hearing in the ancestral territories of the A'I Cofán communities of Sinangoe in the Amazon (2022). Through this judgment, the CC established binding jurisprudence on the right to free, prior, and informed consultation regarding mining concessions issued on their territory (2022). This landmark case reflects the socio-environmental conflicts around the exploitation of natural resources and the collective rights of indigenous peoples to self-determination

120 Andrés García, "Corte Constitucional Sesiona Por Primera Vez En Sinangoe," *El Comercio*, November 15, 2021, https://www.elcomercio.com/actualidad/politica/jueces-sinangoe-sucumbios-corte-constitucional.html.

and the communal property of ancestral land. That complex scenario raises questions about the degradation of the environment, the relations between nature-human, and eventually, who can make the decisions that shape the territories for the production and reproduction of life[121].

Ecuador is a highly biodiverse and plurinational country, marked by profound inequalities and structural discrimination. This South American upper-middle-income country has around 17.5 million people, of which 30% live in poverty, particularly in rural areas where access to public services is limited[122]. According to the national census (2010), 7% of the population self-identify as indigenous, whose majority (80%) live in the countryside of the Amazonian Region and Andean Highlands[123]. Historically, those territories have faced several threats, including mining, oil extraction, agriculture expansion, and colonization policies[124]. While 68% of the Amazon is covered by oil blocks[125], the hyper-diverse Andean Forest faces the threat of mining concessions that have increased its surface from 3% to 13% in 2016-2017[126].

This essay intends to analyze the right to "consultation" and the territories' voices: the indigenous movement's resistance in recognition of their right to self-determination. Nationally, the right to free, prior, and informed consultation (FPIC) has been "weakly institutionalized" due to its uneven enforcement by the State and the perception of illegitimate from the eyes of key stakeholders[127].The indigenous movement has navigated through

121 Horacio Machado Aráoz, "Territorios y Cuerpos En Disputa: Extractivismo Minero y Ecología Política de Las Emociones," Intersticios: Revista Sociológica de Pensamiento Crítico, ISSN-e 1887-3898, Vol. 8, No. 1, 2014 *(Ejemplar Dedicado a: Intransigencias)*, Págs. 56-71 8, no. 1 (2014): 56–71, https://dialnet.unirioja.es/servlet/articulo?codigo=4986305&info=resumen&idioma=SPA.

122 INEC, "Proyecciones Poblacionales," 2020, https://www.ecuadorencifras.gob.ec/proyecciones-poblacionales/; INEC, "Boletín Técnico N. 02-2022-ENEMDU. Encuesta Nacional de Empleo, Desempleo y Subempleo (ENEMDU), Diciembre 2021," 2022, 4, https://www.ecuadorencifras.gob.ec/documentos/web-inec/POBREZA/2021/Diciembre-2021/202112_Boletin_pobreza.pdf.

123 (CNIPN, 2019, pp. 56–66)

124 (Ministerio del Ambiente de Ecuador (MAE, 2016)

125 Janeth Lessmann et al., "Large Expansion of Oil Industry in the Ecuadorian Amazon: Biodiversity Vulnerability and Conservation Alternatives," *Ecology and Evolution* 6, no. 14 (July 1, 2016): 4997–5012, https://doi.org/10.1002/ece3.2099.

126 Bitty A. Roy et al., "New Mining Concessions Could Severely Decrease Biodiversity and Ecosystem Services in Ecuador," *Tropical Conservation Science* 11 (January 19, 2018): 194008291878042, https://doi.org/10.1177/1940082918780427.

127 Tulia G. Falleti and Thea N. Riofrancos, "Endogenous Participation: Strengthening Prior

the different types of consultation: free, prior and informed, pre-legislative, and the popular referendum to make their voices heard in the judicial system. The discussion goes from soft to hard interpretations: is it a mere right "to have a say" or a veto power to refuse permission?[128]. A human rights-pluralist approach to the duty to consult proposed by J. ANAYA & S. PUIG[129] frames the discussion in terms of State's accountability and the protection of indigenous peoples' human rights, considering the different stakeholders involved, including business enterprises. For this purpose, the paper elaborates on: a) the characterization of the indigenous movement in Ecuador, b) an approach from international human rights law, and c) a systematic analysis of the jurisprudence of the Constitutional Court (CC) around the right to free, prior, and informed consultation.

1 A "Body-Territory" understanding of the right to Ancestral Land

The historical struggle of the indigenous movement in Ecuador

Since its origins in the 1920s, the indigenous movement of Ecuador has embraced a common discourse around ethnic identity, a class-based view of society, and the integration of nature and ecology resulting from the spiritual connection with their ancestral territories[130]. The indigenous movement in Ecuador started in the rural highlands in the 1920s and focused on concrete material demands, highlighting the structural oppression and reclaiming autonomy[131]. In the 1960s, the experience of the indigenous movement in the Amazon nurtured the radicalization of demands for autonomy in their territories connected with spiritual elements[132]. In the 1990s, the concept

Consultation in Extractive Economies," World Politics 70, no. 1 (January 1, 2018): 112, https://doi.org/10.1017/S004388711700020X.

128 Belen Olmos Giupponi, "Free, Prior and Informed Consent (FPIC) of Indigenous Peoples before Human Rights Courts and International Investment Tribunals: Two Sides of the Same Coin?," *International Journal on Minority and Group Rights* 25, no. 4 (September 20, 2018): 494, https://doi.org/10.1163/15718115-02503005.

129 "Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples ," *University of Toronto Law Journal* 67, no. 435 (2017): 455, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2876760.

130 Philipp Altmann, "Ecologists by Default? How the Indigenous Movement in Ecuador Became Protector of Nature," *Innovation: The European Journal of Social Science Research* 33, no. 2 (April 2, 2020): 160–72, https://doi.org/10.1080/13511610.2019.1700102.

131 Altmann, 162–63.

132 Altmann, 163–66.

of *Sumak Kawsay* gained space in the political agenda of the indigenous movement as a critique of Western conceptions of development and a holistic vision of the harmonious relationship between communities and nature[133]. During this decade, the indigenous movement consolidated as a solid political force in a period of governmental instability, economic crisis, and neoliberal adjustment policies[134]. In 2008, the new Constitution characterized Ecuador as a plurinational and intercultural State. It institutionalized the concept of *Sumak Kawsay - Buen Vivir* as the national development strategy, which has implied its depoliticization and loss of critical content[135]. Paradoxically, the institutionalization of the indigenous movement's political project came along with the marginalization of the movement itself during the presidency of Rafael Correa (2007-2017)[136].

After the approval of the Constitution of 2008, it took place a period of debilitation of the indigenous movement due to the criminalization and fragmentation strategy of the then-government and the loss of political credibility of male indigenous leaders. At the same time, there was a "commodity price boom" between 2003 and 2014, which favored neo extractivist strategies, additional oil blocks in the Central-South Amazon, and large-scale mining projects in the Southern part of the Andes[137]. While there was a general debilitation process of the indigenous movement, in 2012, during the XI round of oil concessions, the collective Amazonian Women decided to organize as grassroots leaders to resist the government's extractive

133 Philipp Altmann, "Good Life As a Social Movement Proposal for Natural Resource Use: The Indigenous Movement in Ecuador," Consilience: *The Journal of Sustainable Development* 12, no. 1 (2014): 83–85, https://www-jstor-org.ezproxy.ub.gu.se/stable/26476154?-seq=1.

134 Falleti and Riofrancos, "Endogenous Participation: Strengthening Prior Consultation in Extractive Economies," January 1, 2018, 106.

135 Altmann, "Good Life As a Social Movement Proposal for Natural Resource Use: The Indigenous Movement in Ecuador."

136 Roberta Rice, "The Politics of Free, Prior and Informed Consent: Indigenous Rights and Resource Governance in Ecuador and Yukon, Canada," International Journal on Minority and Group Rights 27, no. 2 (March 17, 2020): 349, https://doi.org/10.1163/15718115-02702007.

137 A Bravo and I Vallejo, "Mujeres Indígenas Amazónicas. Autorepresentación, Agencialidad y Resistencia Frente a La Ampliación de Las Fronteras Extractivas," *RITA*, no. 12 (2019), http://www.revue-rita.com/dossier-12/mujeres-indigenas-amazonicas-autorepresentacion-agencialidad-y-resistencia-frente-a-la-ampliacion-de-las-fronteras-extractivas-andrea-bravo-ivette-vallejo.html.

agenda[138]. This exercise of sustaining the territorial struggle and taking over the space "not only happens in their indigenous organizations but also in environmental and feminist platforms"[139].

The strategic alliances of the Amazonian Women with white-mestiza allies brought up a space for discussions around the concept of body-territory as a "space and decolonial understandings of the gendered body"[140]. It implies reflecting consciously on bodies as the first territories, which represents a political and emancipatory step in terms of "what is personal is political": the defense of the female body cannot be separated from a collective claiming of space on the Earth, a territory[141]. The resistance movement also flourishes in the Andean region, where the threat of large-scale mining has resulted in the organization of communities around their indigenous and peasant identities[142]. Beyond the jobs-environment discourse, women's collectives introduce the importance of resisting to protect a place to "live, work, and care for their family"[143]. In 2019, the indigenous movement led the 11 days of national uprise against the elimination of fuel subsidies and other neoliberal adjustment policies requested by the International Monetary Fund in a context of an important credit[144]. The protests were characterized by

138 Andrea Sempértegui, "Sustaining the Struggle, Taking Over the Space: Amazonian Women and the Indigenous Movement in Ecuador," *The Palgrave Handbook of Critical Race and Gender*, 2022, 651–72, https://doi.org/10.1007/978-3-030-83947-5_33.

139 Sempértegui, 664.

140 Martina Angela Caretta et al., "Women's Organizing against Extractivism: Towards a Decolonial Multi-Sited Analysis," *Human Geography* 13, no. 1 (March 27, 2020): 51, https://doi.org/10.1177/1942778620910898.

141 Lorena Cabnal, "Acercamiento a La Construcción de La Propuesta de Pensamiento Epistémico de Las Mujeres Indígenas Feministas Comunitarias de Abya Yala. Feminismos Diversos: El Feminismo Comunitario," ACSUR-Las Segovias, n.d., 11–25, https://www.academia.edu/7693851/Acercamiento_a_la_propuesta_del_feminismo_comunitario_Abya_Yala.

142 Katy Jenkins, "Women Anti-Mining Activists' Narratives of Everyday Resistance in the Andes: Staying Put and Carrying on in Peru and Ecuador," Gender, Place & Culture: *A Journal of Feminist Geography* 24, no. 10 (October 3, 2017): 1454, https://doi.org/10.1080/0966369X.2017.1387102.

143 Caretta et al., "Women's Organizing against Extractivism: Towards a Decolonial Multi--Sited Analysis."

144 Philipp Altmann, "Eleven Days in October 2019 – the Indigenous Movement in the Recent Mobilizations in Ecuador," Https://Doi-Org.Ezproxy.Ub.Gu.Se/10.1080/00207659.2020.1752498 50, no. 3 (May 3, 2020): 220–26, https://doi.org/10.1080/00207659.2020.1752498.

indiscriminate police violence[145]. The indigenous movement claimed for a post-petrol economic model, rejecting the increase of the price of gasoline as it would not contribute to overcoming the extractivist economy but would deepen it[146]. In the national elections of 2021, Pachakutik (the political wing of the indigenous movement) became the second-largest political force in the National Assembly, and its presidential candidate, Yaku Pérez Guartambel, lost in the second round in a tight race against the right-wing candidate and current president, Guillermo Lasso.

2 A Human Rights approach to indigenous peoples' collective rights

From "progressive integration" to recognizing "historic injustices."

In the context of historical injustices and dispossession, indigenous peoples have struggled to accomplish the recognition of their collective rights. From being considered objects of protection, as part of an assimilationist paradigm, to their full recognition as subjects of rights, international human rights law became a "powerful discursive resource"[147]. Despite the low ratification rate[148] of ILO Convention No. 169 (1989), the United Nations Declaration on the Rights of Indigenous Peoples of 2007 (UNDRIP) constitutes a milestone due to its "strong persuasive authority and interpretative function"[149]. For this essay, it is of interest the right to ancestral territories and resources, as well as the legal duty to carry out consultations prior to the approval of any project affecting indigenous peoples (UNDRIP, art. 10, 26, 32.2; ILO Convention No. 169, art. 6, 14-16).

At the regional level, the Inter-American jurisprudence has characterized the right to the indigenous communal property based on the traditional use

145 Altmann, 221.

146 Altmann, 224.

147 Felipe Gómez Isa, "The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights," in T*racing the Roles of Soft* Law in Human Rights (Oxford University Press, 2017), 188, https://doi.org/10.1093/ACPROF:OSO/9780198791409.003.0010.

148 Only 24 countries have ratified ILO Convention 169, the majority of which are located in Latin America. Ecuador ratified the instrument in 1998.

149 Gómez Isa, "The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights," 211.

and possession of land and resources[150], as well as the right to free, prior, and informed consultation in case of development projects carried out in their territories[151]. In the landmark case of Awas Tingni v. Nicaragua (2001), the Inter-American Court of Human Rights (I/A Court) applied an evolutionary interpretation of article 21 of the American Convention on Human Rights protecting the right to land of the indigenous community "...not centered on an individual but rather on the group and its community… [recognizing] the close ties of indigenous people with the land… as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival" (I/A Court, 2001, para. 149). Later on, the I/A Court developed the standards of the consultation process[152]; of particular interest is the case of the Kichwa Indigenous People of Sarayaku v. Ecuador (2012), in which the I/A Court established the importance of the consultation not as a "mere formality" but as an instrument of dialogue and participation to reach consensus (I/A Court, 2012, para. 186).

3 The right to consultation in the jurisprudence of the Constitutional Court

Participatory institutions are mechanisms to "augment citizen involvement in decision making over public goods or social services"[153]. In the case of indigenous peoples, consultations, besides being a "forum for communication and negotiation"[154], safeguard communities against human rights violations[155]. The debate around the right to free, prior, and informed consultation has followed three main interpretative strains: a. an instrumentalist approach to legitimize already predetermined projects; b. a consent-or-veto power interpretation grounded on the historical recognition of indigenous sovereignty, and c. a minimalist understanding based on a neoliberal discourse

150 (IACHR, 2009, para. 68)

151 (IACHR, 2009, para. 172)

152 See Case of the Saramaka People v. Suriname. (2007). Inter-American Court of Human Rights.

153 Falleti and Riofrancos, "Endogenous Participation: Strengthening Prior Consultation in Extractive Economies," January 1, 2018, 87.

154 Falleti and Riofrancos, 89.

155 Anaya and Puig, "Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples ."

that poses consultation as a bureaucratic obstacle to productivity[156]. R. RICE[157] alleges Ecuador is a case of a hybrid regime because there is a recognition of the right to consultation, not consent. Still, on a case-by-case analysis, the control over sub-surface natural resources and the participation mechanisms have allowed the indigenous movement to "pressure governments to narrow the gap between legislation and practice"[158]. In this context, the constitutional framework contemplates four types of consultations: free, prior, and informed (FPIC), pre-legislative, environmental, and popular referendum (see Table N.1). This section will elaborate on the different types of consultations, the challenges, and the opportunities.

The Constitution of 1998 was the first to recognize indigenous peoples' collective rights, including the right to their communal territories, and to be consulted in case of exploitation of non-renewable resources in their land (art. 84). It also included the State's duty to inform and consider the opinion of communities when governmental decisions can affect the environment (art. 88). Later on, the Constitution of 2008 developed the right to prior, accessible, and informed consultation regarding the exploitation of non-renewable resources but added the duty of the State to consult indigenous peoples in case of any legislative measure that could affect their collective rights (art. 57). As the previous Constitution, it contemplates the general obligation of the State to consult communities whose environment could be affected by any governmental decision (2008, art. 398). Eventually, in general, the Constitution determines who can call for a public referendum: the president, local governments, and civil society (art. 104).

156 Anaya and Puig.

157 "The Politics of Free, Prior and Informed Consent: Indigenous Rights and Resource Governance in Ecuador and Yukon, Canada."

158 Rice, 338.

Table 1 - Comparative table of the different types of consultations

	Foundation	Subject	Topic	Duty bearer	Sources
FPIC	Right to self-determination	Indigenous peoples	Any possible affection for collective rights	Any governmental authority	ILO Convention N. 169 UNDRIP I/A Court of Human Rights Constitutional Court
PRE LEGISLATIVE CONSULTATION				Any governmental authority with normative power	
ENVIRONMENTAL CONSULTATION	Right to participate and environmental justice	Any community that can face environmental impacts	Environmental impact	Environmental authority	Constitution Escazú Agreement Environmental international instruments
POPULAR CONSULTATION	Right to participate	Citizens (Considering nature as a subject of rights) Local governments President	Any topic that is not against the Constitution or intends to reform it	Electoral authority after the report of constitutionality issued by the CC	Constitution

Source: author from the jurisprudence of the Constitutional Court and normative instruments.

In 2010 the Constitutional Court (CC) analyzed the constitutionality of the Mining Law concerning FPIC in cases of concessions located in indigenous territories. Through this judgment, the CC determined the standards to be followed by the National Assembly when adopting a law to regulate FPIC[159].

159 Up to the present the National Assembly has not adopted a law to regulate FPIC and the pre-legislative consultation. In 2019, the CC declared the unconstitutionality of different normative instruments: the Regulation for Prior Consultation of the National Assembly, and the one adopted by the Presidency to norm FPIC in cases of oil round concessions. In the first case, the CC determined that the National Assembly has to adopt a national law to regulate this collective right: the procedure of approval of a national law is stricter than the one for a regulation. In the second example, the CC determined the Presidency cannot limit the exercise of the right to free, prior and informed consultation to the field of oil exploitation.

The still in force standards are 1. flexible procedure; 2. prior to any concession; 3. public and informed; 4. it is not only about sharing information but instead a negotiation process; 5. good faith; 6. public diffusion of the consultation process and a reasonable time in each stage; 7. prior definition of the subjects involved and the procedure; 8. respect of the social structure and the authority system of the communities; 9. systemic and formalized character of the procedure. In 2020, the CC added the following considerations: 10. the objective of the consultation is to achieve an agreement or the consent about the measures proposed; 11. the agreements resulting from the consultation must be carried out in good faith; 12. the non-delegable character: the State is the subject obliged to conduct the consultation process.

In 2022, the CC issued obligatory jurisprudence in the case of the A'I Cofán communities of Sinangoe in the Amazon. Their territories were being affected by mining concessions on the bank of the Aguarico River. The CC recognized that the right of property of their ancestral territories does not emanate from the State's formal recognition but instead from the traditional possession of the land. Besides, the Court highlighted the special connection between the Sinangoe community and the jungle regarding subsistence and cultural identity. So any activity, including the exploitation of natural resources or any other unauthorized intervention (e.g., illegal mining), because of its proximity or impact on their territory or natural resources should be considered of their direct interest (para. 108). The CC elaborates on the possible scenarios that result from the consultation: a. that the community gives its consent, or b. that it was not possible for the State to "adjust" the decision: modify or cancel the initial proposal, and therefore no agreement is made (para. 119). If that is the case, the State must ensure: a. communities enjoy the benefits from the project; b. compensation for the socio-cultural and environmental damage; c. if the communities consider it appropriate to offer labor opportunities in dignifying conditions; d. ensure the participation of communities during the whole project (para. 120).

According to the CC, nationally, FPIC includes two different types of consultations depending on whether the topic refers to the exploration, exploitation, and commercialization of non-renewable resources or other government decisions that can affect indigenous peoples' collective rights, known as pre-legislative consultation (2020, para. 81). In the second case, the CC applied the pro-homine principle to understand that any public authority with regulatory power must consult when the decisions can affect collective rights (2020, para. 88). The CC emphasizes that both consultations have to

be carried out in good faith to get an agreement or consent on the proposed measures (2020, para. 81).

The CC determined that the pre-legislative consultation constitutes a formal requirement before adopting a regulatory instrument and a constitutional right recognized in ILO Convention No. 169 and the UNDRIP (2022, para. 44). In the pre-legislative consultation field, the CC has developed jurisprudence in cases of the creation of protected areas, the definition of administrative-territorial boundaries, and the adoption of national laws. In 2020, the CC declared the unconstitutionality of the Ministry of Environment's Agreement that established a protected area in the Amazon - "Triángulo de Cuembí" - which overlaps with Kichwa indigenous territories since the government did not carry out a pre-legislative consultation with local communities and the express mention of military intervention. The CC highlighted that even though environmental conservation is a legitimate objective, the creation of protected areas implies limiting activities, affecting indigenous collective rights to their territory, cultural identity, housing, and food (para. 151). The CC considered the case that the pre-legislative consultation could become a mechanism to harmonize the legitimate intention of environmental protection with the ancestral practices of indigenous peoples (2020, para. 96). Later the CC (2020b) declared the unconstitutionality of the Resolution of the Local Government of Loja, which defined the territorial boundaries of two cantons, splitting the land of the Chinchanga indigenous community. The CC determined that the process of defining territorial boundaries where indigenous peoples live can affect their collective right to cultural identity (2020b, para. 96). Therefore, the local government must perform a pre-legislative consultation process with the Chinchaga indigenous community to achieve an agreement or consent (para. 107). Recently, in 2022, the CC declared the unconstitutionality of the National Water Law because the pre-legislative consultation carried out in 2013 did not achieve the goal of hearing the voice of indigenous peoples, ensuring their participation in public affairs that affect them, nor was it culturally appropriate (2022b, para. 83).

In 2021, the CC declared the unconstitutionality of the regulation of the Environmental Code as it intended to regulate FPIC as an obligation of the different Ministries to inform: a bureaucratic procedure (para. 123-128). The CC clarifies that while FPIC refers to any activity that can cause environmental, cultural, or other detriments to collective rights, the environmental consultation is specific to ecological issues being the subject of any community despite their ethnic composition (para. 131-132). Besides, FPIC is based

on indigenous peoples' right to self-determination, while environmental consultation is founded on the right to participate (para. 133). Applying the Escazú Agreement, the CC determines the environmental consultation includes the access to environmental information and the consultation itself (para. 136). Access to information is understood as a requirement to protect the right to a healthy environment. On the other hand, the consultation must be understood as a double-way dialogue during the decision-making process and project implementation (para. 146). The CC determined that the consultation has to be: a. timely, during the initial stages of the decision process and including reasonable deadlines, so the community has enough time to be informed, effectively participate, submit observations through accessible or appropriate means; b. inclusive, considering the geographic, socio-cultural-economic, and gender characteristics; and c. it has to incorporate the FPIC standards of "prior and good faith" (para. 151-154).

As a mechanism of direct democracy, the popular consultation has also been a strategy to stop extractivist activities, achieving the "veto power" objective of social movements, particularly indigenous organizations. In 2012, representatives of the communitarian water system and the indigenous movement requested a popular consultation to forbid mining activities in Girón, province of Azuay, where the large-scale mining project Loma Larga is located[160]. Eventually, in 2019 due to the lack of response from the CC, the Electoral Authority carried out the consultation without a constitutionality report. Around 90% of the citizens voted against mining activities[161]. In 2019, the CC determined that it is possible to carry out a popular consultation in cases of mining activities[162] because even though the State has exclusive competence over non-renewable natural resources, the Constitution recognizes the right of local communities to participate when there could be environmental impacts on their territories. In this judgment, the CC denied the petition of "popular consultation" to prohibit mining activities in the province of Azuay, where two out of five of the national large scale mining projects are emplaced,

160 Diana Vela-Almeida and Nataly Torres, "Consultation in Ecuador: Institutional Fragility and Participation in National Extractive Policy:," Https://Doi-Org.Ezproxy.Ub.Gu.Se/10.1177/0094582X211008148 48, no. 3 (April 12, 2021): 181, https://doi.org/10.1177/0094582X211008148.

161 Vela-Almeida and Torres, 181.

162 The petition was presented by Yaku Pérez Guartambel who was elected in 2019 as the authority of the local government of Azuay. Pérez Guartambel is a well-known indigenous leader who was the official candidate for the presidency of Pachakutik, the political party of the indigenous movement in 2021.

because the questions were formulated in a way that did not guarantee the freedom of the elector to decide. Nevertheless, in (2020c) the CC determined the constitutionality of the popular consultation requested by the local government of Cuenca in Azuay about the prohibition (for the future) of large-scale mining activities in water sources. In 2021, the referendum was carried out, and 80% of the citizens (348.770) of Cuenca voted to prohibit large-scale mining activities in water sources.

Conclusions

The case-by-case analysis of the jurisprudence of the Constitutional Court shows the progressive implementation of the international human rights standards of FPIC. The Court emphasizes the duty of the State to carry out the consultation to obtain consent or agreement, considering the possibility of "adjusting" the proposal according to the inputs from the dialogue. If the State cannot "adjust" the project, it has to be implemented in compliance with human rights standards guaranteeing the best practices available, compensation, and participation of local communities through the whole process. It follows J. ANAYA & S. PUIG's (2017) statement that FPIC "... entails more than a mere right to be informed and heard but not an absolute right of veto" (p. 453). Nevertheless, there is no reference to the role of the private sector, especially when it comes to extractivist projects: the pluralist approach is still missing in the decisions of the Court.

The institutionalization of the collective right to consultation has gone through a contested process that reflects the historical struggle of the indigenous movement for the recognition of self-determination in their "body-territories." The "good faith" of the State, in a context of dependency on the extraction of natural resources, and the instrumentalist approach adopted by the government have caused "indigenous activists to rely on protest, rather than prior consultation, to express their grievances…"[163]. The indigenous movement faces FPIC as a restriction of the "veto power" they seek to achieve since the Court decisions involve suspending the activities but not the permanent cessation, considering the potential existence of "extractive agreements" involving the private sector[164]. The consultation's technicalization

163 Tulia G. Falleti and Thea N. Riofrancos, "Endogenous Participation: Strengthening Prior Consultation in Extractive Economies," **World Politics** 70, no. 1 (January 1, 2018): 113, https://doi.org/10.1017/S004388711700020X.

164 Falleti and Riofrancos, 182.

could imply the depoliticization of the right to self-determination as a prerogative of the State, disempowering indigenous peoples[165]. Therefore, the indigenous movement started to press for "popular consultation" in alliance with local governments to stop extractivist activities "for the future."

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165 Patricia Urteaga-Crovetto, "Implementation of the Right to Prior Consultation in the Andean Countries. A Comparative Perspective," Https://Doi-Org.Ezproxy.Ub.Gu.Se/10.1080/07329113.2018.1435616 50, no. 1 (January 2, 2018): 7–30, https://doi.org/10.1080/07329113.2018.1435616

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A GENDERED PERSPECTIVE ON INDIGENOUS PEOPLES' LAND RIGHTS

ANJU ANNA JOHN

European Master's in Human Rights and Democratisation
Global Campus of Human Rights

Abstract

This paper aims to consider the gender dimension while considering the land rights of indigenous peoples. While dispossession from their ancestral lands affect all members of the indigenous community, this paper tries to look at whether and how women are disproportionately affected by this dispossession. Towards this, the paper starts out looking at the special relationship of indigenous people with their ancestral land, the history of the concept of 'indigenous', the slow evolution of their land rights in International Law, and the recent considerations by international bodies regarding the rights of indigenous women. It then reviews the available literature on the role that women from indigenous communities play in gathering resources from community lands, in ensuring food security within families, and the conservation of the local biodiversity in their ancestral lands. In light of this, we consider the gendered impact that dispossession of ancestral land has on women. Reports regarding women from various indigenous communities from various regions of the world are considered towards this. Later, the paper analyses the existing laws recognising land rights of indigenous peoples in certain regions. Before concluding, it provides a few suggestions regarding some of the issues that stand out. These include improved participation of women from these communities in decision-making, and the availability of gendered data on aspects relating to indigenous peoples' rights.

Key words: Indigenous Peoples, Women, Intersectionality, Vulnerability, Land Rights

Introduction

Indigenous communities across the globe are said to have a special relationship with land and territory. In the aftermath of decolonisation, the indigenous people of the world have had to contend with a new form of imperialism in the form of development projects. The resulting dispossession

from their ancestral land leads to further marginalisation of the indigenous communities and make them more vulnerable in the face of climate change and other environmental catastrophe, which in turn threatens their livelihoods and security[166]. However, in order to understand whether and how dispossessing indigenous peoples from their ancestral land impacts women differently, it is essential to look at how land rights of indigenous peoples has developed in international law, and assess how these impact women in these communities, while also reflecting on possible changes that need to be made. It is only in doing so that we would be able to ascertain how the indigenous woman's identity as an individual from the indigenous community intersects with their gender identity (and possibly myriad other structural and institutional inequalities). This paper seeks to determine how this intersectionality leads to differences in the effects of dispossession on their daily lives, and the roles they play in their families and their community. More often than not, conversation regarding indigenous peoples' right to land does not look at this issue from a gender-sensitive perspective. Consequently, the gender-specific needs of women in these communities are not acknowledged, which hampers the targeted redressal of these issues.

This paper hopes to engage with the gendered dimension of the struggles of indigenous peoples. It would begin by briefly considering the special relationship that indigenous peoples have with their ancestral land, the history of the concept of 'indigenous', and how the recognition of this has evolved in International Law over the years. Following this, the paper would focus on a literature review of the existing reports and publications concerning the indigenous women across the world and analysing the gender-differentiated effect that denial of land rights has in their lives. It would also examine whether and how States' Practice regarding indigenous peoples' land rights have helped women in these communities and the way forward. The paper would then consider possible steps to be incorporated in the future.

1 Indigenous peoples and their relationship with land

Scholars have argued that although indigenous groups across the world differ, there are various commonalities of experience between them, including their increased susceptibility to climate change and their unique connection

166 United Nations Environment Programme (ed), From Conflict to Peacebuilding: *The Role of Natural Resources and the Environment* (United Nations Environment Programme 2009).

to their lands for legal, spiritual and cultural reasons[167]. Additionally, KEMP and MARTENS also argue that an aspect connecting indigenous people is 'their understanding of and living with nature.'[168] They also share a history of colonisation and oppression, although more recently, their rights have increasingly been recognised under public international law[169].

Experts such as S. James ANAYA state that self-determination is the right on which indigenous people base their demands[170]. However, one of the rights recognised under UNDRIP and the ILO Convention as the right to their ancestral land[171]. Ken S. COATES argues that indigenous peoples' reluctance to change over several centuries stemmed from the fact that their way made sense, and is marked by their connection to the land, with knowledge of the land becoming deeply embedded in their language and vocabulary[172].

The consensus among these scholars seems to be their acknowledgment that that indigenous peoples' special relationship with their ancestral lands is at the heart of all their claims. Therefore, their ability to ensure collective legal rights would be crucial to recognising their other subsidiary rights and general wellbeing. Extending this argument into the conversation regarding the rights of indigenous women, the indivisibility of rights would mean that indigenous women's capacity to exercise the fundamental social, economic, cultural, and political rights under international human rights instruments are inseparable from their collective rights to self-determination in their ancestral lands[173].

167 Randall S Abate and Elizabeth Ann Kronk Warner, *Climate Change and Indigenous Peoples* (Edward Elgar 2013) 4.

168 Pim Martens, 'Indigenous Spirituality and Worldview as an Alternative Approach in Thinking about the COVID 19 Pandemic' (PIM MARTENS, 10 May 2021) <https://pimmartens.com/2021/05/10/indigenous-spirituality-and-worldview-as-an-alternative-approach-in-thinking-about-the-covid-19-pandemic/> accessed 2 June 2022.

169 Abate and Kronk Warner (n 2) 4.

170 S James Anaya, Indigenous Peoples in International Law (Oxford University Press 1996) 75; United Nations Declaration on the Rights of Indigenous Peoples 2007 [(A/RES/61/295)] art 4.

171 United Nations Declaration on the Rights of Indigenous Peoples (n 5) art 25; C169 - Indigenous and Tribal Peoples Convention 1989 arts 13–19.

172 Ken S Coates, *A Global History Of Indigenous Peoples* : Struggle and Survival (1st edn, Palgrave Macmillan 2004) 47.

173 'Briefing Notes: Gender And Indigenous Women' (United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues 2010) 29 <https://www.un.org/esa/socdev/unpfii/documents/Briefing%20Notes%20Gender%20and%20Indigenous%20Women.pdf> accessed 13 April 2022.

2 Developments in international law

Perhaps, before focussing on the land rights of indigenous women, it might be valuable to consider the historical development of the term 'indigenous' and how international law has also developed around the subject of 'indigenous peoples' and the recognition of their land rights.

The term 'indigenous peoples', as anthropologist Ronald NIEZEN notes, was barely used in journals or newspapers before the 1980s[174]. Albert Kwokwo BARUME explains that the etymology of the term 'indigenous', which refers to, "something that comes from the country in which it is found", in contrast to something that would be 'foreign' or 'brought in'[175]. During the colonial period the term was used in the context of all peoples found in colonized territories, regardless of whether they were born there or were newcomers[176]. This was carried on to the definition of indigenous workers in the International Labour Organization's (ILO) Convention No. 50, which included both 'indigenous by origin' and 'indigenous by assimilation'[177]. The definition in ILO Convention No. 107, once again identified two groups; those who were indigenous by origin, and those whose conditions of life were similar to indigenous peoples'[178]. In his book, 'Indigenous Rights and Development: Self-Determination in an Amazonian Community', Andrew GRAY argues that the ILO Convention No. 169 made a departure by not defining 'indigenous' in its text but established "procedures to exercise the right to self-determination"[179].

However, the recognition of 'indigenous peoples' in International law can be traced back to when the European colonists entered into treaties with indigenous peoples to recognise the relationship of the colonial powers with

174 Ronald Niezen, *The Origins of Indigenism*: Human Rights and the Politics of Identity (1st edn, University of California Press 2003) 3.

175 Albert Kwokwo Barume, *Land Rights of Indigenous Peoples in Africa*: With Special Focus on Central, Eastern and Southern Africa (1st edition, International Work Group for Indigenous Affairs 2010) 3.

176 ibid.

177 Recruiting of Indigenous Workers Convention, 1936 (No. 050), International Labour Organisation.

178 Convention C107 - Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957 (No107).

179 Andrew Gray, *Indigenous Rights and Development: Self-Determination in an Amazonian Community*: 3 (Revised ed edition, Berghahn Books, Incorporated 2003) 15.

respect to the original settlers[180]. This demonstrates their position as distinct autonomous groups at the advent of European colonist, which has since been forgotten as the Western philosophical thought and positivist notions of international law evolved to take a central stage. The positivist approach of international law helped establish a Euro-centric world order, where international law accepted the doctrine of *terra nullius* to legitimise the actions of European states as they 'invade(d) foreign lands and peoples and asserted their sovereignty over them.'[181]

2.1 Developments in recognition of indigenous peoples' rights

One could perhaps point to the sixteenth century Spanish theologians Francisco de Vitoria, Bartolomé de las Casas and others (together referred to as the Spanish School), who were worried about the rights of the indigenous communities under the Spanish conquistadores and maintained that these self-determining communities owned their lands[182]. The sermon in 1511 by a Dominican friar, Antonio de Montesinos, condemning the unjust ill-treatment suffered by the Indians moved the Spanish King to call for an official discussion on the topic that led to the adoption of the Laws of Burgos in 1512[183]. However, the statements by the Spanish School were looked upon by legal theorists 'as statements of morality as opposed to the law.'[184] Thus, diminishing the threat these admonishments posed, so as not to challenge the suzerainty that the colonial states exercised over these people under international law.

In most instances, over time the indigenous populations dwindled in comparison to the settler population and they came to be regarded as a minority that had to be integrated into the mainstream society or relegated to the fringes by displacement or other strategies[185]. In such situations, these communities saw little use of approaching the national courts and legislations

180 Niezen (n 9) 29.

181 S James Anaya, 'Indigenous Rights Norms in Contemporary International Law' (1991) 8 Arizona Journal of International and Comparative Law 42, 3.

182 Odette Mazel, 'THE EVOLUTION OF RIGHTS: INDIGENOUS PEOPLES AND INTERNATIONAL LAW' (2009) 13 Australian Indigenous Law Review 140.

183 Felipe Gómez Isa, 'Spain: The First Cry for Justice in the Americas - From Antonio de Montesinos to the Laws of Burgos (1512)', First Fundamental Rights Documents in Europe : *Commemorating 800 Years of Magna Carta* (Intersentia 2015) 93.

184 Anaya (n 16).

185 Niezen (n 9).

to address their concerns. A few indigenous communities under the British Empire did try to appeal to the monarch during the mid-nineteenth century, but these did not result in anything more than 'a polite hearing'[186].

The application of positivist international law also meant further invisibilization of indigenous communities in international forums during the early twentieth century by refusing to acknowledge them as legal entities[187], and non-recognition of the treaties entered between indigenous peoples and colonising states as legally binding.

2.2 The International Labour Organisation and Indigenous Peoples

Since the 1920s, the International Labour Organisation (ILO) – the UN's tripartite agency that brings together governments, employers and workers of member states to set labour standards, develop policies, and programmes to promote decent work for all people[188] – has engaged with issues concerning indigenous peoples[189]. To this day, the Conventions under the ILO remain the only binding treaties relating to indigenous peoples.

2.2.1 ILO C.107 on Indigenous and Tribal Populations Convention, 1957

The first treaty concerning the issues of indigenous and tribal populations was the ILO Convention on Recruiting of Indigenous Workers 1936 (No.50)[190], which was regarding the working conditions of individuals from both 'indigenous by origin' and 'indigenous by assimilation'[191]. This Convention has since been abrogated at the 107th Session of the International

186 ibid 30.

187 *Cayuga Indians* (Great Britain) v United States (1926) VI Reports of International Arbitral Awards 173; Legal Status of Eastern Greenland (Norway v Denmark) [1933] Permanent Court of International Justice Ser. A/B, No.53 71.

188 'About the ILO' (I*nternational Labour Organisation*) <https://www.ilo.org/global/about--the-ilo/lang--en/index.htm> accessed 21 June 2022.

189 'Indigenous and Tribal Peoples (Indigenous and Tribal Peoples)' (*International Labour Organisation*) <https://www.ilo.org/global/topics/indigenous-tribal/lang--en/index.htm> accessed 21 June 2022.

190 Convention C050 - Recruiting of Indigenous Workers Convention, 1936 (No. 50) 1936.

191 Article 2 (b) ibid.

Labour Conference in 2018[192]. The ILO Convention No. 50 was followed in the 1940s by a push from the countries of the Americas for a Convention by the ILO that provided more protection and assistance to the indigenous workers, as well as general measures concerning indigenous peoples[193]. This resulted in Convention No. 107 on Indigenous and Tribal Populations Convention, 1957[194], which referred to 'members of tribal or semi-tribal populations' [195]whereby, the test of 'tribal' status applied to the group as a whole, and the test with respect to the individual was regarding their membership to the group[196].

Part II of the Convention No. 107 addresses issues of recognition of land ownership (collective or individual)[197], the need for free consent before displacing a community[198], provision of alternative land that would meet present needs and future development[199], and provision of fair compensation[200].

Article 13 requires States to take measures to ensure that the transfer of ownership rights and use of land as established in the customs of the indigenous and tribal populations are respected, as long as they satisfy the needs of these populations and 'do not hinder their economic and social development'[201]. Further, the agrarian programmes of States are to afford equal treatment to these populations in terms of provision of more land where it is required, and also provide means for the development of their lands[202].

192 'Abrogation of Six International Labour Conventions and Withdrawal of Three International Labour Recommendations [Electronic Resource] / International Labour Conference, 107th Session, 2018, International Labour Office.' <https://ilo.primo.exlibrisgroup.com> accessed 23 June 2022.

193 Benedict Kingsbury, '"Indigenous Peoples" as an International Legal Concept', *Indigenous Peoples of Asia* (Association for Asian Studies, Inc 1995).

194 Convention C107 - Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.

195 Article 1 para 1, ibid.

196 Kingsbury (n 28) 20.

197 Article 11, Convention C107 - Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.

198 Article 12 para 2, ibid.

199 Article 12 para 2, ibid.

200 Article 12 para 3, ibid.

201 Article 13 para 1, ibid.

202 Article 14, ibid.

2.2.2 ILO C.169 on Indigenous and Tribal Peoples Convention, 1989

Over the years, the discourse regarding the indigenous peoples across the world changed, and at the ILO Meeting of Experts in 1986, a discussion on the revision of the original Convention took place[203]. Following a process that spanned around two years, all three parties (government, employers, and employees) participated in questionnaires to revise the Convention. Indigenous communities were usually represented as employee representatives through trade unions[204]. The participation of indigenous peoples in these discussions is reflected in the language of the Convention, which places emphasis on the participation of indigenous peoples in the policies and decisions that affect them. This process of being able to negotiate their rights has been described by scholars as having helped them move from being 'objects of protection' to 'subjects of rights' in International Law[205].

In a departure from ILO Convention No. 107, the new Convention required governments to respect the cultural and spiritual aspect of the indigenous peoples' relationship with lands and territories[206], and this constituted 'the total environment' that the indigenous peoples occupied[207].

In addition to the rights of ownership and possession over the lands that they traditionally occupied, the ILO Convention No. 169 went further and recognised land use rights, taking into consideration the rights of nomadic peoples and shifting cultivators[208]. It also called for States to provide sufficient procedures within their domestic systems to process the land claims of indigenous peoples[209].

Regarding the dispossession of their traditional lands or relocation, the ILO Convention No. 169 goes beyond the previous Convention by recognising the right of the indigenous peoples to participate in the use, management, and conservation of the resources. It also contemplated the aspect of mineral or

203 '25 Years of ILO Convention 169' <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/25-years-ilo-convention-169> accessed 26 June 2022.

204 ibid.

205 Felipe Gómez Isa, 'The UNDRIP: An Increasingly Robust Legal Parameter' (2019) 23 The International Journal of Human Rights 7, 9.

206 Article 13 para 1, C169 - Indigenous and Tribal Peoples Convention.

207 Article 13 para 2, ibid.

208 Article 14 para 1, ibid.

209 Article 14 para 3, ibid.

sub-surface resources, requiring the government to consult with indigenous peoples before it undertakes any programme for exploration or exploitation of these resources[210]. Additionally, the Convention recognises the peoples' right to return to their traditional lands once the grounds for their relocation cease to exist[211], and places a responsibility on the governments to penalise unauthorised intrusion on their lands[212].

2.3 United Nations Declaration on the Rights of Indigenous Peoples

In a marked difference from the conventions under the ILO, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) steers clear of defining 'indigenous' or explicitly mentioning to whom it applies[213], even though its preamble mentions a number of human right violations that indigenous peoples tend to suffer from[214]. The UN Working Group of the draft Declaration referred to the definition given by Mr. José Martínez COBO in his report, and it has come to be used as the 'scope of application' of the Declaration. His report observed that,

> Indigenous communities, peoples, and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on the territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their own cultural patterns, social institutions and legal systems.

210 Article 15, ibid.

211 Article 16 para 3, ibid.

212 Article 18, ibid.

213 United Nations Declaration on the Rights of Indigenous Peoples (n 5).

214 Valerie Couillard, 'Report on the International Workshop on Indigenous Women's RIghts, Land and Resources' (Forest Peoples Programme 2016) <https://www.researchgate.net/profile/Valerie-Couillard/publication/313875497_Report_on_the_International_Workshop_on_Indigenous_Women%27s_Rights_Land_and_Resources/links/58ac6b5b92851c0979e9c311/Report-on-the-International-Workshop-on-Indigenous-Womens-Rights-Land-and-Resources.pdf?origin=publication_detail> accessed 15 November 2022.

Moreover, in 2012, the International Law Association recognised that while the UNDRIP as a whole cannot be considered as customary international law, it observed that the fact that the UNDRIP passed with an overwhelming support of the United Nations General Assembly 'leads to an expectation of maximum compliance by States and other relevant actors.[215] The ILA enumerated several rights that had come to be regarded as customary international law, which included the right to participate in national decision-making on decisions that affected them; the right to free, prior informed consent[216]; the right to their traditional lands, territories, and resources, including the restitution of these rights[217].

Scholars have cited the use of UNDRIP as a parameter of reference before UN bodies and human rights treaty bodies as an indicator of its strong persuasive authority[218]. Further, countries like Bolivia have incorporated the UNDRIP into their domestic legal system, and regional human rights mechanisms such as the Inter-American Court of Human Rights and the African Commission on Human and People's Rights have used UNDRIP as a legal basis in their decisions, showing the legal impact of the UNDRIP[219].

2.4 Indigenous Women in International Law

For the most part, the discussions in international law have focussed on collective rights of indigenous peoples, with only cursory references to the specific needs of indigenous women. However, the world is increasingly taking note of the gender inequities within the indigenous communities, and how this exacerbates the vulnerability of the women in these communities.

The Committee under the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) drafted its 39th General Recommendation focussing on the rights of indigenous women and girls[220].

215 International Law Association, Rights of Indigenous Peoples 26-30.08.20012 [Resolution No. 5/2012] para 2.

216 ibid 5.

217 ibid 7.

218 Gómez Isa (n 40) 16.

219 Gómez Isa (n 18).

220 '(DRAFT) General Recommendation No. 39 on the Rights of Indigenous Women and Girls' (Committee on the Elimination of Discrimination against Women) <*https://www.ohchr.org/en/calls-for-input/2022/draft-general-recommendation-rights-indigenous-wo-*

This was later adopted in October 2022[221]. It highlights the fact that their traditional lands form an integral part of the indigenous woman's identity, worldview, livelihood, culture, and spirit[222].

The limited recognition of ownership of their ancestral lands, territories, and natural resources, as well as the absence of titles to their lands results in their inability to collectively use and enjoy their land[223]. The Committee had previously stressed on the importance of land rights and collective ownership to indigenous women in its General Recommendation No. 34[224]. The Committee recommended the need for equal access to ownership and possession of and control over land and other resources, and the provision of legal access for this[225]. Further, it recommended the development of local laws and policies to recognise indigenous women's rights to collective ownership and control over land and customary land tenure[226].

However, these recent general recommendations do not carry the same degree of enforceability as the international conventions

3 Indigenous women and their access to land

According to the FAO report, "Indigenous Women, Daughters of Mother Earth"[227], about half of the 476 million indigenous inhabitants around the world are women. For centuries, indigenous women have played an important role in preserving their livelihoods, languages, food systems, and territory[228]. Their rights are intricately linked to their unique connection to

men-and-girls> accessed 4 July 2022.

221 'OHCHR | General Recommendation No.39 (2022) on the Rights of Indigeneous Women and Girls' (OHCHR) <*https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no39-2022-rights-indigeneous*> accessed 21 November 2022.

222 ibid 56.

223 ibid.

224 ibid 22.

225 ibid 28.

226 ibid 57.

227 Food and Agriculture Organisation, Indigenous Peoples Unit, 'Indigenous Women, Daughters of Mother Earth' (Food and Agriculture Organisation 2020) <*https://www.fao.org/3/cb0719en/CB0719EN.pdf*> accessed 13 April 2022.

228 ibid 8.

their ancestral lands[229]. Their livelihoods are dependent on access to land and natural resources, which is generally managed collectively, under community-based governance[230].

Article 22 of the UNDRIP requires states to pay special attention to the rights and special needs of various groups within the indigenous community including women[231]. It obligates states to take measures to ensure that women and children enjoy the full protection and guarantees against all forms of violence and discrimination[232].

However, the systemic lack of recognition of their rights – particularly concerning their right to self-determined development and their collective rights – have resulted in them being increasingly discriminated and have made them more vulnerable and susceptible to poverty, conflict, and food insecurity[233]. These changes have taken place due to changes in environment, social and political factors indigenous peoples' governance and social structures[234].

3.1 Effect of dispossession of land on indigenous women

The foremost factor that has affected the dispossession of indigenous land has been development activities[235]. These activities in many countries do not follow the principle of free, prior, informed consent as necessitated by the international conventions.

In most parts of the world, the traditions of indigenous communities have generally afforded equal access and control over collective land and the natural resources on these lands[236]. Moreover, in some indigenous communities of Asia, the matriarchal system is followed, and women in these societies enjoy high social positions[237]. In matrilineal societies in the North-East of India,

229 ibid 4.

230 ibid 6.

231 Article 22(1), United Nations Declaration on the Rights of Indigenous Peoples (n 5).

232 Article 22(2), ibid.

233 Food and Agriculture Organisation, Indigenous Peoples Unit (n 62) 3.

234 ibid 7.

235 ibid.

236 'Briefing Notes: Gender And Indigenous Women' (n 8) 2.

237 ibid.

women have traditionally held land rights and inherited ancestral land. In such systems, influences from mainstream society and the colonial past have shaken their traditional roles as custodians of their cultures[238]. However, by and large, the conversation regarding indigenous peoples' rights has mostly focussed on their collective rights, and rarely on its specific effects on women.

Some of the general observations that came from the International Strategy Workshop on Indigenous Women's Rights, Land and Resources (the IWIW workshop)[239] – which took place in February 2015 – provided some insights regarding the lack of intersectional considerations of the problems affecting indigenous women. While the international legal standards on both indigenous peoples' rights and women's rights have developed significantly over the past few decades, documentation and reporting from the ground showed that indigenous women were yet to use these two standards in conjunction and make the best of these two separate sets of standards that would apply to them. It was contemplated that this could probably be due to the two different nature of these rights; while women's rights generally focussed on individual rights, indigenous peoples' rights were inherently of a collective nature. However, it has been generally accepted that the indigenous women's rights could not be conceived, addressed or realised without realising indigenous peoples' collective rights to land. And therefore, land rights would be a common starting point in any discussion relating to indigenous women's rights[240].

However, it is important to note that while dispossession from their ancestral lands has affected indigenous women across the globe, their lived realities are very different. And therefore, the effects of dispossession from their traditional land have been varied across different regions. Therefore, in an effort to understand the regional distinctions, the following section would consider the reports from a few countries from Africa, Asia, and Latin America.

3.1.1 Africa

The reports from Africa demonstrate how women's daily household needs are affected by the lack of easily available natural resources.

238 ibid.

239 Couillard (n 49).

240

The East African example shows how the indigenous women's interaction with the environment varies from their male counterparts. While women are interested in natural resources, such as tree branches for firewood and shrub leaves and roots for medicine, the men look to natural resources such as water for their animals and to create settlements[241]. Therefore, the dispossession from traditional lands would deprive women in these household of their sources of medicinal plants and run the risk of losing their traditional knowledge regarding the biodiversity in their ancestral lands.

In Uganda, the Batwa communities were displaced from their traditional forests. The forest had been taken over for the creation of a national park. Consequently, the Batwa communities were forced into the territory of the Bakiga community, resulting in a conflict over access to water holes. Consequently, the Batwa women were forced to travel more than half a day to reach an alternative water source[242].

3.1.2 Asia

Instances of land dispossession in Asia has often affected the traditional means of livelihood and forced women to look for alternative means to support their families.

In Laos, indigenous women generally depend on collecting leaves and shoots for their livelihood. Underlying economic interests have resulted in frequent attacks on their lands and have now forced these women to find alternative occupations[243]. Women in these societies are faced with food insecurity, even as they grapple with their deteriorating mental health and increasing vulnerability to gender-based violence[244]. In a search for alternative means of ensuring their livelihood, the indigenous women in Laos have

241 'Briefing Notes: Gender And Indigenous Women' (n 8).

242 Elisa Scalise, 'Indigenous Women's Land Rights: Case Studies from Africa' (Minority Rights Group International 2012) 53 <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-1117-Indigenous-womens-land-rights-case-studies--from-Africa.pdf> accessed 13 April 2022.

243 Krishna B Bhattachan, Kamala Thapa and Sushila Kumari Thapa Magar, 'Climate Justice for Indigenous Women: Urgency and Way Forward' (Asia Indigenous Peoples Pact (AIPP) and Cuso International 2020) 8 <https://aippnet.org/wp-content/uploads/2020/09/Climate-justice-for-indigenous-women-urgency-and-way-forward-edited.pdf> accessed 13 April 2022.

244 ibid 10.

reportedly turned to the production of cash crops, crafts and textiles made from forest products[245].

Similarly, in Myanmar, land conflicts have affected the livelihoods of women, increased their workload and undermined their socio-economic power within their communities[246]. Reports indicate that, as much as 70% of the family income of indigenous women in the rural areas of Myanmar go towards food. And many have had to borrow money to afford food[247].

About 82% of the population in Pu Chhrob (in Cambodia) are faced with food insecurity each year. Food insecurity has forced male migration, which has been encouraged by the government policies[248]. The alteration in traditional life has led to a situation where cultural agricultural practices and the women who remain behind are most affected[249].

In India, the data presented in the Parliament point to a poverty-induced migration from their ancestral lands to work in the informal labour sector in the cities[250]. Schedules Tribes[251] clearly indicates to the intersectional discrimination that indigenous women face. reported incidents of assaults on women for the year 2020 was 885, the second most reported offence that affected the Scheduled Tribes population[252]. Incidents recorded of rape against women and children stood at 1137 (681 cases of rape of women, and 456 cases of rape of children below 18[253])[254].

245 ibid 8.

246 ibid.

247 ibid.

248 ibid 10.

249 ibid.

250 'Unstarred Question No. 968, Answered on 17.12.2018' (Lok Sabha, Parliament of India, 17 December 2018) <http://loksabhaph.nic.in/Questions/QResult15.aspx?qref=74445&lsno=16> accessed 8 July 2022.

251 The term used for indigenous communities that have been recognised under the constitution and are therefore, entitled to positive discriminations by the government.

252 Table 7C.2 and Table 7C.3 National Crime Records Bureau, 'Crime in India 2020 Report - Volume II' (Ministry of Home Affairs, Government of India 2021) Annual Report 68 623–624, 631 <https://ncrb.gov.in/en/Crime-in-India-2020> accessed 7 July 2022.

253 The legislation regarding sexual violence against children is gender neutral and applies to both boys and girls.

254 National Crime Records Bureau (n 87).

3.1.3. Latin America

Reports from Latin America point to the clear discrimination of indigenous women and the various forms in which violence is perpetrated against them.

An FAO study looked at how external factors have affected the economic and social support networks of the Wayuu people of Latin America, resulting in weakening of the collective obligations to the matrilineal structure and consequently reducing the economic independence of indigenous women[255]. The fading of kinship ties results in women losing their traditional support system and make them more vulnerable to violence.

The Inter-American Commission on Human Rights (IACHR) in its 2017 report titled, 'Indigenous Women And Their Human Rights In The Americas', considers the various forms of violence faced by indigenous women in the contexts of armed conflict, development and other extractive projects, among others[256]. The Inter-American Court of Human Rights has observed that during the period of armed conflict in Guatemala, women were specifically selected as victims of sexual violence[257]. In Colombia, the IACHR found that indigenous women had been subjected to sexual enslavement, forced pregnancy, gang rapes, sexual mutilation, and killings by various actors of the armed conflict[258].

The report noted that the violence perpetrated against indigenous women came from both State and non-State actors, and by indigenous and non-indigenous individuals. This could be "during armed conflicts; during the implementation of development, investment, and extractive projects; the militarisation of indigenous peoples' territories; situations of deprivation of liberty; within the family or domestic sphere; and in connection with their involvement in the defence of human rights."[259]

The IACHR has previously called upon States to "consider the specific needs of indigenous women in their response to the problem of violence, respecting their cultural identity, ethnicity, language, and the need to

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257 *Case of the Massacre of "Las Dos Erres" v Guatemala* [2009] Inter-American Court of Human Rights Series C No. 211 [139].

258 'Indigenous Women and Their Human Rights in the Americas' (n 91) 67.

259 *ibid 64.*

incorporate cultural expert testimonies in cases of violence."[260]

The report also documents the obstacles women face in the economic, social and cultural rights[261]. The IACHR reiterated its previous observation that the discrimination faced by indigenous women with regard to economic, social and cultural rights can be seen in the labour markets, with limited access to social security, higher rates of illiteracy, and being faced with poverty and social exclusion[262].

3.1.4 Observations

During the IWIW workshop in 2015, it was observed that a lot of the issues were similar across regions. However, only groups from Asia raised issues concerning trafficking. Africa and Latin America reported a lot of cases concerning sexual violence. Moreover, issues about maternal mortality were a concern for participants from Africa[263]. Therefore, it could be concluded that while there are many issues of common concern, some concerns are more pertinent in certain regions.

Thus, by examining issues faced by indigenous women that were previously reported before various forums and which emanate from different parts of the world, it can be seen that, while the issues are generally not representative of the entire region's experience, the experiences of indigenous women vary greatly. This is also reflected in how they have tried to adapt to their changing circumstances. It would be safe to conclude that most have generally faced intersectional discrimination, and unequal access to opportunities. Further, there has been very little by way of research and documentation that looked at the gendered experiences of indigenous women[264].

260 'Access to Justice for Women Victims of Sexual Violence in Mesoamerica' (Inter-American Commission on Human Rights 2011) para 302 <https://www.oas.org/en/iachr/women/docs/pdf/women%20mesoamerica%20eng.pdf> accessed 22 November 2022.

261 'Indigenous Women and Their Human Rights in the Americas' (n 91) 122.

262 ibid.

263 Couillard (n 49) 6.

264 'Gender and Land Rights in Asia: Workshop Report, November 20-21, 2010' (Asian Indigenous Women's Network (AWN) and Forest Peoples Programme) <https://www.forestpeoples.org/sites/fpp/files/publication/2011/02/gender-and-land-rights-asia-report-final2-ht.pdf> accessed 13 April 2022.

3.2 Domestic measures to recognise indigenous peoples' rights

Although countries are yet to make concerted efforts towards improving the status of indigenous women in their societies, some countries have made efforts through constitutional or legislative changes, to recognise the collective rights of indigenous peoples.

3.2.1 Constitutional recognition of collective land rights

Canada was one of the first countries in the world to devote a section in its constitution to indigenous peoples' rights[265]. Several countries in Latin America have included specific provisions in their constitutions granting collective land rights to indigenous communities. This includes countries like Brazil (which was the first country in Latin America to give constitutional status to the concept of indigenous lands), Paraguay, Ecuador, Venezuela, and Bolivia[266]. While many countries in Africa have refused to use the term 'indigenous', they have recognised both individual and collective rights to property. This is the case for countries like the Republic of Gabon, and Ethiopia[267]. The Constitution of the Philippines has several provisions relating to indigenous peoples and recognises their right to their ancestral land[268].

3.2.2 Legislative measures to recognise land rights of indigenous peoples

Australia chose to recognise the rights of the Aboriginal peoples and Torres Strait Islanders through the 1993 legislation on the Australian Native Title Act[269]. In Cambodia, the Land Act, 2001 grants land rights to indigenous peoples. Moreover, the National Policy of Indigenous People of Cambodia recognises the rights of indigenous peoples' rights and the role they play in the management of natural resources[270]. In the Philippines, in addition to the constitutional provisions, the Indigenous Peoples Rights Act of 1997 recognizes indigenous peoples' rights of ownership and possession to their

265 Barume (n 10) 196–227.

266 ibid 204–206.

267 ibid 215, 218.

268 ibid 211.

269 ibid 207.

270 Bhattachan, Thapa and Thapa Magar (n 78) 6.

ancestral domains[271].

Similarly, in India, the government enacted the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (also known as the Forest Rights Act). This law sought to recognize the symbiotic relationship between the indigenous people and the forest and granted them rights to the forest. This legislation recognised both, the individual right to land and the community land rights, while also placing a responsibility on the community to conserve this land through sustainable use.

However, even where policies and legislations exist, there still remains a gap between the policy and its implementation. In Cambodia, this is reported to be due to political delays. In India, collective rights are rarely recognised[272], and the individual claims of indigenous peoples are often rejected, as not many people have sufficient documentation to prove their documentation[273].

3.2.3 Indigenous women's rights to land

While collective rights over indigenous peoples' traditional rights is considered, it also becomes pertinent to look at the extent to which this has been able to ensure the indigenous women's rights to community forests.

An analysis by Rights and Resources Initiative in 2017 concluded that 'national laws and regulations on the rights of indigenous and rural women to inheritance, community membership, community-level dispute resolution are consistently unjust, falling far below the requirements of international law and related standards.[274]

271 Stefania Errico, 'The Rights of Indigenous Peoples in Asia: Human Rights-Based Overview of National Legal and Policy Frameworks against the Backdrop of Country Strategies for Development and Poverty Reduction' (International Labour Organisation 2017) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_545487.pdf> accessed 22 November 2022.

272 Bhattachan, Thapa and Thapa Magar (n 78) 6.

273 Wildlife First & Ors v Ministry of Forest and Environment Ors (Supreme Court of India).

274 Executive Summary, 'Power and Potential: A Comparative Analysis of National Laws and Regulations Concerning Women's Rights to Community Forests' (Rights and Resources Initiative 2017) 7 <https://rightsandresources.org/wp-content/uploads/2017/07/Power-and-Potential-A-Comparative-Analysis-of-National-Laws-and-Regulations--Concerning-Womens-Rights-to-Community-Forests_May-2017_RRI-1.pdf> accessed 22 November 2022.

The study considered the extent to which the rights of indigenous women's rights were recognised in 30 low-and-middle-income countries (LMIC) in Africa, Asia and Latin America, which covered 78% of forests in LMIC across the world. Over a third of these LMIC countries[275] had laws that legally discriminate against daughters, widows, women in consensual unions, or have religious or customary laws that govern women's inheritance rights[276]. Around 45-50 percent of the countries assessed in Africa and Asia do not equitably protect women's inheritance rights[277]. While studying the different regions, no region had strong legal protection for women across all parameters, but the countries studied in Africa provided the most consistent affirmation of women's property rights; Asian countries provided the greatest protection for community-level inheritance, voting and inheritance rights; and Latin America had the strongest over-arching inheritance rights and gender-sensitive recognition of women's community-level membership rights[278].

4 Partial conclusions

The sections above indicate that while countries have taken steps to recognise collective rights of indigenous peoples over community lands. However, a glaring problem remains the inadequate implementation of the laws and policies that have already been adopted[279].

Moreover, as the study by Rights and Resources Initiative demonstrates, an analysis of the national laws in Asia, Africa, and Latin America demonstrates that these laws and policies leave much to be desired regarding ensuring gender equality in terms of women's access to these collective lands.

275 India, Indonesia, Kenya, Mali, Myanmar, Panama, Papua New Guinea, Philippines, Senegal, Tanzania, and Zambia.

276 'Power and Potential | Rights and Resources Initiative' (*Rights + Resources*) <https://rightsandresources.org/publication/power-and-potential/> accessed 23 November 2022.

277 ibid.

278 'Power and Potential: A Comparative Analysis of National Laws and Regulations Concerning Women's Rights to Community Forests' (n 109) 9.

279 'Women's Land Rights in Asia – Asian NGO Coalition' (Asian NGO Coalition for Agrarian Reform and Rural Development (ANGOC)) <https://angoc.org/portal/womens-land-rights-in-asia/> accessed 22 November 2022.

4.3 Way Forward

While recognising the individual and collective rights of indigenous people is a positive step, this needs to be supplemented with adequate protections ensuring that these rights are also granted to the women in these communities. Moreover, the reports also point to a wide gap between the passing of these legislations and their implementation. Therefore, a crucial first step would be to take sufficient steps to monitor and ensure the implementation of the laws and policies that are already in effect.

4.3.1 Gender-sensitive laws and policies empowering indigenous women

Further, indigenous women continue to face intersectional discrimination and are disproportionately more vulnerable than their male counterparts in these circumstances. However, as demonstrated in the previous section, laws regarding the rights to community lands do not sufficiently empower the women in these communities, with a third of these countries also having legislations that discriminate against women's land rights. Therefore, there is a grave and urgent need for gender-sensitive approaches in land-related programs and policies.

4.3.2 Need for gender-disaggregated data to inform policy decisions

While indigenous peoples' issues have been studied, it was only in October 2022 that the General Recommendations concerning indigenous women by the Committee under CEDAW was published. The recognition of the gender-specific needs and vulnerabilities of indigenous women is only beginning to be discussed now. Civil society organisations and indigenous communities can help further this discussion by taking measures to support research and documentation in this regard and fill-in the existing gap. This could be done by collecting gender disaggregated data to inform policy discussions[280].

280 ibid; Food and Agriculture Organisation, Indigenous Peoples Unit (n 62) 15; Couillard (n 49) 15.

4.3.3 Participation of women in domestic and international forums

Another step would be to ensure participation of indigenous women in the political sphere and in decision-making processes. As noted by experts, indigenous women are inadequately represented in negotiations for mining and development related procurement of indigenous lands in Australia, Papua New Guinea, Indonesia, and India[281]. Therefore, countries need to take measures to increase participation of both indigenous men and women in decision-making bodies and politics.

Measures should also be taken to inform the community members on forums for human rights and women rights instruments and supporting submissions of the indigenous communities before the relevant instruments or litigating and pursuing cases before regional forums (in regions where that is a possibility).

Conclusions

It is an encouraging sign that the gender-specific effects of dispossession of land on indigenous women has been discussed at various fora in different regions of the world. The CEDAW Committee's recent General Recommendation goes a long way in strengthening the argument for more legal and policy initiatives by governments who are signatories of the CEDAW. While recognition of collective rights of indigenous peoples is a step in the right direction, efforts need to be taken to ensure their proper implementation.

The next steps for States would involve ensuring that gender-disaggregated data is taken into consideration by policymakers and effective measures are implemented on the field to improve the rights of indigenous women over their traditional lands. Towards this, it also becomes essential that indigenous women can participate in political discussions that affect them, and shape policy in a positive way.

281 Ciaran O' Faircheallaigh, 'Indigenous Women and Mining Agreement Negotiations: Australia and Canada' in Kuntala Lahiri-Dutt (ed), *Gendering the Field*, vol 6 (ANU Press 2011) <https://www.jstor.org/stable/j.ctt24h9g4.12> accessed 22 November 2022.

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ADDRESSING THE DE JURE AND DE FACTO REALITIES OF THE IDENTITIES IN INDIGENOUS COMMUNITIES: HIGHLIGHTING CULTURAL RIGHTS OF INDIGENOUS GIRLS AND WOMEN

Fatuma ABDILLAHI ALI

Master of Laws (LL.M.) in International Legal Studies
University of Deusto

Abstract

This paper seeks to shed limelight on the de facto and de jure realities of indigenous girls and women in as a far as the collective right to culture is concerned. At the backdrop of the changing tide in human rights discourse, indigenous peoples' rights have become mainstreamed with clear established legal norms on indigenous rights. In essence, indigenous people have become empowered with certain protection and privileges, as a result, necessitating the emerging discourse as to what are the practical implications of this milestone pivoted from the need to protect the rights and well-being of vulnerable members of indigenous communities mainly girls and women. At the same time, there is a need to take note of how legal standards and norms create certain protection and privilege that yield tangible powers. Moreover, with these powers, a niggling concern arises as to what are their existing limits in terms of creating checks and balances. Especially, when it comes to reining the overreach of harmful practices perpetuated against indigenous girls and women through cultural norms raising the question, on how to find introspective solutions that ensure protection of indigenous girls and women without undermining indigenous peoples' rights on cultural autonomy. In the same breath inquiring whether, the rights to self-determination in the cultural development context should have a carte blanche coverage in the fora they appear. If so, whether there is a need to have check or balance to ensure there is meaningful measure to equality and fairness in this context. At the same time focusing on how the platform in which the right to culture is enjoyed can perpetuate human abuse and create a new group of victims contrary the purpose behind the right. Whilst, arguments can be made that state parties in international human right instruments have the power to ensure protection of these special interest group, their mandate can been a seen an interference of the autonomy envisioned in the rights to self-determination on cultural development, which alluded to a dissonance. Furthermore, it analyses a

few existing legal standards and their capacity to protect both collective and individual rights and how they exist from far ends of the each other pivoted from whether they complement or entirely contradict each other. Finally, it will discuss the need to find a balance between protection of indigenous girls and women from harmful cultural practices and the collective rights to culture.

Key words: Collective rights, cultural rights, self-determination and individual rights, harmful practices.

Introduction

The history of indigenous people tells of a profound struggle marred with conquest and usurpation of their sovereignty as well the disposition of lands, territories and resources juxtaposed with how the traditional international law played a major enabling role[282]. This quandary featured why for a long time indigenous people were barely mentioned in the international human rights law. A good case in point, being how conspicuously the 1948 Universal Declaration of Human Rights (UDHR) does not feature indigenous people rights with the trend persisting in other the major human rights convention notably the 1965 International convention on the Elimination of All Racial Discrimination (ICERD), the 1966 International Convention on Civil and Political Rights (ICCPR), the 1966 International Convention on Economic, Social and Cultural Rights (ICESCR), the 1979 Convention on the Elimination of All Forms Of Discrimination Against Women (CEDAW) or even the 2007 International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)[283]. A trend that has resultantly ensured a systemic exclusion of indigenous people from meaning participating in the evolution of international human rights law as well their development. Notwithstanding the notable International Labour Convention instrument (ILO 169) which serves and mirrors major recognition of the protection of indigenous people rights whilst attempting to challenge the status quo, its relevance has been thwarted by the significant problems inter alia, limited ratification and

282 GÓMEZ ISA, F. (2007) The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights. Tracing the Roles of Soft Law in Human Rights. Oxford: Oxford University Press, p187.

283 SAUL, B. (2016).The United Nations Human Rights Committee and Indigenous Peoples. Indigenous Peoples and Human Rights: International and Regional Jurisprudence. Oxford: Hart Publishing, p1.

effective mechanisms for its implementation and utilisation[284]. As a result, with the absence of specific indigenous rights standards in most human rights treaties, most indigenous people have resulted to advance their interest by utilising general human rights law instruments and mechanisms. A good case in point is where the Human Rights Committee has tailored the general standards of International Convention on Civil and Political Rights to address the special circumstances of indigenous people[285]. Adding on this innovative standpoint, the trajectory in which Indigenous right has taken continues to stride and changed tremendously. Evidently so, as the international human rights law landscape has evolved enough to serve as a powerful discursive tool for the indigenous people to advance their demands both domestically and at the international fora[286]. Therefore, creating a global indigenous movement that has been viewed as an example in grasping the transformative, dynamic potential lodged in the human rights discourse, drawn from its manipulability and malleability in fostering human rights reforms and not to mention how the United Nations has been receptive of indigenous peoples claims through setting avenues and spaces for participation in an effort to advance their demands[287].

Cumulatively, owing to the changing tide in human rights discourse, indigenous peoples' rights have become mainstreamed notwithstanding the challenges of their operationalisation, enforceability or implementation. Hence, with clear established legal norms on indigenous rights, indigenous people are empowered with certain protection and privileges. At the same time, there is a need to take note of how protection and privilege yield certain powers and what are the practical implications emanating from these powers.

As a result, this paper seeks to highlight and illustrate the power dynamic arising from the collective rights due to mainstreaming of indigenous rights, pivoted from the practical implication it has on the individual rights of special interest individuals mainly indigenous women and girls. A good case in point is how the 2007 United Nations Declaration on the Rights of

284 Supra. GÓMEZ ISA, F. (2007) The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights. Tracing the Roles of Soft Law in Human Rights. Oxford: Oxford University Press, p 185.

285 Supra, SAUL, B. (2016).The United Nations Human Rights Committee and Indigenous Peoples. Indigenous Peoples and Human Rights: International and Regional Jurisprudence. Oxford: Hart Publishing, p 82.

286 Supra. GÓMEZ ISA, F. (2007) The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights. Tracing the Roles of Soft Law in Human Rights. Oxford: Oxford University Press, p 188.

287 Ibid ,p 188 &189

Indigenous Peoples (UNDRIP) provides indigenous people with the right to self-determination. In doing so, this right allows indigenous people to the autonomy to determine their political status and freely pursue their economic, social and cultural development[288]. This right perfectly embodies a vital empowerment tool for their emancipation. What is more is how the Declaration goes further to provide the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains[289] as well as the rights of the Indigenous peoples and individuals to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned and that no discrimination of any kind may arise from the exercise of such a right[290]. As such, once consolidated the above mentioned set of rights under the auspice of rights to self-determination can be a powerful tool for indigenous populations to have autonomy of the cultures among other aspects of life.

At the heart of this profound and progressive set of rights is the right to culture. Whilst analysing the right to culture from the right to self-determination's lens, indigenous people are empowered with autonomy over their cultures, norms and traditions. Consequently, this autonomy yields a powerful privilege for indigenous people in formulating cultural institutions befitting their beliefs and identities. Subsequently, once these cultural institutions are built and cultural norms and traditions are then formulated to ensure seamless enjoyment and manifestation of those customs and practises. Whilst, this sounds and echoes a progressive and meaningful endeavour, often times facts has shown that reality seems so grim, as some cultural norms and practise tend to perpetrate harm to some individuals in indigenous communities. Hence, a niggling concern arises as to what are limits to this power and privilege especially in terms of checks and balances when it comes to reining the overreach of harmful practices perpetuated against indigenous girls and women in the name of cultural norms. Ideally, the international human rights law provides for mechanisms and mediums to ensure individual rights are protected. For instance, in the case of indigenous

288 UN General Assembly. (2007).United Nations Declaration on the Rights of Indigenous Peoples: A/RES/61/295.New York: United Nations General Assembly ,Art 3.

289 Ibid.Art.12.

290 Ibid. Art.9

girls and women are protected by the 1989 Convention on Right of the Child (CRC) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) respectively. In particular, these instruments set forth duties and responsibilities where the states are the duties bearer tasked with formulating, enforcing and implementing these protective measures. Furthermore as straightforward as this appears, when state parties faithfully undertake and discharge those and duties, will they not amount to interference of the rights to self-determination on cultural development? Ergo a dissonance is alluded here. Hence, the question, how do we find introspective solutions that ensure the protection of indigenous girls and women without undermining indigenous peoples' rights on cultural autonomy, striking the right balance so to speak.

Thus, in an attempt to understand the dynamics surrounding enjoyment of cultural rights from the collective and individual rights lens in indigenous rights discourse, the paper will focus on whether the rights to self-determination in the cultural development context should have carte blanche coverage in the fora they so appear. If so, whether there is a need to have check or balance to ensure there is meaningful measure to equality and fairness in this context.

Additionally, it will focus on how the platform in which the right to culture is enjoyed can perpetuate human abuse and create a new group of victims contrary the purpose envisioned in this right. Furthermore, it analyses a few of existing legal standards and their capacity to protect both collective and individual rights and how they exist from far ends of the each spectrum angle. Not to mention whether they complement or entirely contradict each other? Finally, it will discuss the need to find a common ground where the balance between protection of indigenous girls and women from harmful cultural practices and enjoyment of the collective rights to culture in an effort to create a just indigenous societies.

1 Collective rights of culture vis a- vis individual rights to protection from harmful cultural practices

As above mentioned the indigenous rights discourse has had a profound and remarkable progress. Notwithstanding, this progress especially at the international human rights law level, victimhood and persecution of indigenous people continuous to exist. Indigenous peoples continue to face

serious human rights abuses, violation and persecution on a day-to-day basis[291]. Moreover, in many countries indigenous people are further persecuted because of their work in defence of their human rights and fundamental freedoms, and are the victims of extrajudicial executions, arbitrary detention, torture, forced evictions and many forms of discrimination[292]. As a result, collective right stands out as one of most vital tool for protection and the dignity of the indigenous people. In other words, it serves as lifeline upon which the survival is dependent on.

Particularly, collective right from the land and natural resources angle, serves as one of the most crucial demands of indigenous peoples globally as they are so closely related to the capability of these groups to survive as peoples, and to be able to exercise other fundamental collective rights such as the right to determine their own future, to continue and develop their mode of production and way of life on their own terms and to exercise their own culture[293]. Consequently, the importance of collective rights and its role in empowering cannot be overemphasised.

In the same breath, an emphasis is made on how collective rights are enjoyed under the umbrella of indigenous populations, especially bearing in mind the dynamic surrounding the intersectionality of identities in such setting. It is for this reason that there is a need to recognise and consider that collective rights does not act in vacuum as it stands on backbone of existence of indigenous individuals. As such it can be argued that it is through individual rights that collective rights as realised. For instance, Nobel Prize laureate Wole Soyinka asserts that it is through freedom of expression (personal freedom) that guarantees the rights of individuals, minorities, the collective and the community[294], rightfully so. Thus, it is important to recognize the complementarity and interdependence of human rights in the divergent contexts they so appear. Nonetheless, it's apparent that the mere

291 United Nations Department of Economic and Social Affairs. (2009). State of the World's Indigenous Peoples. New York: United Nations publication, p. 203.

292 Ibid, p 204.

293 African Commission on Human and People's Rights (ACHPR). (2006). Indigenous peoples in Africa: the forgotten peoples? The African Commission's work on indigenous peoples in Africa. Copenhagen: International Work Group for Indigenous Affairs, (IWGIA), p 14.Available at: https://library.au.int/indigenous-peoples-africa-forgotten-peoples-african-commissions-work-indigenous-peoples-africa-3.

294 Viljoen, F. International Human Rights Law: A Short History. UN Chronicle. UN WEBSITE. Available at: https://www.un.org/en/chronicle/article/international-human-rights-law-short-history ast accessed(21/03/2022).

existence of human rights on paper does not guarantee seamless enjoyment in practice, especially considering the complex and intricate nature of human identities which are diverse with competing interests resulting to inevitable conflict.

A good case in point is how the collective rights to culture takes form. Essentially, the enjoyment of cultural rights may manifest on an individual level but can only be realised in a collective context. Moreover, as above mentioned and reiterated herein, cultural norms, traditions and practices is by product created under this rights and becomes an institution of some kind which is manage with some regulations and rules ''by law so to speak." Nevertheless, these norms become a regulatory mechanism with duties and rights that can be limiting in so far as they affect some individual members. For instance, some culture practices have shown time and again to dangerous and harmful. Oftentimes such practises targeting mainly indigenous girls and women. Notwithstanding, the limiting role of ethnocentrism in setting standards as to what normative cultural practices are, which can propagate real harm to minorities and marginalised identities, it is imperative to acknowledge the effect of the harmful and dangerous cultural practices that limit the vision and goal of the emancipation of the indigenous people.

According to the Special Representative of the Secretary-General on Violence against Children, the list of harmful practices worldwide is quite endless ranging from lesser-known practices such as breast ironing, forced feeding and nutritional taboos, and the use of children in witchcraft rituals, to the more commonly known practices of Female Genital Mutilation /Cutting (FGM/C), forced mainly to child marriage and isolated examples of Female Genital Mutilations/Cutting (FGM/C) and son preference[295]. Consequently, considering the existence and gravity of these cultural practices, indigenous girls and women become double jeopardised and persecuted from their identity as indigenous individuals as well as women and children. As previously mentioned, according to a report by the UNFPA and UNICEF, in many countries, indigenous people are persecuted because of their work in defence of their human rights and fundamental freedoms, and are the victims of extrajudicial executions, arbitrary detention, torture, forced evictions and many forms of discrimination[296]. In addition, the report further sheds light

295 UNFPA, UNICEF, UN Women, ILO, OSRSG/VAC. (2013). Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women. UNICEF Publication, p 28.

296 Supra, United Nations Department of Economic and Social Affairs. (2009). State of the

on how indigenous women are particularly vulnerable to such violence both within their own communities and in the broader society. Furthermore, Indigenous women experience many kinds of violence in times of peace and war, including female genital mutilation, forced marriages, early marriages, polygamy, beating and forced labour[297].

To top it all off, is the multifaceted discrimination faced by indigenous women on the basis of sex, race/ethnicity, language, culture, religion and class. For instance, study has shown that indigenous women in some countries are referred to as third class citizen because of their inferior status in relation to men and in relation to non-indigenous people[298]. Subsequently, taking in to account the progress in the indigenous rights discourse, it can be argued that indigenous girls and women, whilst they are emancipated in so far as they fit the category of being a person under the collective right of the indigenous people umbrella, they are still vulnerable in their identities as indigenous girls. Consequently, a special recognition is due to fully emancipating them from victimisation and persecution emanating within their communities.

For instance, an obvious and logical solution has always been de facto and de jure protection of these special interest groups. The protection can be effected through utilising normative existing legal standards. However, the promotion of children's and women's rights are critical, sensitive issues and may differ in face of inter-culturalism and an automatic one fit all approach may fall short of the daunting task at hand. Particularly , arguments have been that elements of the universal which tends to be the normative depiction of rights as spelled out in the 1989 Convention on Right of the Child (CRC)and other international instruments may not coincide with indigenous peoples' understanding of men's, women's and children's entitlements and duties[299].

This is evidently seen in the Peruvian indigenous communities of Wampis and Awajún marriage customs which dictate that young men marrying daughters of their father's sisters (matrilateral cross-cousin).

World's Indigenous Peoples. New York: United Nations publication, p 204.

297 United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues. (2010).Gender and Indigenous Peoples: Briefing Note No. 1, Gender and Indigenous Peoples. United Nation Publication, p 3.

298 Ibid.

299 UNICEF. (2009).Promoting the Rights of Indigenous Children and Women: A Stock-taking of UNICEF's Approach and Practice Division of Policy and Practice. UNICEF Publication, p 39.

This clearly clashes and contravenes with the right of women to avoid and be protected from forced marriage[300] Another cultural harmful practise by these two communities relates a customs that allows physical punishment of children usually by hitting them with '*ishanga*' (stinging nettle). This custom and practice ridden with spiritual meaning and is considered to drive away the bad spirits who are responsible for a child's defiant behaviour, is incompatible with a child's right to be protected from physical and psychological violence[301].

Subject to the foregoing, it is clear that sets of standards exist however they may lack harmonisation in so far as any attempt to protect one group of individuals may result to contravening another group's interests. This creates a conundrum in which such circumstances blur and impede the empowering goals and visions of these rights.

2 Legal standards on rights to culture within the indigenous people's rights spectrum: complementarity or conflicting?

As above mentioned and reiterated herein, the right to culture in an international human rights law context manifest in form of privileges and powers than can be enjoyed individually or collectively. For instance, the individual to culture is provided for by the 1966 International Convention on Civil and Political Rights (ICCPR)[302], the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)[303] as well as the 1989 Convention on the Rights of the child (CRC)[304]. Whereas, when it comes to the collective rights to culture, the 2007 United Nations Declaration of the Rights of Indigenous People (UNDRIP) take the crown and notably it also provides and covers individual cultural rights as well[305].

300 Ibid, p 39.

301 UNICEF. (2009).Promoting the Rights of Indigenous Children and Women: A Stock-taking of UNICEF's Approach and Practice Division of Policy and Practice. UNICEF Publication, p 39.

302 UN General Assembly. (1966). The International Covenant on Civil and Political Rights. United Nations Treaty Series Volume 999: New York. United Nations General Assembly, Art.27

303 Ibid, Art 15.

304 UN General Assembly, (1989). The Convention on the Rights of the Child. United Nations Treaty Series: Volume 1577.New York: United Nations General Assembly, Art 30.

305 UN General Assembly. (2007).United Nations Declaration on the Rights of Indigenous Peoples: A/RES/61/295.New York: United Nations General Assembly, Art 8, 11 & 14.

In addition to provision of existing international human rights instruments, treaty bodies have also played important role in setting and contributing to legal standards. A good example can be seen in how the Committee on the Rights of the Child (CRC) through its General Comment underscored the need for Article 3o of the Convention on the Rights of the Child be exercised in accordance with other provision of the Convention and under no circumstances should it prejudiced to the child's dignity, health and development and in the context where harmful practises such as early marriages and female Genital Mutilation (FGM) are present[306]. In the same instance, the Committee when further in obligating the state parties to work together with indigenous communities to ensure their eradication[307]. Therefore, it is apparent that international human right law provides for standards in a bid to ensure the full enjoyment of the rights to culture both in individual and collective capacity. However, whilst these legal standards exist and to some extent work separately, a niggling question arises as to how complementary they are to each other if not entirely conflicting one another? For instance, in 2004, the UNPFII took note of the fact the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) does not make specific reference to indigenous women and recommended that special attention should be paid to the issues related to maintaining the integrity of indigenous women and the gender dimension of racial discrimination against indigenous peoples[308]. Ergo a deficit or dissonance is alluded to as to the protection indigenous women's rights. Furthermore, In plural legal systems, it is evidently seen that the simultaneous existence and operation of national legislation, customary and/or religious laws often lead to tensions and complications in the implementation of the rights of women and girls as established in international and regional human rights treaties which are particularly evident in a number of countries where harmful practices have been outlawed but continue to persist due to the continuing influence of traditional norms and practises[309].

306 UN Committee on the Rights of the Child (CRC). (2009). General comment No. 11: Indigenous children and their rights under the Convention on the Rights of the Child. New York: United Nations Committee on the Rights of the Child, paras 22.

307 Ibid.

308 Supra, United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues. (2010).Gender and Indigenous Peoples: Briefing Note No. 1, Gender and Indigenous Peoples. United Nation Publication, p 3.

309 Supra, UNFPA, UNICEF, UN Women, ILO, OSRSG/VAC. (2013). Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women. UNICEF Publi-

Moreover, the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides for the protection of the distinct identities and cultural integrity of indigenous peoples in different ways. In essence, these protections and privileges differ and range from the right to maintain and strengthen their distinct cultural institutions; to the right to belong to an indigenous community or nation in accordance with the customs of the community or nation concerned; to the right to practise, revitalise and transmit their cultural traditions and customs; to the right to control their education systems and institutions providing education in their own languages; to the right to promote, develop and maintain their institutional structures, customs, spirituality, traditions and juridical systems; to the right to maintain, control and develop their cultural heritage and traditional knowledge; as well the right not to be subjected to forced assimilation or destruction of their culture[310]. However, in as much as this is a well thought list of rights, it is not fully exhaustive as the Declaration falls short of providing a kill switch provision to rein in possibilities of harmful and dangerous cultural practices. This position was evidently apparent in the observation of an Expert Mechanism, which highlighted that indigenous women and children are often holders of significant cultural knowledge but they can also be disproportionately affected by violations of the right to culture[311]. In the same breath, the observation went further and recommended that state parties adopt special measures to mitigate these problems and blind spots[312]. Taking into the consideration above arguments, it clear that these solutions echo and mirrors a well thought endeavour, however, a pertinent question arises concerning the form in which these standards take shape without amounting to an interference and limitation of autonomy envisioned under the rights of self-determination to the cultural development at the same time protecting the rights of indigenous women and girls.

3 Finding a balance between individual and collective rights: adjusting the limelight to mainstream the rights of indigenous girls and women

cation, p 28.

310 Asia Pacific Forum of National Human Rights Institutions and the Office of the United Nations High Commissioner for Human Rights. (2013).the United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions, p 13.

311 Ibid.

312 Ibid , p 14.

Conundrums discussed above features in many diverse legal contexts not only limited in indigenous rights context and will continue to do so as long as the diversity and complexity of human identities exists. As such, notwithstanding, the blind spots in the cultural rights of indigenous people, it is prudent to devise solution to ensure that indigenous girls and women´s cultural rights are not only protected but also, equally empowered to enjoy such rights without being victimised and persecuted based on their identities. In essence, indigenous girls and women should be free to enjoy their cultures in a dignified way that is free of victimisation and violence, freedom to enjoy who they are.

Taking into consideration, the prevailing dialogue and argument on this score which tends to generally perceive the beliefs that existing set of individuals' rights would be sufficient to ensure adequate protection and promotion of rights with a collective dimension, like that of the right to culture[313], Whilst ideally that could work and indeed these special interest individual can be rely on the existing legal standards for protection, however, it could be impractical and could exacerbate this conundrum further. Firstly, the use of normative laws to mitigate the harmful cultural practices could be deemed as interference and limiting the autonomy envisioned under the auspice of rights of self-determination to culture thus making this endeavour futile ab initio. For instance, utilising the traditional and normative approach has always been met with criticisms. As a result, there has been reluctance in addressing the gender dimensions of indigenous peoples' issues, as to do so is seen as "interfering with culture" or "imposing western values[314]. In essence, such reactions can be justified due to the historical injustices faced by indigenous populations hence to some extent justifying their fears and apprehension. However, it is important to acknowledge the vulnerable individual within special interest groups. Thus, in an endeavour to find a solution, indigenous communities should lead in devising a workable solution. Essentially, there is a need to strike a collaborative approach so to speak.

Secondly, in the event that these normative and traditional approaches are not seen as interference, they still fall short of the task at hand. A good

313 United Nations Office of the United Nations High Commissioner for Human Rights. (2013). Indigenous Peoples and the United Nations Human Rights System. Fact Sheet No. 9: Rev 2. New York &Geneva: United Nations Publication, p 7.

314 supra, United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues. (2010).Gender and Indigenous Peoples: Briefing Note No. 1, Gender and Indigenous Peoples. United Nation Publication, p 1.

example is the approach taken by the Committee on the Rights of a Child (CRC) where it urged the state parties inter alia, to ensure that adequate attention is given to Article 30 of the Convention on Rights of the Child (CRC) when implementing the convention as well as provide detailed information via periodic reports on the special measures undertaken to guarantee enjoyment of Article 30 by the indigenous children[315]. Whilst, on the face of it, this echoes and mirrors a brilliant recommendation, a niggling and pertinent concern arises as to feasibility of this endeavour. For instance, notwithstanding, the lack of political will and impunity in realisation, enforcement and implementation of such endeavours, another concern that needs addressing is lack of capabilities to do so.

A good case in point is the case of Kenya, a state party to many international human rights instruments and has been hailed to have one of the most progressive constitutions in the world[316]. In the case of Kenya, the creation of the Anti-Female Genital Mutilation Board to facilitate the implementation of the Prohibition of Female Genital Mutilation Act (No. 32) of 2011 presented a unique opportunity to reflect the views of indigenous communities in the design and implementation of anti-Female Genital Mutilation/Cutting (FGM/C) interventions. However, despite this progressive step towards the right direction, in the recent times, the United Nations Committee on the elimination of Discrimination against Women (CEDAW) observed that insufficient human and financial resources allocated to the Kenya national machinery for the advancement of women was hindering the effective discharge of its mandate, including coordination efforts between different institutions[317]. Thus, in a bid to combat such deficits, there is a need to find the right based meaningful and sustainable solutions that fit both the de jure and the de facto realities of all indigenous people notwithstanding their identities.

Additionally, there is need to take note that this endeavour is not easy as it requires retrospective solutions that are reminiscent of the will and interest of

315 UN Committee on the Rights of the Child (CRC). (2009). General comment No. 11: Indigenous children and their rights under the Convention on the Rights of the Child. New York: United Nations Committee on the Rights of the Child, p 5.

316 The open society initiative for Eastern Africa(OSIEA). Promoting progressive law and human rights. Nairobi: OSIEA Publication. Available at: http://www.osiea.org/amplifying_voices/promoting-progressive-laws-and-human-rights/

317 Supra, UNFPA, UNICEF, UN Women, ILO, OSRSG/VAC. (2013). Breaking the Silence on Violence against Indigenous Girls, Adolescents and Young Women. UNICEF Publication, p 45.

the indigenous communities and the capabilities of the state their nationalities lie in. Perhaps, the brainstorming should be left to the communities and the government should provide capacity building to these communities. This is not far-fetched, seeing as the tide is changing for the better and recent time is the reminiscent of that.

For example, in March 2021, a milestone was reached in Kenya relating to challenging harmful cultural practices. Through Kisumu Declaration where the top clan elders of the Samburu Community, an indigenous tribe in Kenya, publicly declared to abandon Female Genital Mutilation/Cutting (FGM/C) and Child, Early and Forced Marriages (CEFM)[318].

These milestones echoes and mirrors the perfect embodiment of the true essence of what these indigenous human rights regimes seek to achieve. Notwithstanding this monumental breakthrough, the buck does not stop here. This should be a stepping stone towards developing further progressive standards. In the same breath, there is also a need to utilise the current exist standards and structures at international level.

As it stands right now, the United Nations Human rights system boasts of plethora of progressive structures that are currently used in advancing the rights of indigenous people and the same can be adjusted in advancing this same agenda.

A good of example is the establishment of the Permanent Forum by Economic and Social Council resolution 2000/22, in response to demands from indigenous peoples for a high-level body that could promote dialogue and cooperation among Member States, United Nations agencies and indigenous peoples[319]. This forum should perhaps be used in from the intersectionality of indigenous identities.

Another United Nations platform is the use of the Expert Mechanism on the Rights of Indigenous Peoples was established in 2007 by the Human Rights Council, to provide the Human Rights Council with thematic expertise, mainly in the form of studies and research, on the rights of indigenous

318 AMREF Health Africa. (2021).The kisima Declaration. Samburu elders publicly declared to no longer practice FGM. New York: AMREF Health Africa. Available at:https://amrefusa.org/news/samburu-elders-publicly-declare-to-no-longer-practice-fgm/ (last accessed.5/04/2022)

319 Supra, United Nations Office of the United Nations High Commissioner for Human Rights. (2013). Indigenous Peoples and the United Nations Human Rights System. Fact Sheet No. 9:Rev 2. New York &Geneva: United Nations Publication, p 12.

peoples as directed by the Council[320]. Not to mention the office of the Special Rapporteur on the rights of indigenous peoples which ideally is tasked with examining the ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples, in conformity with this mandate includes the identification , exchanges and promotion of best practices[321]. Taking in consideration these existing institutions, it would be a travesty of justice and waste of resources if they are not utilised at the very least in find lasting and meaningful solutions to these dilemma and issues.

At the same time, there is need to adjust the limelight of these structures and mechanisms ensuring that the mandate and vision are not cosmetic in finding meaningful solutions for the existing conundrums. Additionally, these processes and approaches should have a bottom up angle in which legitimate heir at the bottom level of the food chain are meaningful engaged. Ultimately, the results should be the one that echoes inclusivity and cultural relativism.

This is not a far-fetched task if anything the evolution of human rights law is one of the most remarkable journeys notwithstanding its blind spots and at the risk of being too optimistic, it only of a matter of time before the international human rights law devises a solution for this conundrum.

Conclusions

In conclusion, this work highlighted the de facto and de jure realities of indigenous women and girls in the exercise of the right culture as enshrined in various international human rights law instrument. In doing so, it shed lime light on the various intricate aspect of rights to culture that comes to play. Especially, when it comes to the conflict and battle of supremacy arising from the utilisation of legal standards and regulations realised through the enjoyment and manifestation of these rights. In the same breath, taking consideration into how the intersectionality of human identities in the indigenous rights context creates a power dynamic contest that often times have unpalatable implications that may result to the rise of new set of human rights abuse thereby creating new group of victims. Hence, the need to paying attention on how to ensure rights and human dignity of individuals with diverse identities are respected without also watering down the very essence the collective rights seeks to establish cannot be overemphasized enough.

320 Ibid, p 15.

321 Ibid, p 16.

Subject to the foregoing, it apparent that advancing rights of indigenous people is not an easy fete notwithstanding the progressive legal standards and progress in recent times. In essence, this problem is particularly execrated by diverse and complex nature of human identities. Not to mention to the mere existence of rights and privileges on paper does not seamless ensure practical enjoyment of those rights and privilege, especially in the case where there is conflicting interests.

At the same time, evidence has shown that existence of legal standards that yields powers and privilege for one group on one end could be a chance for violation of rights of another group hence a need to ensure introspective solutions that are true reflection of realities of both groups. Evidently, the few approaches undertaken so far has indicated this is indeed possible and the journey is ongoing and on the right trajectory.

In nutshell, the conundrums and dilemmas in human rights discourse has stood the test of time and will continue to exist and feature and indigenous discourse should take note and be prepared for it. The great approach lies with realising and acknowledging whilst taking notice of the situation at hand by leveraging the existing legal structures and standards at the same time not shying from innovating new solutions in a bid to keeping abreast with ever changing landscape in this discourse. After all, if anything there human rights movement especially the indigenous movement has had a long and remarkable journey that is nothing shy of a profound success.

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AN OVERVIEW OF THE CHALLENGES FACED BY ROMANI WOMEN DURING UKRAINE'S ONGOING HUMANITARIAN CRISIS

Florina-Marieta NEAGU

Erasmus Mundus Master's Programme in Human Rights Policy and Practice
University of Gothenburg, Sweden, University of Deusto, Spain, Roehampton University, UK, The Arctic University of Norway, Norway

Abstract

Since the Russian Federation's invasion of Ukraine in February this year, millions of people have been internally displaced or forced to seek refuge, mostly in Republic of Moldova, Romania, Poland or Hungary. Among them, Romani women and children are at risk of facing additional challenges when crossing the border or seeking support in these neighbouring countries. This paper analyses how pre-existing conditions such as lack of civil documentation and stigmatisation can have an impact on Romani women's access to international protection and humanitarian assistance, in the context of the Russian-Ukrainian war. This analysis also takes into consideration the anti-Roma attitudes in host countries and how they can affect Romani women fleeing the war, with further recommendations in the context of this ongoing crisis.

Keywords: Ukraine, humanitarian crisis, statelessness, Romani women, Anti-Gypsyism

Introduction

On the 24th of February 2022, the Russian Federation invaded Ukraine, marking the biggest military offensive in Europe since World War II and what might become the region's greatest refugee crisis of the 21st century[322]. In the first five weeks, the large-scale invasion displaced more than 6.5 million people inside the country[323], with nearly 3 million already in need of humanitarian aid prior to this crisis. UNHCR estimates that as of November

322 European Policy Centre, 'Putin's War on Ukrainian Women'.

323 UNHCR, 'Operational Data Portal: Ukraine Refugee Situation'

1, approximately 7.8 million refugees from Ukraine[324] have been recorded across different European countries. The Ukrainians, mostly women and children, are currently seeking refuge in neighbouring states such as Poland, Bulgaria, Romania, Hungary, Slovakia, the Czech Republic and the Republic of Moldova, with smaller numbers going to other European countries.

Women and children belonging to the Roma community in Ukraine are among the millions of refugees and internally displaced people. Although the ongoing crisis is affecting everyone in the country, Romani women may face additional challenges in obtaining protection and humanitarian assistance. While they are in a vulnerable position in times of stability, due to discrimination based on gender, ethnicity and social status, the war is exacerbating existing inequalities and creating a climate where their rights can be easily violated. The obstacles in accessing basic services and protected status in the neighbouring countries can be caused, among others, by the lack of personal documents and pre-existing discrimination and prejudice against Roma.

Moving forward, this paper aims to analyse the impact of these factors on Romani women's access to humanitarian assistance and the protection of their human rights, after fleeing Ukraine. The analysis is considering pre-existing conditions and the lack of documents of the Roma minority in Ukraine, with a focus on women. It also provides an overview of the climate of exclusion of this minority group in host countries and how these conditions can affect Romani women fleeing the war, with further recommendations in the context of this ongoing crisis.

Due to the rapid development of the armed conflict and the uncertainty involving the ongoing humanitarian crisis, there are not that many academic resources focusing on the topic of this analysis. At the time when this paper was started, five weeks after the invasion, there was no existing literature in this field and most of the cases were reported by civil society, without receiving too much attention from the main media outlets, both in Ukraine and neighbouring countries. Especially when it comes to Romani women, they have historically received less attention among academics. Therefore, most of the available literature about the Roma community and their cultural roots, history of exclusion or violations of human rights does not necessarily treat separately the particularities involving women.

However, this paper takes into consideration some of the recent news articles, statements and reports from organisations working on the ground,

324 UNHCR, 'Ukraine Emergency'.

as well as academic literature. It gives an overview of sources that can offer a better image of the challenges that the Roma community was facing prior to this conflict, to analyse possible risks that Romani women can encounter while fleeing the war and accessing humanitarian assistance.

1 The Roma community in Ukraine

According to the official census of 2001, there are 47 587 Roma living in Ukraine, mostly in regions such as Zakarpattia, Donetsk, Dnipropetrovsk, Odessa, Kharkiv and Luhansk[325]. But as stated by organisations working in the field, this information is outdated and the real number of Roma in the country is much higher. Unofficial sources estimate between 200 and 400 thousand people, out of which half of them are women[326].

The discrepancy between the official and unofficial statistics makes it difficult to assess the level of socio-economic development, access to services and overall treatment of the Roma community in the country. The lack of comprehensive data is mostly determined by the partial inexistence of personal documents and the fear of discrimination due to their ethnicity[327]. These issues can result in obstacles for the Roma people to fully enjoy their human rights.

The Roma community is considered one of the largest groups of undocumented individuals with a high risk of statelessness in Europe. In Ukraine, 10-20% of Romani people don't possess the civil documentation necessary to confirm their citizenship, due to various reasons[328]. The aftermath of the dissolution of the USSR in 1991, for example, left many people among the Roma community with outdated forms of documentation which made it impossible for them to acquire Ukrainian nationality, even 31 years later. They either missed the deadlines to exchange their documents, due to a lack of information and awareness campaigns or did not have any documents prior to

325 State Statistics Committee of Ukraine, 'All-Ukrainian Population Census 2001 | English Version'.

326 Chiricli and The European Roma Rights Centre, 'Written Comments of the European Roma Rights Centre and the International Charitable Organization Roma Women Fund "Chiricli"'.

327 Chiricli, 'Monitoring the Human Rights Situation of Roma in Ukraine'.

328 European Roma Rights Centre, 'Roma Belong - Statelessness, Discrimination and Marginalisation of Roma in Ukraine'.

1991, to prove their residence[329]. Those previously living in non-Government-controlled areas such as Crimea or the Roma who were internally displaced due to the conflict in Eastern Ukraine are in a similar situation[330]. Since 2014, they face multiple barriers to obtaining or renewing their documents, which makes them more likely to be at risk of statelessness.

Various personal circumstances are also having an impact on the absence of civil documentation among the Roma community in Ukraine. Insufficient funds to cover the costs of what has become an expensive process, but also the low level of literacy, make it almost impossible for Romani people to engage in bureaucratic procedures necessary for receiving the documents. There are also additional burdens imposed by state actors which are not stated in current regulations[331]. Moreover, there is not enough support from state authorities or resources for NGOs to counter this large-scale issue involving Roma.

Romani women in Ukraine are finding themselves in all these scenarios while encountering additional barriers. Despite the international obligation of Ukraine[332] to ensure immediate registration of every child born on its territory, undocumented women cannot obtain birth certificates for their children[333]. This leads to an inheritance of lack of civil documentation and statelessness, often caused also by other factors. Romani women's ill-treatment when accessing healthcare determines many of them to give birth in their own homes, for example. Eventually, the lack of resources, no legal expertise or documented witnesses, and also the reluctance to appear in front of the court, make obtaining documents a difficult procedure.

The absence of civil documentation further prevents Romani women from enjoying other social and economic rights, such as social assistance for their children, employment, medical care, education or protection against

329 Chiricli, 'Monitoring the Human Rights Situation of Roma in Ukraine'; European Roma Rights Centre, 'Roma Belong - Statelessness, Discrimination and Marginalisation of Roma in Ukraine'; Galer, 'Undocumented Roma Refugees Facing Discrimination As They Flee Ukraine'.

330 UN Women, 'The Rights of Roma Women in Ukraine'.

331 Chiricli and The European Roma Rights Centre, 'Written Comments of the European Roma Rights Centre and the International Charitable Organization Roma Women Fund "Chiricli"'.

332 As a State Party of The Convention on the Rights of the Child and the Convention on the Reduction of Statelessness (1961).

333 European Roma Rights Centre, 'Roma Belong - Statelessness, Discrimination and Marginalisation of Roma in Ukraine'.

gender-based violence. In relation to lack of documentation, women cannot access financial and educational opportunities, which puts them in a vulnerable position and makes them susceptible to intersectional discrimination.

These issues may not belong only to the Roma community, in Ukraine, but the deeply rooted social exclusion of this minority group determines their marginalised position in society. With no proof of their residence or Ukrainian citizenship, and no access to essential services, the Roma people have been facing poverty, prejudice and negative stereotypes which inevitably led to differential treatment[334]. In this context, Romani women are more likely to become targets of violent attacks and hate speech across the country, which aggravates their disadvantaged position among other groups in society.

Considering that these issues already imposed additional challenges for the community living or moving within the country, they can significantly impact Roma's ability to leave Ukraine and access international protection. Since the Ukrainian President declared martial law, most of those in need of humanitarian assistance in neighbouring countries are women and children. As a consequence, it is worth analysing also how these particularities involving the Roma community, namely the lack of documentation and existing discrimination, may affect Romani women from Ukraine across the border.

2 Statelessness and the discrimination of romani women

Since Russia's aggression against Ukraine, there are numerous reports of how thousands of Romani people have had to cope with both the consequences of the war and also discrimination when being evacuated from Ukraine. The neighbouring countries have responded to the crisis not only by condemning Russia's actions, but also by welcoming everyone who is fleeing the war, regardless of their status in Ukraine, and offering them humanitarian assistance and access to services such as healthcare or education. But despite their policies and official declarations, inconsistent practices, cases of racial profiling and additional screening procedures are reported at the border[335].

Organisations working on the ground have received complaints from Romani individuals who faced refoulement. This was due to their ethnicity and

334 Chiricli, 'Monitoring the Human Rights Situation of Roma in Ukraine'; OSCE, 'Situation Assessment Report on Roma in Ukraine and the Impact of the Current Crisis'.

335 Lee, 'Ukrainian Roma in Moldova face segregation, poor conditions and – without documentation – nowhere to go'.

lack of documentation when trying to cross the borders of countries such as Moldova, Hungary, Poland or the Czech Republic[336]. These reports took place in a context where other Ukrainians who do not belong to the minority are accepted to enter these countries, despite not possessing documents. While the lack of civil documentation does not automatically lead to statelessness, the inability of many Romani women to prove their place of residence makes it difficult for them to enjoy the rights provided through international protection systems[337]. The same issues arise when trying to access other services and assistance provided to Ukrainian citizens all across the world, from free accommodation and transport to support in finding a job, for example.

The majority of neighbouring countries are currently applying the Temporary Protection Directive, as part of the European Union. This should be able to grant immediate protection to Ukrainian nationals. But in order for stateless individuals such as Roma to receive protected status, they have to prove their nationality or at least their residence in Ukraine prior to the start of the conflict. And as mentioned above, many Romani women cannot prove that they resided in Ukraine legally, due to lack of registration and personal circumstances, despite them living in the country all their life. Even with international mechanisms in place, such as special task forces for Roma people organised mainly by non-governmental organisations in partnership with local authorities, the Romani women are still facing challenges in practice.

All of the states close to Ukraine are also parties to the UN's 1951 Refugee Convention and 1954 Statelessness Convention. Therefore, the authorities of these host countries cannot turn away anyone seeking refuge within their borders, solely on the basis of a lack of documentation. But claiming asylum as an alternative form of protection is time-consuming and not an accessible procedure to Romani women who are already vulnerable due to displacement and existing discrimination. Therefore, Romani women and their children are facing the challenge of finding themselves in an uncertain legal position, excluded from protection or even at the risk of arbitrary detention[338]. With a lack of proper documentation and international protection, they may also lose access to the labour market, education, social welfare, housing or medical care.

336 ERGO Network, '"End the War against Ukraine!" Joint Statement'; Lee, 'Ukrainian Roma in Moldova face segregation, poor conditions and – without documentation – nowhere to go'; OHCHR, 'Ukraine'.

337 Galer, 'Undocumented Roma Refugees Facing Discrimination As They Flee Ukraine'.

338 European Network on Statelessness, 'Stateless People and People at Risk of Statelessness Forcibly Displaced from Ukraine Briefing'.

What increases the vulnerability of Romani women when crossing the borders is also the anti-Roma prejudice and differential treatment that they encounter in host countries. People of all nationalities have shown an impressive mobilisation, providing donations, access to transportation, accommodation and other services to anyone crossing the border. But the same response has not been shown always towards Romani women and their children, despite them being affected by the war just as other co-nationals who do not belong to a minority.

The Roma community represents one of the most disadvantaged groups not only in Ukraine but also in those countries where they are currently seeking refuge from the war. Roma represents Europe's largest ethnic minority and out of those estimated living in Europe, half of them are residing in the European Union[339], often being victims of prejudice and exclusion. From denial of basic human rights, violent attacks, police brutality, segregation and stigmatisation in the media and by politicians, Roma are considered one of Europe's most marginalised minority groups.

Anti-Gypsyism, as a form of prejudice towards Roma, manifests itself through hate speech, harassment, violent attacks and structural discrimination, almost becoming socially acceptable, especially in Central and Eastern Europe. But while societal norms almost approve of the discrimination of Roma in those countries that are more likely to receive refugees due to their proximity to Ukraine[340], the situation is almost similar in more egalitarian states. Anti-immigrant attitudes, combined with ethnic stereotypes, can put Romani women fleeing Ukraine at risk even in Western European countries and challenge their hopes to reunite their families residing there. Due to existing prejudice and a history of exclusion, the Roma community is seen in many states as unfair competitors for Europe's economic resources[341] and sometimes even unworthy of humanitarian aid, which can also determine barriers against them in Ukraine's ongoing crisis.

The existing policy frameworks in almost all European countries did not eliminate the anti-Roma discrimination or the segregation of this minority group in most economic, social and cultural spheres[342]. And what is more

339 European Commission, 'Roma Equality, Inclusion and Participation in the EU'.

340 Kende, Hadarics, and Lášticová, 'Anti-Roma Attitudes as Expressions of Dominant Social Norms in Eastern Europe'.

341 Kende et al., 'The Last Acceptable Prejudice in Europe?'

342 Ciaian and Kancs, 'Social Mobility Barriers for Roma'; Ciaian and Kancs, 'Marginalisa-

concerning is the fact that while in Eastern Europe anti-Roma attitudes can be attributed to non-state actors, Western countries have been known for their discriminatory acts of deportation[343] or authorities' official declarations against the community. The recent history includes expulsions from Italy and France, walls built to exacerbate the segregation of Romani people in Romania, the Czech Republic and Slovakia, but also racially motivated killings in Hungary and other violent acts. These could pose real threats to the inclusion and assistance of those fleeing from Ukraine and belonging to this minority.

When analysing possible attempts to equal access to humanitarian assistance and international protection of Romani women, we cannot ignore the different integration challenges they face due to their gender. Women are often seen as a particularly vulnerable group due to the fact that gender inequality it is still present in both Central and Eastern European societies, but also in traditional Roma families. In times of stability, women are often seen as collateral damage in attacks against members of the community and they are silenced in the media or by authorities due to their marginalised position and further stigmatisation[344]. Being a disadvantaged group inside a minority with a history of marginalisation, Romani women face additional barriers that can be exacerbated by war.

3 Conclusions and Recommendations

Romani women are discriminated against as belonging to an ethnic minority, as women, but also on other grounds determined by structural issues. For this reason, the complexities surrounding them cannot be ignored in the contemporary human rights discourse[345] and when analysing Ukraine's ongoing crisis and the response to it.

This paper attempted to analyse how pre-existing conditions such as lack of civil documentation and stigmatisation in Ukraine, can affect Romani women's access to international protection and humanitarian assistance. It also took into consideration the current immigration policies applied in

tion of Roma'.

343 Feischmidt, Szombati, and Szuhay, 'Collective Criminalization of the Roma in Central and Eastern Europe'.

344 Gómez, 'Identity of Roma Women and Processes of International and Transitional Justice'.

345 Ravnbøl, 'The Human Rights of Minority Women'.

neighbouring countries, anti-Roma attitudes present in these societies and the particularities involving women when fleeing war.

Romani women from Ukraine are not inherently vulnerable. Statelessness and refugee experience, combined with possible anti-Roma attitudes and lack of documentation, place them in a situation that can determine dependency and vulnerability. From this analysis, we have seen that Romani women and their children are often met with reluctance and prejudice on their evacuation journey from Ukraine, according to recent reports from the border. They may also be put in a difficult situation when requesting international protection, due to their lack of documents, proof of residence or nationality. This can further obstruct their access to services such as employment, education, social welfare, reproductive or other health care, and even legal representation.

The analysis is of course limited due to the uncertainty involving this ongoing crisis which started less than one year ago, but also the lack of comprehensive reports, data and academic literature on the topic. This however should not impact the effort to provide further recommendations, based on existing information.

Therefore, evacuation, reception and integration policies should be implemented taking into account a gender perspective and the complexities involving Romani women. Moreover, all the actors involved in providing humanitarian assistance, including the authorities of Ukraine and neighbouring countries, the European Union and other organisations on the ground should make sure that this aid also reaches members of the Roma community, with a history of exclusion and discrimination.

Free passage of people fleeing Ukraine, regardless of their gender, ethnicity or documentation, should be provided according to international obligations. The European Union should also extend the existing mechanisms to all the stateless persons, including those who cannot prove their prior residence in Ukraine and lack documentation, or at least provide them with other forms of international protection. Furthermore, there is a need for efficient monitoring mechanisms to assess the protection of human rights and possible acts of discrimination. These instruments should be able to stop any incidents against minority groups such as Romani women and provide them with the support needed on their evacuation route from Ukraine.

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THE DEMARCATION OF THE INDIGENOUS TERRITORIES IN BRAZIL UNDER ANALYSES BY THE SUPREME COURT

Giulia dos Prazeres Costa

Erasmus Mundus Master's Programme in Human Rights Policy and Practice
University of Deusto

Abstract

This paper aims to show the debate around the Theory of Indigenato and the Theory of the Time Frame, under appreciation by the Supreme Federal Court of Brazil in the Extraordinary Appeal n. 1.017.365. The case on trial is to decide the *Xokleng*'s land occupation, and considering the general repercussion granted by The Brazilian Supreme Court, the decision will impact the future of all indigenous lands in the country. In this sense, the case brought to the debate the dichotomy between the Theory of Indigenato applied by the Inter-American Court of Human Rights and the Theory of the Time Frame developed by the Supreme Court of Brazil, exposing the challenging to guarantee indigenous rights and to keep the history alive.

Keywords: Brazilian Supreme Court; indigenous land; indigenous peoples; territorial rights; original rights; Theory of Indigenato; Theory of the Time Frame.

Introduction

The start point of this paper is the debate surrounding the two thesis under appreciation of the Supreme Federal Court of Brazil (*Supremo Tribunal Federal – STF* in Portuguese) in the Extraordinary Appeal n. 1.017.365: the Theory of Indigenato (or Institute of Indigenato) and the Theory of Indigenous Fact (or Theory of the Time Frame). The two theories diverge on the time frame on the right of indigenous peoples to land.

The trial will decide the destiny of the land inhabited by the Xokleng and other indigenous peoples, but due to the general repercussion granted by Supreme Court Justice Edson Fachin, this case will impact the future of indigenous lands in Brazil. This will be decisive for the history and the future of the country.

Firstly, it is necessary to understand the two main theories involved in the debate, contextualizing them historically, politically, and socially. While the Theory of Indigenato is followed by the jurisdiction of the Inter-American Court of Human Rights in the case of the Xucuru Indigenous People, the Theory of the Time Frame was developed by the Supreme Court of Brazil in the case Raposa do Sol. Subsequently, the present work will carry out an analysis on the legal case under appreciation by the Supreme Federal Court.

It is important to make a brief digression to contextualize the importance of this debate that has also gained dimensions in the legislative. The draft bill n. 490/07, currently in debate in the House of Representatives (MURILO, 2021), intends to transfer from the Executive Power to the Legislature the competence to carry out demarcation of the indigenous territories, changing the Indian Statute. The demarcation would be carried out through the approval of a law in the House of Representatives and the Senate – Congress.

The present work will focus on the debate in the Judiciary and doesn't intent to broader the analyses to the legislative arena. However, it is crucial to have in view that the delay in the decision of the Supreme Court can encourage the advancement of legislative proposals to withdraw indigenous rights.

The scenario of perpetuation of colonial violence in a so-called democratic society made the discussion take large proportions around the country. Indigenous people have been mobilizing and protesting, putting in evidence the conflicts involving collective rights (BOADLE, 2021), and the anti-indigenous policy adopted by Bolsonaro's administration (G1 DF, 2022).

Among these lines and considering the complexity of the theme, the present work will focus on the legal case, analysing the two theories involved, and the eminent risk of the implementation of a forgetting policy by the Brazilian State, that goes in the opposite direction of safeguarding the memory and history of the original peoples in Brazil.

1 Theory Of Indigenato

Starting from the premise of exploration, genocide, and vulnerability of indigenous peoples in centuries of the Portuguese colonization, João Mendes Junior (1912), Brazilian lawyer and judge, develop the Theory of Indigenato in the beginning of the 20th century. According to him (JUNIOR, 1912, p. 58) the "indigenato" is an original right, that does not result from any other right and no ground truth other than the history of the indigenous people in Brazil;

while the "occupation" is a title that needs to be acquired.

In this way, Mendes Junior (1912) elaborates a crucial argument for indigenous possession of traditionally occupied lands, differing it from the ownership in Civil Law. The difference between these institutes is what guarantees respect for the rights of indigenous peoples. While civil tenure is described by the Brazilian Civil Code, the Constitution safeguards the original right to land for the peoples who traditionally occupied the territory.

The father of the Institute of Indigenato questions how it would be possible to call "new" the group of individuals who were dispossessed of their primitive lands, detached from the place where they inhabited, today occupied by those who will hardly be punished for the abuses they practiced (JUNIOR, 1912, p. 57). Accept this historical inversion is to place the indigenous people in the position of invaders of their own lands, doubly punishing them.

This theory assumes that indigenous peoples are the original owners of their lands without the need to legitimize their possession. This idea was consolidated in the Federal Constitution of Brazil in the article 231:

"Article 231. Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as **their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property**." (our emphasis).

In this way, it is incumbent upon the Union to declare a right that is original, in other words, a right that already exists, and it is collectively enjoyed by indigenous peoples. Furthermore, considering the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the "Indigenous peoples have the right to the lands, territories and resources which **they have traditionally owned, occupied or otherwise used or acquired**" (our emphasis) and "States shall give legal recognition and protection to these lands, territories and resources", according to the Article 26 of the Declaration.

In this line of reasoning, national and international legislations crystallize the theory that values the defence of indigenous rights and recognizes the history of genocide, appropriation, and exploitation of traditional peoples. The legal documents come to protect those who were historically massacred by the State force that denied them dignity and respect for centuries.

In the international jurisdiction, the Inter-American Court of Human Rights (IACtHR) recognized the Theory of Indigenato in the case of the

Xucuru Indigenous People and its members v. Brazil. Briefly, twenty years ago, the National Human Rights Movement/Northeast Region (in Portuguese Movimento Nacional de Direitos Humanos/Regional Nordeste), the Legal Advisory Office for Popular Organizations (in Portuguse Gabinete de Assessoria Jurídica às Organizações Populares – GAJOP) and the Missionary Indigenist Council (in Portuguese Conselho Indigenista Missionário – CIMI)[346] lodged a petition with the Inter-American Commission on Human Rights (IACHR) against the Federative Republic of Brazil[347] (IACHR, 2015, p. 2). The case discussed the presumed violation of the rights to collective property and to personal integrity of the Xucuru indigenous people in the demarcation of "Xucuru Indigenous Territory" (in Portuguese Terra Indígena Xucuru) (IACtHR, 2018, p. 4).

Following the procedure of the Inter-American Human Rights System, the case was first analyzed by the Commission that concluded by the culpability of Brazil (IACHR, 2015). In this way, in 2016, the case was submitted to the I/A Court, as the I/A Commission considered that the State had violated Articles 21 ("Right to Property"), 5 ("Right to Humane Treatment"), 8 ("Right to a Fair Trial") and 25 ("Right to Judicial Protection") the American Convention in relation to Articles 1(1) ("Obligation to Respect Rights") and 2 ("Domestic Legal Effects") (IACtHR, 2018, p. 4).

The I/A Court, unanimously, declared that Brazil was responsible for "the violation of the right to a judicial guarantee within a reasonable period, for the violation of the right to judicial protection, as well as the right to collective property", but it was considered that there was no violation of the right to personal integrity of the Xukuru Indigenous People (CAMBI, PADILHA, and RORATO, 2021, p. 649).

The crucial point in this case was the evolutive interpretation of the treaties made by the I/A Court that recognized the collective right to the land

346 The delay in the demarcation of the land and the ineffectiveness of the judicial protection were alleged by the petitioners as a violation of the collective right to property. In addition, they included allegations related to Articles 4 ("Right to Life") and 5 ("Right to Humane Treatment") of the American Convention in the merits (IACHR, 2015, p. 2).

347 In the opposite side, the State argued that the petition was inadmissible due to the completion of the territorial demarcation process, which began in 1989. It was also alleged that the removal of non-indigenous occupants from the Xucuru territory was carried out in a reasonable timeframe, taking into account the complexity of the matter and the need to guarantee due process of law. Furthermore, Brazil stated that it has not yet completed the full removal of all non-Indigenous occupants and either a fair compensation (IACHR, 2015, p. 2).

of Xukuru Indigenous People, applying the Theory of Indigenato (CAMBI, PADILHA, and RORATO, 2021, p. 649). Thus, the IACtHR followed its precedents from other cases, and recognized in a Brazilian's case that indigenous peoples have an immemorial right to land (CAMBI, PADILHA, and RORATO, 2021, p. 660).

In this way, the Theory of Indigenato, applied nationally in the Constitution and internationally in legal diplomas and cases, recognizes the vulnerable position occupied by indigenous people that in centuries of exploration were banned not only from the decision process, but also from the territories that they traditionally occupied. On this basis, it is necessary to question again, as Mendes Junior made in more than a century ago, if it is right to keep using mechanisms to perpetrate the abuses committed in the past or if a real democratic society should ensure and protect indigenous peoples' rights.

1 Theory of indigenous fact

In the other side, the theses of the "time frame" (or theory of indigenous fact), created by the Supreme Federal Court of Brazil in 2010, adds more obstacle to the indigenous land demarcation (DINIZ, ESPINOZA, ISA, 2021, p. 98). The theory was developed in the decision of the Popular Action n. 3,388/RR about the demarcation of the Raposa Serra do Sol indigenous land.

Briefly, the Supreme Court developed the argument that the constitution should be used as a "time frame" for the recognition of the indigenous territories (STF, 2010, p. 235). The idea is to use the date of the Federal Constitution, 5 October 1988, as a time frame for the recognition of indigenous lands rights.

This theory mischaracterizes indigenous people as original possessors of the land and goes in the opposite direction of national and international legislations. To understand the start point of the theory of indigenous fact, it is necessary to briefly summarize the case.

The Popular Action n. 3,388/RR aimed to discuss the annulment of Ordinance No. 534/2005 of the Ministry of Justice, which was ratified by the homologating Decree of 15.04.2005 of the President of the Republic Luiz Inácio Lula da Silva. These documents promoted the demarcation of the Raposa Serra do Sol indigenous reserve, in Roraima (STF, 2009, p. 569), and

they were contested by the State Governor, José de Anchieta Júnior[348].

The Supreme Court recognized the demarcation of indigenous territory (STF, 2010), but developed the idea that the constitution should be used as a "time frame" for the recognition of the indigenous territories (STF, 2010, p. 235):

"The Federal Constitution worked with a certain date — **the date of its promulgation (October 5, 1988)** — as an irreplaceable reference for the occupation of a certain geographic space by this or that aboriginal ethnicity; that is, for the recognition, to the Indians, of the original rights over the lands they traditionally occupy."[349] (our translation) (our emphasis).

In this way, all land claimed as traditional territory after the time frame would not be subject to recognition by the State as an area of legitimate occupation by indigenous peoples, putting it outside the scope of both the constitutional norm and the administrative procedure of land demarcation (DINIZ, ESPINOZA, ISA, 2021, p. 98). In other words, the Federal Constitution from 5 October 1988, would be used as a time frame for the recognition of indigenous lands rights, despite the fact that indigenous people

348 The prosecution pole requested the preliminary suspension of the effects of these documents and in the merit the declaration of invalidity. The State Governor argued succinctly that the ordinance would have defects from previous one (nº 820/98) related to the administrative process of demarcation, which would have violated the rules of Decrees nº 22/91 and 1.775796, considering that all the people and entities involved would not have been heard and the anthropological report about the area was signed by only one specialist. In addition, commercial, economic, and social losses were alleged for the State of Roraima and the danger to national security and sovereignty for Brazil. Finally, it was alleged that there would be an imbalance in the federative pact, due to the transmission of a large area to the Union and it would privilege the protection of the Indian to the detriment of free initiative, offending the principle of reasonableness (STF, 2009, p. 246-247). By the opposite side, the Union's defence brought to the debate the legislative evolution on the subject since the colonial period, in parallel with an historical survey of indigenous occupation throughout the region (STF, 2009, p. 247). The Federal Constitution of Brazil that crystalizes the Institute of Indigenato in the article 231 was also argued by the Union, considering that "it is not the demarcation procedure that creates an immemorial possession, an indigenous habitat, but it only delimits the indigenous area of traditional occupation, by inescapable constitutional and legal commandments." (our translation) (cited in STF, 2009, p. 248).

349 "A Constituição Federal trabalhou com data certa — a data da promulgação dela própria (5 de outubro de 1988) — como insubstituível referencial para o dado da ocupação de um determinado espaço geográfico por essa ou aquela etnia aborígene; ou seja, para o reconhecimento, aos índios, dos direitos originários sobre as terras que tradicionalmente ocupam." (original in Portuguese) (Brazil, 2010, p. 235).

are the original possessors of the land.

The applicability of this theory put in risk indigenous right to the land and going further stood precisely in contradistinction the constitutional right to land, because "the characteristic of its originality is mitigated and the traditionality completely distorted by a criterion of recognition instituted by the Brazilian State" (DINIZ, ESPINOZA, ISA, 2021, p. 98) (our translation). In this scenario, the collective right to the land is offended by a creating of Institute that goes against the Federal Constitution, and the history.

The case Raposa do Sol illustrates the challenging to build a democratic society that respect indigenous people as prescribed in the Constitution, in addition showed that "local governments see and promote indigenous peoples as foreigners in their own territories, ignoring their important contributions in the social and economic relations of states and municipalities" (YAMADA, VILLARES, 2010, p. 149). Although the Supreme Court has recognized the demarcation of indigenous territory (STF, 2010), the conditions created by the Ministers, and the elaboration of the Theory of the Indigenous Fact demonstrate the perpetuation of the discrimination against indigenous peoples.

The permissibility of such a theory puts at risk not only indigenous communities, but also the environment that is rescued by native peoples. Furthermore, it empties institutions crystallized by the Constitution, and in national and international laws, erasing the history of Brazil and returning structures of a colonial period, which was extremely violent and oppressive with minorities.

2 Supreme Federal Court Case – Extraordinary Appeal n. 1.017.365

The highest court in Brazil, the Supreme Federal Court, has the important task of revisiting these two theories and deciding on the applicability of one to the detriment of the other. More than that, the Court has currently the power to ensure indigenous people rights or perpetuate the historical state violence against vulnerable groups.

The Extraordinary Appeal n. 1.017.365 with general repercussion is on trial in the Supreme Federal Court of Brazil to discuss the appropriateness of the reintegration of possession required by the Environmental Foundation of Santa Catarina (in Portuguese Fundação do Meio Ambiente do Estado de Santa Catarina - FATMA) / Environmental Institute of Santa Catarina (in

Portuguese Instituto do Meio Ambiente de Santa Catarina - IMA)[350] of an area administratively declared as traditional indigenous occupation by Xokleng, Guarani e Kaingang peoples, located in part of the Sassafrás Biological Reserve, in the state of Santa Catarina (STF, 2021).

Due to the general repercussions of the case, the decision will impact all processes related to the theme in Brazil, in other words, it will impact the demarcation of the indigenous lands in the whole country. On this wise, the aim of the action is to decide if indigenous people need to prove that they occupied their lands at the time of the promulgation of the Federal Constitution, on October 5th, 1988, to have the recognition of the area as indigenous territory. Thus, the Constitution would be used as a time frame for the land rights of indigenous people, even though they are considered original peoples by the national and international legislation.

The actor of the action, the Environmental Institute of Santa Catarina, an environmental agency at the state level of the Government of Santa Catarina, claims that some indigenous people invaded the territory now under judicialization, cut down the native vegetation and built shacks, characterizing the disseisin in an Integral Protection Conservation Unit. They argue that they have upholding the land tenure in a peaceful and uninterrupted way for more than seven years, tried without success "amicable solutions", and have the public deed to confirm the land ownership. In the light of this argumentation, the IMA pleaded for ownership repossession of the land (STF, 2021).

The Institute is legally demanding that traditional peoples leave their lands, using democratic procedures to perpetuate the state violence against indigenous peoples. By the same token, IMA applies the dichotomy between individual and collective rights to transform indigenous people from original peoples to invaders, using the language surrounding Human Rights as a powerful tool to express political claims (DEMBOUR, 2010, p. 4).

In the opposite position, the National Indian Foundation, official indigenous body of Brazil, argues that the territory now under judicialization is traditionally occupied by indigenous people (STF, 2021), and emphasizes the theory of indigenato as established in the Constitution. Along these lines and taking into consideration that the process of demarcating indigenous lands is

350 Environmental Foundation of Santa Catarina (in Portuguese Fundação do Meio Ambiente do Estado de Santa Catarina - FATMA) was replaced by the Environmental Institute of Santa Catarina (in Portuguese Instituto do Meio Ambiente de Santa Catarina - IMA).

merely administrative, is a matter of declaring a right that the indigenous people already have, the Foundation claims that it is unnecessary to demarcate the territory for the recognition of indigenous and constitutional rights (STF, 2021).

Furthermore, the indigenous' line of argument highlights the imprescriptibility of the right to ownership the land and the exclusive usufruct of the natural resources, as established by the Constitution in Chapter VIII and the Indian Statute in Article 2 (IX). In this way, FUNAI's perspective considers the historical situation of indigenous people that have been victims of genocide, and a secular violence against their culture, languages, traditions, bodies, and territories.

The country is still awaiting a decision of the highest Court. The Supreme Court Justice Edson Fachin has a position in line with the Theory of Indigenato, while the Supreme Court Justice Marques Nunes voted in favour of the Theory of Indigenous Fact. The trial was suspended due to the request of the Supreme Court Justice Alexandre de Moraes to have more time to study the case, and later the process has been returned for judgment (STF, 2021). Taking this in consideration, the present paper will analyse the Ministers' position.

3 Federal Supreme Court Justice Edson Fachin

The position of the Federal Supreme Court Justice Edson Fachin is representative in the case, because he was responsible for granting the general repercussion, making the Extraordinary Appeal n. 1,017,365 a paradigm in the matter of indigenous lands demarcation. In other words, the decision of the Supreme Court in this trial will impact all cases related to the demarcation of indigenous lands.

Briefly, the Minister argued in favour of the establishment of the Instituto of Indigenato, which has been endorsed by the national legislation since the 17th century, for the recognition of indigenous territoriality as an original right (STF, 2021). In this matter, the Constitution in force consecrates historical and legal facts, following the evolution of legislation (STF, 2021), that recognized the colonial past, marked by violence, which imposed a vulnerable position on indigenous people.

Furthermore, Fachin criticizes the time frame idea, because it does not consider the self-determination of indigenous people who live isolated (STF, 2021). For the full exercise of indigenous citizenship, it is necessary to respect them, and recognize their collective rights. For him, the indigenous collective

land tenure does not depend on a time frame, considering Chapter VIII of the Constitution about Indians and other national laws (STF, 2021).

Considering the colonial past and the vulnerable position of indigenous peoples, the Minister affirms that we should avoid the progressive ethnocide of indigenous culture and stop denying them the right to live a life different from that experienced by society, in this way he declared that "there is no greater legal security than endorsing the Constitution" (STF, 2021).

Edson Fachin recognizes the vulnerability of indigenous people and uses broad legislation to support his argument. In the same line, as explained by M. Freeman (2017, p 130), the recognition of some special categories, such as indigenous people, by the Vienna Declaration does not necessarily exclude the universality of human rights or put this group in a special position. In fact, it only set some standard, due to their historical vulnerability to human rights violations.

In this case it is crucial to differ the collective land tenure of indigenous people from individual rights related to private property as Fachin does. The collective right of indigenous people to their territories has nothing related to the individual right to property.

This line of argument finds support in the Indigenous and Tribal Peoples Convention, 1989 (No. 169), Article 14(2): "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". For the Minister, as endorsed by the Constitution, the Court should lead a decision that ensures greater protection to indigenous people and their land rights, considering their historical and political reality.

4 Federal Supreme Court Justice Nunes Marques

In the opposite direction, enshrining the theory of the time frame, the Federal Supreme Court Justice Nunes Marques called outdated the institute of indigenato. According to him, if the Court understands the indigenous tenure as an original right that does not result from any other right and no ground truth other than the history of the indigenous people in Brazil, the sovereignty of the country will be impacted (STF, 2021). Along these lines, this concept in its maximum degree could eliminate the foundation of national sovereignty.

Nunes Marques questions the collective rights of indigenous people

over the land, asking: "how could Brazil justify his power of command in a territory that would be considered only a village in return process to their rightful owners?" (STF, 2021). Inverting the history of centuries of exclusion and violence, the Minister argues in favour of the protection of private property, in order to avoid "restlessness" and "regression" (STF, 2021).

The defence of the time frame gets contours even more incongruous, when the Minister argues that if the Court sees indigenous tenure as an original right, this will mean "give back" Brazil to indigenous people, considering that everything is indigenous land. This kind of correlation is at the very least not reasonable, to not say not plausible of support in a Court, that should be proportional, use legal argument and apply the Constitution, when analysing the most relevant cases of the country.

The dissenting opinion of the Minister Nunes Marques does not consider political, historical, and legal perspectives about the process to demarcate indigenous territories and neither consider the collective rights of indigenous peoples. He brings generalist arguments and uses the language surrounding human rights as a powerful instrument to express political claims (DEMBOUR, 2010, p.4).

This dangerous line of argument can culminate in the perpetuation of State violence against indigenous peoples. The trial is expected to return this year and will impact not only indigenous peoples, but also the society as a whole and the ideal of democracy, that is constantly struggling to be maintained in the midst of constant attacks.

Conclusion

The Indian still represents the strange, the other, the naked, the wild, the painted, that speaks more straight to the point, kind of appearing a lack of hierarchy (YAMADA, VILLARES, 2010, p. 145). As it happened in the Raposa do Sol case, all this contrasts with the sobriety and refinement of the Court, exposing that these two worlds are hardly co-existing, on the contrary they repel each other in a disturbing discrimination (YAMADA, VILLARES, 2010, p. 145).

The Extraordinary Appeal n. 1.017.365 is crucial for Brazil, because the country has the opportunity to revisit the past and choose between perpetuating systemic violence against historically marginalized bodies, or promoting justice, consecrating what several national and international legal

diplomas, and the I/A Court's jurisdiction already understand regarding the demarcation of indigenous lands. In other words, the Federal Supreme Court has the chance to lead a decision that recognizes the Institute of Indigenato, guaranteeing legal security and respect for native peoples.

Ensuring indigenous rights to the land does not mean the end of the indigenous struggle, but the pursuance of the material democratic process that should use State's tools to guarantee the principles established in the Brazilian Constitution. What has been noticed before, and now it is repeated, are the delay, suspense and unpredictable endings that only match with spectacles, and not with trials of the highest Court of the country (YAMADA, VILLARES, 2010, p. 154). The delay in the decision of the Supreme Court can encourage the advancement of legislative proposals to withdraw indigenous rights.

A democratic society should not allow the ones with power to use and to invoke human rights to express their claims. The questions raised by the theme are not only legal, but also political. The Extraordinary Appeal n. 1.017.365 will impact all processes involving the demarcation of the indigenous lands. It is a huge impact without precedents. On this basis, the Supreme Court has now the opportunity to recognize indigenous peoples as the original owners of their lands without the need to legitimize their possession by a "time frame". STF have the change to revisit the incongruous theory of the indigenous fact, repair the jurisprudential understanding and historical injustices.

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THE POTENTIAL FOR PROTECTION OF INDIGENOUS PEOPLES THROUGH THE RIGHTS OF NATURE

Nicholas Hewitt

Master of Human Rights and Democratization
University of Deusto

Abstract

The ongoing climate crisis is poised to inflict irreversible damage on the planet and the beings that inhabit Her. While all beings will be affected, those who have contributed the least to the climate crisis are the most vulnerable to its consequences. Those vulnerable include communities living in periphery countries and Indigenous peoples, many of which promote lifestyles and cosmologies that are built around living in harmony with the natural world. To address these inequalities, there has been a call for climate justice. However, due to the nature of our legal systems, such justice is approached through a Western and colonial perspective that does not adequately address the core issues of climate change. To this end, this paper proposes that to provide true protection to Indigenous communities there must be an incorporation of their beliefs and values into international law. One such approach is through the Rights of Nature, which promotes the idea that the natural world be legally protected. This concept is based in Indigenous thought on the interdependence and interconnectedness of all life. Therefore, incorporating this cosmology into international law would provide a new framework and legal protections for Indigenous communities that is inclusive of their culture and worldview. This approach would be more equitable in its protection and provide justice to those most affected by climate change.

Key words: Indigenous Peoples, The Rights of Nature, Ecocentrism, Climate Justice, Human Rights

Introduction

As the effects of the climate crisis are unfolding around the globe, it has become increasingly evident that we are not prepared physically or legally, for the consequences it will bring. While its damage will not spare anyone, some

communities are more vulnerable to the coming devastation. Those who are most vulnerable include Indigenous peoples who are disproportionally affected by climate change due to their close cultural ties to nature and the environment. Furthermore, their eco-centric lifestyle has had far less impact on the environment when compared to any Western civilization and therefore is less impactful to climate change. Despite this lifestyle, they will bear the greatest brunt of climate change and, for many of them, it has already begun. For this reason, it is critical that international law, specifically human rights law, evolves in a way that can not only protect these communities but also afford them justice. Furthermore, the argument can be made that by affording Indigenous communities the protection of their rights by following their cultural heritage, we can take a step toward minimizing climate disasters. In brief, this is due to their unique relationship with the natural world and their deep respect for non-human beings. By codifying their worldview into international human rights law, particularly through the concept of the Rights of Nature, it is possible to create a new framework of international law that is more equitable in its protections. However, there have been some roadblocks since the concept of international human rights law has come into existence in an environment predominately controlled by a Western and Eurocentric perspective. This perspective has often served as a tool of colonialism whereby it has oppressed, dispossessed, and marginalized those it deemed, uncivilized or not, in line with Western European values (Gomez Isa, 2010). Therefore, if international human rights law is to serve as a mechanism of Indigenous protection, the first step in its evolution must be its decolonization.

1 Decolonizing Human Rights Law

At its core, international human rights law proclaims that all humans are entitled to universal rights, such as the right to life and liberty, freedom from slavery and torture, the right to self-determination, amongst others. While on paper this sounds good, it should be noted that the enforcement and protection mechanisms tend to be weak or soft law. Since human rights are primarily enforced by States, and more often than not many Indigenous communities are not recognized by said states, their territories and culture are exploited or disregarded. Therefore, by recognizing the rights of Indigenous peoples, including non-Western views and values, international human rights law takes the first step in creating truly universal human rights. One of the first places we can find this happening is in Latin America, which has been at the forefront of recognizing the human rights of Indigenous peoples. This

decolonization begins in the 1990s in what became known as the 'Indigenous emergence' due to the rise of highly politicized Indigenous social movements which began to claim recognition and historical justice (Guzman, 2019). With this emergence, Indigenous communities made their presence known within the international community and began to have an impact on international law. One such impact is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Of the more noteworthy aspects of the UNDRIP was the recognition of collective rights and the right to self-determination within the context of Indigenous worldviews. Collective rights in particular were a leap forward as they granted recognition of Indigenous language history, territory, and natural resources (Guzman, 2019). This provided a legal link between their human rights and their cultural identity that was previously unknown. Further still, the right to self-determination provided acknowledgment of some self-governance and autonomy within the realm of the state. This allows for a cultural diversity that is not dominated by colonial ideals. From these two examples, we can see that the establishment of UNDRIP played a vital role in the decolonization of human rights law and, as will be shown, has laid the groundwork for expanding it as well.

2 The Rights of Nature

As the decolonization of human rights law progresses, it gives way to more diverse perspectives, in this case, Indigenous narratives that can enrich international human rights law, making it more effective and inclusive. One such path for this is the incorporation of the Rights of Nature. The Rights of Nature are the non-anthropocentric approach to rights that consists of making Nature the subject of rights. One of the first instances that this was done was in Ecuador in 2008 when they wrote the Rights of Nature into their constitution under pressure from Indigenous communities and environmental groups (Guzman, 2019). This was a milestone for Indigenous rights groups as it was another step forward in decolonizing international law. Furthermore, it paved the way for more legal recognition of Nature, as is shown in New Zealand, where the Whanganui River was granted legal personhood in 2014 due to its value and relationship with the Maori Iwi people (Guzman, 2019). While it may seem strange to grant such status to a non-human being, it should be noted that it is not without precedent, as corporations also possess legal personhood. In his work Thomas Berry elaborates on how Nature rights should be viewed. He argues that all rights are species-specific and limited to the functional nature of that being (Cullinan, 2011). For instance, acknowledging the rights

of a river would be within the context of how a river operates therefore, by disrupting its flow or polluting it, one would be violating its rights (Cullinan, 2011). The idea of the Rights of Nature is the next progression in international law that has the potential to protect not only the environment but also Indigenous communities. Such rights also have the legal potential for enacting a human right to a healthy environment and therefore can assist in providing justice in the wake of climate change. Recently there have been developments in international law that demonstrate this progress and further establish protections for Indigenous peoples and the Rights of Nature.

3 Expansion of The Right to a Healthy Environment

As of October 2021, the United Nations Human Rights Council approved a resolution to incorporate recognizing access to a healthy and sustainable environment as a universal right. This was a landmark victory in the battle for climate justice for all, but it had some failings. Firstly, at this time it is not legally binding and is still waiting for approval from the United Nations General Assembly.[351] Also, the approach to this right is largely anthropocentric in that it states that there is a right to a healthy environment for the sake of human benefit. This falls short of the Indigenous interpretation of the Rights of Nature, which as stated previously consists of an eco-centric model and therefore regards Nature as a legal person. That said, it is still a leap forward and holds great implications for future legislation and implementation. However, it was not the first instance of establishing the right to a healthy environment. Another development that has come about recently is the case of Lhaka Honhat Association v. Argentina, which went before the Inter-American Court of Human Rights in 2020. It was in this case that the Court considered the right to a healthy environment within the context of Article 26 of the American Convention on Human Rights (Tigre, 2021). In brief, this article speaks to the right of progressive development and ensuring its full realization in the economic, social, educational, scientific, and cultural standards. Under their new interpretation of this article, the Court decided that the state of Argentina violated the rights outlined in Article 26 of the Convention. This ruling was momentous as it now advocated for a more expanded interpretation of Article 26, thus allowing it to apply to the Rights of Nature and consequently greater

351 It should be noted that as of July 28th 2022 the UN General Assembly (UNGA) passed a resolution recognizing the right to a clean, healthy, and sustainable environment as a human right under resolution A/76/L.75 (Unga recognizes human right to clean, healthy, and sustainable environment: News: SDG knowledge hub: IISD 2022).

protection for Indigenous peoples (Tigre, 2021). In their decision, the Court examined the right to a healthy environment as an autonomous right as well as the right to adequate food, water, and cultural identity as they pertain to article 26 (Inter-American Court of Human Rights, Environment and Human Rights, Advisory Opinion OC-23/17, November 15, 2017, para. 62). They discussed specific factors that lead to a violation of each right. In terms of the right to food and water, they stated that raising livestock and installing fencing affected environmental rights, and therefore had an impact on the traditional ways the Indigenous community obtained food as well as their access to water (Inter-American Court of Human Rights, Environment and Human Rights, Advisory Opinion OC-23/17, November 15, 2017, para. 59). Furthermore, by raising cattle on the land, the criollo compromised the flora and natural habitat of the wildlife as they were now forced into a competition for access to water (Lhaka v. Argentina, 2020). In the case of the right to a healthy environment, the court found that this must include the protection of the environment as an interest in itself. This goes far beyond previous interpretations where the right to a healthy environment was granted due to its benefits to human beings. The Court went on to say that due to its importance to other living organisms, Nature deserves protection ((Lhaka v. Argentina, 2020). It should be noted that this is different than saying that it should be protected because of its usefulness to other organisms. Therefore, the Court is stating that Nature should be protected not because it is useful to humans or other beings, but because all other things rely on it. The Court is making the case for the interconnectedness of Nature and lends more credibility to the Rights of Nature. This way of thinking challenges the anthropocentric and colonialist worldview that has so heavily dominated international law and suggests that a more eco-centric framework based on Indigenous perspectives is possible. Furthermore, it suggests that this can be accomplished by using the framework we have previously established within human rights and more specifically, Indigenous rights.

To further this point, it has been discussed that without Indigenous perspectives the Rights of Nature would be severely diminished or not even possible (O'Donnell et al., 2020). It's argued that alongside the Rights of Nature is also the idea of Earth Jurisprudence, which is the legal philosophy that "humans are only a part of a wider community of beings, and that the welfare of the community is dependent on the welfare of the Earth" (Cullinan, 2011). Cormac states that this is only possible if we have laws that can regulate and protect the natural functionality of the Universe. This idea falls directly in line with Indigenous cosmologies on the Rights of Nature and is one of the

more straightforward ways to accomplish Earth Jurisprudence. (O'Donnell et al., 2020). This is not to say that the Rights of Nature are easy to accomplish; like many things in law, it is a slow-moving process that has been fought for over decades. Often the Rights of Nature are balanced against the rights of humans and therefore are not entirely eco-centric. This was seen in the case of the Rio Vilcabamba in Ecuador, which balanced the rights of the river against the human rights of economic development. This resulted in the restoration of the river, but did nothing to stop the construction of a road (O'Donnell et al., 2020). For this reason, the ruling in the case of Lhaka v. Argentina is even more monumental, as it gives precedent to recognizing the Rights of Nature on the fact that Nature exists.

4 An Ecocentric Approach to Climate Justice

Since many arguments for the Rights of Nature take the approach of granting legal personhood to Nature, it should be pointed out that this too is an anthropocentric system influenced by Western ideals. The idea of being a legal person only makes sense to a human being who understands and operates within a framework of laws. This is because legal personhood centers around three forms of rights which include; the right to enter into and enforce contracts; the right to own and deal with property, and the right to sue and be sued (O'Donnell et al., 2020). This raises questions such as who will represent Nature and how will its interests be best represented? Another consideration is that while it moves Nature from an object of the law to the subject, it also puts it in the unfortunate position of being a competitor to human rights and thus further perpetuates the desire for human dominance (O'Donnell et al., 2020). If there is any lesson that can be learned from human history, it is that when given the choice between protecting another or ourselves, we invariably will choose humanity. This reasoning still possesses some forms of Western colonial thought as it seeks to force an Indigenous perspective in line with its modern practice and in so doing fails to be a method of protecting Indigenous rights. Another, more equitable approach, then, is called Ecological Jurisprudence, which differs from Earth Jurisprudence in that it is more in line with Indigenous laws and cosmologies. This framework allows for more ecological-based constitutions, such as Ecuador's 2008 constitution. Not only does this provide a decolonized version of the Rights of Nature, but it also allows for Indigenous voices to not simply influence law but shape it. Such was the case with the constitution of Ecuador in 2008, which contains Articles 71 – 74, which speak directly to the Rights of Nature. This includes that Nature

has the right to exist, the right to be restored, the responsibility of the state to prevent its destruction; and that 'persons communities and peoples have the right to benefit from its natural wealth' (Guzman, 2019). These articles ensured that any person could file a lawsuit on behalf of Nature without the need to prove that there was direct damage to humans (Guzman, 2019). Additionally, through this perspective, Indigenous communities can use the Rights of Nature in a legal capacity to protect their ancestral lands. This in turn allows them to establish sovereignty over their lands, ensuring they are the custodians and advocates of it, rather than seceding such powers to colonial laws and interpretations. In his essay, Guzman discusses such potential for Indigenous rights that can be upheld through the Rights of Nature approach. As pointed out earlier in this essay, he contends that this incorporation will lead to a post-colonial perspective on human rights that will not only expand them but also allow for the struggles of Indigenous peoples to be heard and validated within the legal discourse (Guzman, 2019). Furthermore, this would enable Indigenous communities to take control over their land in a way that can protect them from the effects of climate change, specifically those that are environmentally damaging. Another potentiality of the Rights of Nature is that it would provide more legal backing for rights such as the right to self-determination and collective rights like the right to ancestral lands, as was seen in the case of Lhaka v. Argentina.

The most impactful legal protection that could come about through the Rights of Nature is a reworking of our anthropocentric model that favors the more ecocentric worldview. This would provide a shift from our current thinking that puts humans at a hierarchal advantage which has been responsible for the destruction of the earth that has disproportionally affected Indigenous peoples (O'Donnell et al., 2020). Such a shift would lead to new laws being written that not only provide protection for Indigenous rights and communities but produce accountability for those who have been at the forefront of environmental destruction. This could take the form of what has been labeled green crimes or the crime of ecocide. Green crimes include a crime that violates environmental law, whether it is through pollution, deforestation, or other forms of environmental degradation. From a rights-based framework, green crimes have the potential to be the teeth of human rights law by criminalizing the destruction of our world's ecosystems and thus making it more enforceable (Aliozi, 2021). Another aspect of an ecocide law that would benefit Indigenous rights is that it would not merely be a reactionary legal instrument but could also serve as a preventative one. This is to say that while there are proactive steps taken by certain mechanisms to ensure the

rights of Indigenous people, human rights law has room for improvement, and ecocide laws provide a good option for preemptive enforcement. Polly Higgins addresses this implication by stating that "ecocide creates a preemptive obligation to act responsibly before damage or destruction of a given territory takes place' (Higgins, 2013 p. 27). Whereas under current human rights law one would have to wait for a violation to occur, in this scenario Indigenous communities would have their lands and cultural relationships with Nature protected before any violation of rights happens. This could also have implications for the right to self-determination as it would allow for Indigenous peoples to set laws that would protect the environment and its natural resources within the context of their cultural practices. Therefore, ecocide laws would provide accountability and legally binding consequences to the rights already declared in declarations like UNDRIP. This form of legal accountability has the incredible potential not only for the protection of Indigenous peoples but also for aiding in the fight for climate justice for all beings. However, this approach is only possible through an eco-centric perspective and therefore, through this lens there can be no protection of the Earth that does not also start with protecting Indigenous rights.

Conclusion

In the end, the evolution of international human rights law is a slow-moving process that will require a multifaceted approach that begins with its further decolonization. Moreover, it cannot be stressed enough that the primary way we can strengthen it is through incorporating more pluralistic views and advancing perspectives that are counter to the typical Western approach. If there is to be any chance of providing a more equitable solution to climate justice, it must include not only hearing the voices and perspectives of those who are already most vulnerable but applying and codifying them into law. Further still, we should not see Indigenous rights as merely a means to an end but as an equal party in the discourse of rights. While there is incredible potential for enacting the Rights of Nature, this framework is most effective if it is strengthened by ecocide laws. Only then will there be legal enforcement that provides adequate protection to Indigenous peoples and furthers the climate justice movement.

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THE ENVIRONMENT AND HUMAN RIGHTS (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), OC-23/17 (Inter-American Court of Human Rights November 15, 2017).

WHEN PAST CASTS A NEVER-ENDING SHADOW: INDIGENOUS PEOPLES, ENFORCED DISAPPEARANCES AND VULNERABILITY IN GUATEMALA.

Francisco Javier Murillo Dominguez

Erasmus Mundus Master's Programme in Human Rights Policy and Practice
University of Deusto

Abstract

This paper aims to research what has been historically the relationship between Enforced Disappearances (ED) and the condition of vulnerability of indigenous peoples (IP) in Guatemala according to precedents of human rights (HR) violations from the Inter-American Court. The author attempts to research on whether or not a direct link can be established between the crime of ED and vulnerability. The case study of choice is that of the Guatemalan State which underwent a period of armed conflict in which the government made use of the military to carry out the National Security Doctrine that involved a series of operations of informally known as "scorched lands", among others. These military deployments were the frame of times in which, in the name of eliminating subversion and any possible internal enemy to the political regime, mainly indigenous peoples were targeted for actions of annihilation, which included ED. In light of the findings by the Commission for the Historical Explanation, the precedents on the right to access to justice for indigenous peoples in the Inter-American System for the protection of human rights from the Organization of American States, and theory on vulnerability, this paper attempts to answer the question of whether it can be stated that indigenous peoples in Guatemala that lived during the armed conflict under the National Security Doctrine were in a disproportionate risk to face ED and if that could be traced to yet another layer of the condition of vulnerability that they already faced.

Key words: Enforced Disappearances, Indigenous Peoples, Vulnerability, Access to Justice, Crimes Against Humanity.

1 INTRODUCTION.

The motivation of this work came from what the Inter-American Commission of Human Rights (the Commission) has stated in its country report from 2016 signaling the situation of inequality, exclusion and structural racism against indigenous Peoples (IP) in Guatemala (CIDH, 2016, para. 29). The Commission pointed out that the State of Guatemala needs to solve the grave issue of enforced disappearances (ED) against IP that was generated by the end of the internal armed conflict and to guarantee the right to truth to the missing persons' next of kin (CIDH, 2016, para. 127).

2 VULNERABILITY AND INDIGENOUS PEOPLES

As a starting point of analysis, this work aims to provide with a definition under which the term of vulnerability can be operationalized. As Morawa (2003, p. 146) has pointed out, International Human Rights Law has coined this concept to refer to groups that should be recipients of higher level of protection by States and places an obligation on them to adopt extraordinary measures aimed to counter the context of inequality.

Similarly, within the jurisprudence of the Inter-American Court of human Rights (hereinafter the Court), vulnerability can be constituted by both conditions de jure, which can be understood as conditions of inequality before the law; and conditions de facto, which correspond to structural inequalities, such as, for instance, the existence of discrimination or generalized violence against a certain group . It must be stated that, throughout other systems of human rights protection, IP are generally recognized among the most vulnerable and dispossessed groups in society .

3 REFERENCE FRAMEWORK ON ENFORCED DISAPPEARANCE IN THE INTER-AMERICAN SYSTEM AND THE CONTEXT IN LATIN-AMERICA

With regard to ED, it must be acknowledged that it refers to a serious violation of HR that has been coined as an affront to all humanity (Benavides Hernández, 2012). ED has been historically considered of such a serious and harmful character that it has even been considered as a crime against humanity under the Rome Statute (UN Diplomatic Conference, 1998).

In turn, in the Inter-American Human Rights System (IA System), the

Inter-American Convention on Forced Disappearance of Persons was adopted in 1994, becoming the first specialized and binding treaty on this subject. Unfortunately, referring to the context in Latin-America, ED began to occur with increasing frequency, especially since 1970, in the context of installments of dictatorships in the hemisphere (Basaure Miranda, 2018).

Thus, considering that prevalence of the crime of ED in Latin-America, it comes as no surprise that it became a recurrent theme of analysis within the line of jurisprudence of the Court. In fact, as it has set out by means of numerous precedents, the Court has, in addition to the definition in the Inter-American Convention on Forced Disappearance of Persons, enlisted the elements that constitute the practice of ED, those being the following:

a) deprivation of liberty of the victim or victims,

b) the direct intervention of state agents or their acquiescence or tolerance, and

c) the refusal to acknowledge the detention or to reveal the fate or whereabouts of the person concerned.

Particularly, about the last one of the three, the Court elaborated on that ED entails the refusal of the State to acknowledge that the victim is under its control and to provide information. This creates a state of uncertainty as to the whereabouts, life, or death of the victim . In this sense, it is worth mentioning that the refusal to provide information in cases of ED renders particular effects, among them the constitution of the relatives of the disappeared person into also victims. Especially regarding their right to a fair trial, judicial protection, truth, and reparations -in addition to their right to their physical integrity due to the suffering caused by the disappearance of their relatives .

Accordingly, this is perhaps one of the most damaging characteristics of ED, since it entails a psychological element that places the victims' next of kin in a state of total ignorance about the disappeared person. That circumstance is worsened when the State is, for any reason, reluctant to launch an effective investigation that complies with all the essential requirements (which will be analyzed below) or even to launch an investigation at all, which places them in a state of true uncertainty and defenselessness (Palma Florián, 2016).

Finally, the Court has signaled that ED is that it is a multiple, complex, and continuous violation of numerous rights enshrined in the American Convention on Human Rights . Based on this criterion, the Court has qualified ED as a violation whose practice is of particular gravity in the hemisphere

(Inter-American Court of Human Rights, 2020); particularly due to cases such as the case of study that this work analyses, that of Guatemala.

4 HOW HAVE ENFORCED DISAPPEARANCES AFFECTED INDIGENOUS PEOPLES IN GUATEMALA? CONTEXT OF THE ARMED CONFLICT

For the purposes of this study, it becomes necessary to briefly overview the context of the armed conflict the country underwent between 1962 and 1996. During this period of time, there was a domestic armed conflict in Guatemala in which the State applied the "National Security Doctrine" (Commission for the Historical Explanation, 1999, vol. I). Within the logic of this doctrine, the military was utilized to "face subversion" and "internal enemies", which included any person, community or group considered to represent a form of opposition (Revista Envío - "Memoria Del Silencio": Un Informe Estremecedor, 1999). This caused that violence became structural. To the point that torture and ED were coined as the corrective measures applied to whoever was "considered not a hundred percent loyal government" (Kruijt, 2000).

On the one hand, what is striking is that it is estimated that more than two hundred thousand people were victims of serious crimes, including ED due to the escalation of the violent political confrontations. On the other hand, what stands out is that according to the Commission for the Historical Explanation (1999, vol. II, p. 321-322), 83.3% of the victims of human rights violations during the conflict belonged to the Mayan ethnic group.

In connection to this, during the years of conflict, military operations were conducted with a view to the destruction as well as forced displacement of entire Mayan communities. This practice by the State consisted in targeting indigenous people, groups, or entire communities under the premise of them being inclined to insurgency. According to the report of the CEH, an estimated of 626 massacres were carried out with the aim of causing terror as a control mechanism exerted by the State over IP .

Consequently, ED became a common practice in Guatemala. It was mainly conducted by agents of the State security forces, following a modus operandi that reunited all the constitutive elements set out by the Court in is jurisprudence: State officials would capture them, hold them secretly without informing any competent authority, torture them to obtain information and

even murdered them without any information given to the public, let alone to the families of the captured individuals .

5 ACCESS TO JUSTICE FOR INDIGENOUS PEOPLES IN THE AMERICAS AND THE OBLIGATION OF THE STATE TO INVESTIGATE ENFORCED DISAPPEARANCES

It is important to consider the evolution that the protection of the rights of IP at the international level has had throughout the years. From the assimilationist approach undertaken in the ILO Convention 107 to the new paradigm that the jurisprudence of international mechanisms and the ILO Convention 169 established regarding the right to self-determination and respect to cultural identity (Bucetto, 2020). Regarding the access to justice, as the former Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz (2016) has stated, States are bound to implement special measures in order to guarantee the effective access of IP to justice since the condition of vulnerability in which they find themselves can be a conditioning factor as they face language, economic and other barriers within the state legal system.

In this sense, the IA System of Human Rights has consolidated itself as one of the pioneering systems that has achieved the greatest scope of protection of the rights of indigenous peoples. The Commission (2009) has established that the right to access to justice for IP implies a number of obligations to the State, such as, inter alia, to establish legal-judiciary systems according to IP's cultural diversity, to allocate financial and material resources for its effective functioning and especially to provide intercultural training to its operators, including training in indigenous culture and identity.

Aligned to the foregoing and particularly in relation to victims of crimes, it is a standard set by the Court that, to guarantee the access to justice for IP, the investigation must be carried out with due diligence, with no obstacles relatable to their indigenous identity and culture, and no discrimination. It elaborates on that the State must ensure that IP are able to understand and express themselves in every step of the legal procedures, by providing interpreters or other effective mechanisms to that end.

Because of this, for instance, the lack of an interpreter provided by the State when trying to access the system of justice; or not receiving information related to a procedure in their language, imply that the condition of

vulnerability of the indigenous person, based on their language and ethnicity was not accounted, and thus, constitute an unjustified impairment of their right to access to justice . As a result, under the judgement of the Court, States are obliged to set in place adequate and effective judicial resources through which the rights of IP can be protected in practice, and not formally by relying solely on their inclusion in the legislation .

As for the intersection of ED and access to justice, the key factor lies on the obligation of the State to investigate. That is, whenever there is sufficient information and reasons to suspect an ED, an investigation must be open without delay, regardless of whether a complaint has been filed . This investigation must ensure the undertaking of all necessary measures and means at the State's disposal as to determine the fate of the victim and their whereabouts, and it must prevail in time for as long as the uncertainty remains. The Court has reached as far as to connect this obligation of the State to the rights of the victim and the rights of the victim's next of kin to know the victim's fate . Moreover, the investigation must be conducted and advanced not only to determine the truth, but also as to pursue, capture, prosecute and punish the perpetrators and masterminds after a fair trial .

6 CONTEXT OF INDIGENOUS PEOPLES AND ACCESS TO JUSTICE IN GUATEMALA

In addition to the violence perpetrated by the State against the Mayan communities, IP would face another affront to their dignity, only this time on the institutional arena. That is because, accordingly to the cases that have reached the Court and selected for this work, the Guatemalan system for the administration of justice would prove itself ineffective .

In other words, there existed in Guatemala a pattern of denial of justice and of impunity. Considering -as has been established before- that over 80% of the victims were IP, it can be inferred that this malfunctioning would affect them particularly and disproportionately . In sum, the Court found that the lack of investigation of these crimes, EDs included, represented a failure to comply with the State's international obligations and therefore, determined that there existed a reality of systematic violations of HR against IP in relation to their access to justice.

7 PRECEDENTS FROM THE INTER-AMERICAN COURT ON ENFORCED DISAPPEARANCES AGAINST INDIGENOUS PEOPLES IN GUATEMALA

Having defined the context of systematic and grave human rights violations in Guatemala committed by the State for more than 30 years of armed conflict, let us now turn to recollect, in a summarized manner, the elements of specific sample cases that eventually became judgements by the Court. These cases comply with the following criteria: a) the victim of the case belonged to an indigenous community in Guatemala, b) one of the violations -although not the only one- determined by the Court was that of ED, and c) the Court also found proven the violations to the rights to a fair trial and to judicial protection. To that end, the cases selected are those of Tiu Tojín, Chitay Nech et al. (Chitay Nech), both against the State of Guatemala

7.1 Tiu Tojin v. Guatemala

The facts of this case relate to the enforced disappearance of María Tiu Tojín and her daughter Josefa in 1990 which was attributed to the Guatemalan army and Civil Self-Defense Patrols. Both belonged to the Mayan ethnic group. Their relatives filed four habeas corpus resources were presented in 1990, two before the Judge of Paz, Santa Cruz of el Quiché, the second one before the Human Rights Ombudsman and finally, a third one before the Supreme Court of Justice. In the same year, a brief was presented to the Auxiliary Human Rights Ombudsman denouncing the disappearance of María and Josefa and also the threats that they had been suffering in the hands of the military. None those remedies had any positive result. The Court determined that the victim's next of kin "faced obstacles when accessing justice due to the fact that they belonged to the Mayan Indian People", in particular, they faced differentiated detrimental treatment and a generalized lack of translation during every procedure.

7.2 Chitay Nech et al. v. Guatemala

This case deals with the enforced disappearance of Florencia Chitay Nech, also known as Kaqchikel, a Mayan political leader which occurred in 1981 in Guatemala City. According to the facts of the case, his capture was carried out by armed men in front of his son and forced him into a vehicle. On that same day a claim was filed before the National Police for which no action was taken. In 2004, a habeas corpus was filed which was declared inadmissible and in

2009 an accusation by the Executive Director of the Presidential Commission Coordinator of Executive Policy in Human Rights Matters before the Public Prosecutor. However, regardless of these domestic remedies that were actioned by Mr. Chitay Nech's next of kin, his disappearance has not been investigated properly and 29 years have passed since. The court determined that this lack of investigation during such a large period constitutes a clear denial of justice and a violation of the right to access to justice.

CONCLUSIONS

In light of the findings above sections and the selected judgements from the Court, this work can draw three conclusions. The first one is related to the context of ED and other HR violations used as control mechanisms by the Guatemalan State during the armed conflict the country underwent and how IP were the main target of said measures. In other words, IP were the social group that faced greatest risk to being victims of ED from 1962 to 1996.

The second one is related to when ED has already happened and the missing person's next of kin make claims for the State to launch an effective investigation. As described above, the judiciary system in Guatemala presented a pattern of denial of justice and impunity regarding the crimes committed against IP during the conflict. In other words, IP lived under permanent threat of being victims of ED and the State would not show any will to investigate those crimes.

Thus, since it was a state practice to target IP, this can be seen as an endemic factor of risk that IP faced in Guatemala. Therefore, this permanent threat of being a victim of ED, and the denial of justice to the indigenous missing person's next of kin, were -additionally to the already existing vulnerability factors recognized to IP- structural factors that placed them in an aggravated condition of vulnerability in Guatemala.

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