

# THE PROCESS OF DEMARCATION OF TRADITIONAL INDIGENOUS LANDS IN THE SOUTHERN REGION OF BRAZIL: AN ANALYSIS OF LEGAL AND POLITICAL OBSTACLES

O PROCESSO DE DEMARCAÇÃO DAS TERRAS TRADICIONAIS INDÍGENAS NA REGIÃO SUL DO BRASIL: UMA ANÁLISE DOS OBSTÁCULOS JURÍDICOS E POLÍTICOS

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## ABSTRACT

The proposed study aims to analyze the problem of demarcation of indigenous lands in the southern region of Brazil. Initially, the historical aspects, relevant concepts, constitutional rights and guarantees of indigenous peoples and interventionist policies in defense of these peoples were addressed. In this sense, the role of FUNAI as an organ directly responsible for the demarcations was highlighted, but, especially the current situation of the processes of regularization of indigenous areas. The deductive method in theoretical and qualitative exploration was used as a scientific methodology with the use of bibliographic and legal documentary material. It was found that one of the main obstacles to the effective demarcation of indigenous lands is linked to the absence of public policies, in which the interests of certain groups overlap with diffuse and collective interests. In addition, the lack of trained civil servants at FUNAI, the low budget and the lack of staff in the judiciary, coupled with the great demand for lawsuits of all kinds, in all spheres of this power, end up generating the impasses the definitive demarcations, a since administrative procedures cannot be finalized and, in the end, a large part of these processes will end up in the Judiciary.

**KEYWORDS:** Indigenous peoples. Demarcation. Indigenous rights. South region of Brazil.

## RESUMO

*O estudo proposto tem como objetivo analisar a problemática da demarcação das terras indígenas na Região Sul do Brasil. Inicialmente abordou-se os aspectos históricos, conceitos relevantes, direitos e garantias*

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constitucionais dos povos indígenas e as políticas intervencionistas na defesa destes povos. Neste sentido, destacou-se o papel da FUNAI como órgão responsável direto pelas demarcações, mas, especialmente a situação atual dos processos de regularização das áreas indígenas. Foi utilizado como metodologia científica o método dedutivo em exploração teórica e qualitativa com a utilização de material bibliográfico e documental legal. Constatou-se que um dos principais obstáculos para as efetivas demarcações das terras indígenas está ligado à ausência de políticas públicas, em que os interesses de determinados grupos se sobrepõem aos interesses difusos e coletivos. Além disso, a falta de servidores públicos capacitados na FUNAI, o baixo orçamento e a falta de pessoal do judiciário, aliada à grande demanda de processos de todas as espécies, em todas as esferas deste poder, acabam gerando os impasses as demarcações definitivas, uma vez que os procedimentos administrativos não conseguem ser finalizados e, no final, grande parte destes processos vai parar no Poder Judiciário.

**PALAVRAS-CHAVE:** Povos indígenas. Demarcação. Direitos indígenas. Região Sul do Brasil.

## 1 INTRODUCTION

The occupation and conquest of the title, "New World", by European conquerors in relation to the future American continent, aimed at the exploitation of wealth, mainly precious metals, gold and silver. These metals, mainly, gold constituted the basis of measure of wealth of the new Absolutist States of the 15th century.

However, the Europeans found in this "new" territory "discovered" when crossing the Atlantic Ocean, diverse native peoples with different languages, cultures, traditions and forms of social organizations. In certain regions were found: complex civilizations (with complex forms of social organization) and others with more tribal organizations. However, all with models of social organization, totally different from European models.

At first, European conquerors, needing the knowledge of these peoples on how to survive in this "new" land, sought to understand and tolerate these peoples. However, after the emergence of the first conflicts and with the European need to exploit and enslave indigenous peoples in order to forge the economic model for exploiting the wealth of the land, a great massacres began.

At no time in the entire history of occupation and conquest of American territory, the protection of the rights of indigenous peoples and the maintenance of their lands was in the scope of this process. On the contrary, what was established was: a genuine genocide of these peoples, with a view to exterminating this culture and all their rights over their land and their millenary form of life.

Throughout the colonial, imperial, republican, military and finally democratic periods, indigenous peoples were: sometimes ignored, sometimes treated as if they were not human, sometimes treated as incapable (which somehow still remains), and their rights weren't respected, especially with regard to land rights.

The 1988 Brazilian Constitution strengthened some ideas and policies that had emerged from 1910 onwards. However, it was only with the advent of the 1988 Constitution that real attention was paid, even if on a small scale, to the rights of indigenous peoples. The 'Statute of the Indian' (*Estatuto do Índio*) was approved by the 1988 Constitution and, although outda-

ted, strengthens the need to guarantee the living conditions of indigenous peoples, both in terms of integration, which the statute provides, and in terms of maintaining their identity.

Thus, a legal and factual analysis of the current situation of indigenous peoples in Brazil will be made, more especially with regard to territorial issues and the demarcation of indigenous lands, as well as political and legal obstacles that may harm the effecting the aforementioned demarcations in the southern region of Brazil.

## 2 TRADITIONAL INDIGENOUS LANDS AND THE EFFECTS OF COLONIZATION

Initially, it should be noted that European occupations<sup>3</sup> caused significant changes in the culture and demography of the diverse indigenous populations that resided in the country. The demographic changes were due to the colonization itself, with struggles due to the demarcation and territorial conquests, diseases transmitted by white people, in addition to “[...] intensive exploitation of indigenous labor, such as slavery [...]” (our translation into english) (COLAÇO, 2005, p.11-12).

Cultural changes were due to the lack of respect for the culture of indigenous peoples, which was gradually being destroyed, since the colonizers began to impose their own culture on the colonized indians. Important changes have occurred for indigenous peoples, especially with regard to evangelization, with significant consequences for their culture, since the arrival of the Jesuits culminated in a significant change in the religious beliefs imposed from this and there. The Jesuits, coming from Europe, served primarily to the interests of the Spanish Monarchy, “occupying the territory, defending its borders, and, through tutelary power, acting as an efficient vehicle for the dissemination of European Christian-Western culture” (our translation into english) (COLAÇO, 1998, p.05).

Europeans viewed the Indians as a completely inferior species and without any capacity to govern themselves, even with the belief that there was no legal system between these peoples, which proved not to be real, over the years and after many research and analysis. Thus, through the tutelage imposed on the Indians by the Europeans, through the Jesuits, they justified by what they called, at the time, humanization (COLAÇO, 1998, p.22).

It is possible to observe that since the beginning of the European conquests and colonizations, in the “new” American continent, there was no observance of the rights of these original peoples, or of the legal systems proper to the indigenous populations, imposing as essential the implementation of situations and conditions that aimed at guaranteeing the continuity of the colonizers' projects. In this sense, the search for wealth and the imposition of culture, religion and civility of the dominants, without paying attention to the fact that the real owners of the land found at the time, were the people who were already there, with the rights of use and pre-existing occupation, with ‘rules’ already established (WOLKMER, 2001).

3 Europeans, according to history, when they arrived in America didn't know that they were here, believing that in reality that they landed in India, even having called the peoples who lived here as ‘Indians’ for such reasons. In fact, Christopher Columbus himself ended up dying, after two trips, believing that he had actually arrived in Asia. (GALEANO, 1980).

In the case of the history of the conquest and colonization of Brazil, on the part of the Portuguese who arrived here, they met native peoples (original), who in a generalized way they called 'Indians'<sup>4</sup> and who had a history and culture different from the European peoples<sup>5</sup> (COLAÇO, 2005).

When the Portuguese arrived in Brazil, several indigenous populations occupied the territory, and the Tupi-Guarani were predominantly on the coast, where European conquerors<sup>6</sup> from Portugal first arrived. In this way, these populations were the first to suffer cultural and social interference, as a whole, from European peoples. In addition, they were captured and forced to work for the colonizers, thus causing the annihilation of their traditions, customs, beliefs, cultures and their history, which started to mix with the history of the then invaders. (SANTOS, 1973)

Meira (2013, p. 103), points out that, in Brazil, "what was in effect from Colony to the Empire was a strong reduction in the indigenous population due to epidemics, wars and exploitation of indigenous labor", not having existed, in the first centuries, any political, humanitarian or cultural concern or interest with these peoples.

These original peoples, in addition to their own traditions and cultures, had a legal order, or legal rules, even if these weren't written or if there is no real knowledge about them. On the contrary, the indigenous peoples found in Brazil at the time of its colonization, had until then, norms of conviviality elaborated by the own group to which they belonged, which they called 'tradition'. These norms, or traditions, should be respected and followed, under penalty of the individual who disobeyed, being excluded and abandoned by the group of which he was part, after all, "[...] circumventing customs would be disrespecting taboos, it would be irate the gods and nature [...]" and this would jeopardize both, the individual and the group as a whole (our translation into english) (COLAÇO, 2005, p. 23).

The sociopolitical and legal institutions of these original indigenous peoples attended to their needs for conflict resolution, organization and social interaction for millennia. These institutions, if we can call them that, had another form of organization and constitution totally different from the European model of the same period (MONTE, 1999, p. 17).

It's necessary to highlight that although the evangelization and integration of indigenous peoples have suppressed the traditions, customs and legal system of these peoples, they still maintain traces of their own cultures, which ends up turning them into an example of resistance to the system of legal monism imposed by the colonizers (MONTE, 1999).

The first rules that governed the situations of the indigenous peoples found in Brazil were the letters exchanged between the colonies and their territories, and in the case of Brazil, it should be emphasized that it was the Portuguese Empire, through the 'Royal Charter', dated 9 April 1655 (*Carta Régia, 09/04/1655*) and, subsequently, the Pombaline Law of 1755 (*Lei Pombalina de 1755*). The aforementioned 'Royal Charter' established certain rights

4

5 In the eyes of Europeans, the Indians were inferior specimens and unable to self-govern; thus, through the tutelary regime they would bring civilization and the consequent [sic] "humanization", legitimizing transmission and cultural interference, inserting them in a new socio-cultural order. (COLAÇO, 2005, p. 13).

6 "The term "discovered", which for a long time has been used in official Latin American history, disregards in a prejudiced and arbitrary manner the indigenous peoples that inhabited the American continent. For the approach in the present study, we opted for the use of the word "conquest", which represents in a more reliable way the reality that happened at that time". (Our translation into english) (PREVE, 2019, p. 148).

for indigenous people, but paradoxically, allowed certain situations for them to be enslaved (ALENCAR, 2015, p.01)

The first legal norm that brought some security to the indigenous peoples, was the Imperial Law 601 of 1850, which reserved the lands of the villages to these peoples<sup>7</sup>, which were summarized in groups of various ethnicities, including the indigenous peoples, in a determined area of land, with the purpose, in particular, of maintaining control and catechizing the peoples gathered there (ALENCAR, 2015, p. 01).

The so-called 'villages' gave rise to what was called the "Directory of the Indians" ("*Directorio dos Índios*"), at the time created by the Marquis of Pombal, in the middle of 1757, which would last until 1798, having, during this period, instituted policies that were limited to confining indigenous populations in small land conglomerates, which, as a rule, were limited to the surroundings of their small villages. "This policy, associated with the practice of transforming all other spaces into vacant lands on which third parties were allowed to hold titles, will create land chaos, in fact and in law, in which the Indians were involved" (our translation into english) (ARAUJO, 2006, p. 25).

The 1891 Constitution didn't change the legal, human, political and national situation of indigenous peoples. Only in 1910, the Indian Protection Service (*Serviço de Proteção ao Índio - SPI*) was created - commanded by Marechal Rondon, which started to bring some peace and security to the native peoples of Brazil, until then, not considered members of the Brazilian people (ALENCAR, 2015, p.01).

Only in 1934, the Indians began to have effective legal protection, and the text of the Constitution of that year, established the private competence of the Union to legislate on the incorporation of forestry into the national communion, in its art. 5º, and in its article 129, it established "(...) respect for the possession of lands of forestry that are permanently located in them, being, however, forbidden to alienate these lands". (BRASIL, 1934)

New changes in relation to the indigenous question were only observed in the following Constitution, of 1967, and in the Constitutional Amendment of 1969 (*Emenda Constitucional de 1969*), which maintained such provisions, adding, in article 186 of the aforementioned Constitution, that the indigenous lands belonged to the goods of the Union. Meanwhile, this 1969 Amendment included in article 198 the nullity of the legal effects of dominance, possession or occupation by third parties of indigenous lands without the right to action or indemnity against the Union and the FUNAI. (ALENCAR, 2015, p. 1)

In 1988, with the entry into force of the current Brazilian Constitution, indigenous peoples began to have an entire chapter protecting them, as well as their legacies, in addition to articles scattered throughout the constitutional text, such as article 231, which protects and guarantees to the indigenous peoples, their languages, customs, traditions, land rights originally and traditionally occupied by them, recognizing them as a social organization. (ALENCAR, 2015)

7 Village: destination of areas where indigenous communities were gathered under the administration of religious orders (especially Jesuits) and which followed the so-called 1686 Missions Regiment, aiming in particular to facilitate the work of religious assistance, or catechesis. (ARAUJO, 2006, p. 25)

In terms of the relevant concepts for understanding the proposed work, it's possible to find them in Law nº 6.001/1973, which provides for the status of the 'Statute of the Indian' (*Estatuto do Índio*). Thus, it's necessary that these concepts are explained here, as follows.

The legislation in question, in its article 3º, item I, describes as being Indian, or silvicultural, any and all individuals that have pre-Columbian origin and ancestry and that can be identified as belonging to an ethnic group and that their cultural characteristics may distinguish him from national society. Still, in item II, of the same article there is a description that the Indigenous Community, or Tribal Group, is characterized when a set of Indian families or communities, who live both in complete isolation and in permanent contact, or not, with others sectors and social groups, aren't integrated to the this latter.

The article 4º of Law Nº 6.001/1973 also explains that indigenous populations will be considered isolated when they live in unknown groups or, even when about these groups we have little and vague information, usually through occasional contacts with elements of the national communion.

On the other hand, the Indians are considered integrated when they are united to the national communion and profiled in the full exercise of all civil rights, even if they maintain their own uses, customs and traditions. And, if they are in permanent or intermittent contact with foreign groups, and retaining part of the conditions of their Aboriginal life, but being open to accept certain practices and lifestyles common to other sectors of the national communion, from which they become increasingly more dependent for self-support, we can say that they are in the process of integration (FUNAI, 2018).

With regard to the concept of indigenous lands, Law Nº 6.001/73 brings in its article 17, the following legal requirements:

Art. 17. Indigenous lands are reputed:

I - lands occupied or inhabited by foresters, referred to in articles 4º, IV, and 198, of the Constitution;

II - the reserved areas referred to in Chapter III of this Title;

III - lands belonging to indigenous or forestry communities.

(Our translation into english) (BRASIL, 1973).

Occupied lands are those that are traditionally inhabited and used by indigenous populations, although there are no demarcation actions or even recognition by the State. (CAVALCANTE, 2016)

According to Cavalcante's (2016) understanding, when talking about 'reserved lands', described in Chapter III of Law Nº 6.001/1973, reference is made to the lands expressly called 'indigenous reserves', which are demarcated by State power, so that the Indians can occupy them and take possession of them, regardless of whether there was already a previous occupation on the part of these peoples.

The 'lands belonging to indigenous communities or to forestry', on the other hand, refer specifically to the dominant territories, that is, they actually belong, with record ownership, to the Indians, which in reality, occurs in rare cases. In contrast, the two species described above, that is, the 'traditionally occupied lands' and the 'indigenous reserves', effectively belong to the Union, without title to the indigenous populations. (CAVALCANTE, 2016)



At the end of the 19th century, when European immigrants came to work in Brazil, after the abolition of slavery, it was observed in the southeast and south of the country, more specifically in the states of São Paulo, Paraná and Santa Catarina, the appearance of countless conflicts with the indigenous peoples who were expelled from their territories by the immigrants who arrived here. (MEIRA, 2013, p. 104)

And at the end of the previous century and the beginning of the 20th century, the Brazilian government decided to expand its telegraph lines in relation to the west / northwest, towards the State of Mato Grosso, culminating in the entry of employees into unexplored territory, which caused to become aware of innumerable tribes and indigenous populations hitherto unknown. In this context, the figure of Cândido Rondon emerged, a military who would defend the indigenous peoples and fight against the acts of extermination of these populations that occurred intensely in the south and southeast regions. "His motto 'to die if necessary, to kill never' has become legendary". (MEIRA, 2013, p. 104)

Due to the great influence of Cândido Rondon, in 1910 his arguments were able to influence the government to the point of creating the 'Service for the Protection of Indians and Location of National Workers' (*Serviço de Proteção aos Índios e Localização dos Trabalhadores Nacionais - SPILTN*), which became known as *SPI*, from 1918, which would last until 1967, as previously highlighted. (MEIRA, 2013, p. 105)

It's also necessary to highlight the interventionist policies to protect indigenous peoples in Brazil. One of the main milestones in this regard was the creation of the Indian Protection Service in 1910 (*Serviço de Proteção aos Índios - SPI*), which had no chance of recognizing indigenous peoples their deserved rights, especially to land, as determined by the new legislation in force at the time. In 1910 there was a movement to recognize indigenous lands, which should be done by the Member States of the Union and their respective municipalities. However, as the lands had been transformed into vacant land, and, consequently, the Portuguese Crown had transferred its to whoever interested it ((transfer of land according to the interests of the Portuguese Crown), became difficult to demarcate the territories for the occupation of indigenous peoples. (ARAUJO, 2006, p. 27)

The real changes began between the years 1967 and 1969, with the 1967 Constitution and the 1969 Constitutional Amendment, which declared indigenous lands to be the patrimony of the Union, removing, at least, the continuity of the drudgery practiced by the entities federated and private sectors allied to their governments. In addition, the legal provisions began to guarantee the exclusive enjoyment of natural resources that may exist on the lands they occupy, in addition to expressly annulling acts that had an impact on the lands occupied by the indigenous people, without any indemnity or understanding of 'acquired rights'. (ARAUJO, 2006, p. 30)

Although the protectionist speeches were fierce, in practice the military government didn't fulfill with the promises of inspection and punishment of those responsible for the squandering of the indigenous people's heritage and non-compliance with legal provisions, culminating in 1967 with the extinction of the *SPI*, and, concomitantly, with the creation of "National Indian Foundation" (*Fundação Nacional do Índio - FUNAI*). (ARAUJO, 2006, p. 31)

The *FUNAI*, however, would be built on the basis of the *SPI*, following, in fact, the same guidelines and operation, which, in practice, didn't bring, at that time, any different result. The

situation and the pressure on the government ended up forcing the military government to draft specific legislation to defend the interests of indigenous peoples, when then, in 1973, the Law Nº 6.001, called 'Statute of the Indian' (*Estatuto do Índio*), came into force. (ARAUJO, 2006, p. 31-32)

The 'Statute of the Indian' is based on the premise of the progressive and harmonious integration of indigenous peoples into Brazilian society and in the legal system. "In other words, the objective of the Statute was to make the Indians gradually stop being Indians". (ARAUJO, 2006, p. 32)

However, from 1988 onwards, FUNAI became a kind of tutor of the indigenous peoples, as if they were totally or relatively incapable, including, with some difficulty for the judiciary of that time to understand the possibility of the Indians to choose their own representatives, especially lawyers, since they suffered with the need to always clarify their interests regarding the representation of those - lawyers, before the police and judicial authorities. (ARAUJO, 2006, p. 41-42)

Centuries after colonization, now it's possible to glimpse the existence of the 'National Policy for the Promotion and Protection of Indigenous Peoples' (*Política Nacional de Promoção e Proteção dos Povos Indígenas - PNPPPI*), it appears that although the protectionist discourse has been widespread for a long time, it's possible to observe, in recent years, the growing concern with the real rights and guarantees provided for in the Constitution, at least, in theory. (FUNAI, 2018)

As extracted from the topic 'indigenous policy', on the Portal of the Ministry of Justice (*Portal Brasileiro do Ministério da Justiça*), it's necessary to highlight that innumerable norms have been elaborated with the intention of guaranteeing real protection to the Indians, including, with deconcentration and decentralization of the relevant policies in relation, for example, to the education for indigenous peoples and questions about indigenous health. (FUNAI, 2018)

It happens, however, that no matter how valiant and intense the drafting of legislation capable of guaranteeing rights and public policies to the Indians, it's only the constant enforcement and inspection of these norms that will be able to eliminate the homeless abandonment to which the indigenous peoples are subject. As in all national sectors, indigenous peoples need more attention and effective administrative acts capable of causing real impacts in terms of constitutional rights and guarantees, as shown in the following approach.

In this sense, due to the magnitude and impacts generated since the Brazilian Constitution of 1988 came into force with respect to the fundamental rights and guarantees of indigenous peoples, it is necessary to list some highlights. This is because, the Constitution of 1988 established the recognition to indigenous peoples of 'collective and permanent rights', "(...) creating the bases for the establishment of the right of a multi-ethnic and multicultural society, in which peoples continue to exist as peoples that they are, regardless of the degree of contact or interaction they have with other sectors of society". (ARAUJO, 2006, p. 45)

The 1988 Constitutional text, mainly in the provisions of article 231, recognizes the rights of the Indians in relation to social organization, customs, languages, beliefs and traditions, and the original rights over the lands that they traditionally occupy, determining that the Union is responsible for the protection and demarcation of indigenous lands.



It's clear, therefore, from the text expressed in the Brazilian Constitution, that indigenous peoples came to have greater protection, at least in theory, in relation to their individual and collective rights, as well as in relation to lands considered as 'traditionally occupied', and the Union is responsible for ensuring these rights.

The rights provided for in the transcribed article can be translated into: extra-patrimonial rights (such as the right to social organization, customs, languages, beliefs and traditions, that is, in a more summarized way, the right to difference), and, patrimonial right (which is summarized in the right to land/soil), the latter being considered original rights, that is, rights that precede the creation of the State itself. (OLIVEIRA, 2017)

It's possible to see, therefore, that the Constitution of 1988 brought important determinations regarding the rights and guarantees of indigenous peoples, especially with regard to the lands traditionally occupied by these peoples, guaranteeing them, in a way, that their cultural and traditional assets/goods are maintained and preserved.

In this way, the Constitution of 1988, more specifically in its article 231, assures the rights of indigenous peoples to their traditionally occupied lands, in face of the absence of express rules, which ended up causing several legal insecurities to those interested. In this sense, it's possible to note that even with the guarantees and protections of rights related to indigenous peoples by the 1988 Constitution, the social history of the formation of the Brazilian State, since the colonial period, still marks our society with profound social inequalities experienced between its people. (CUSTÓDIO; LIMA, 2009, p. 286)

Furthermore, it must be emphasized that the law has always been at the service (and still is), and was elaborated, in its most part, by a 'power-hungry bourgeois social elite'. "The normative production had as one of its functions the exercise of social control over the less favored classes, concealed by political and economic interests". (CUSTÓDIO; LIMA, 2009, p. 286)

However, it's undeniable to note the advances provided by the Constitutional Charter of 1988. From this legal statute, several complementary and ordinary laws unfolded. Thus, in order to reinforce the legal provisions that deal with the issues of demarcation of indigenous lands, now constitutionally guaranteed, the existence of the following legal instruments on the subject is emphasized: Decree N° 1.775/1996, which provides for administrative procedures for demarcations; Decree N° 5.051/2004, which promulgated Convention n° 169 of the International Labor Organization – ILO (*Convenção 169 da Organização Internacional do Trabalho - OIT*), on indigenous peoples; Ordinance MJ No. 14/96 (*Portaria MJ N° 14/1996*), which came to establish rules on the preparation of the detailed report on the identification and delimitation of indigenous lands; Ordinance MJ N° 2498/11 (*Portaria MJ N° 2498/2011*), which regulates the participation of federated entities within the scope of the administrative process of demarcating indigenous lands; the Normative Instruction of FUNAI N° 02/2012, which establishes the Permanent Commission for the Analysis of Improvements (*Comissão Permanente de Análise de Benfeitorias - CPAB*) and establishes the procedure for indemnification of the improvements implanted in the interior of indigenous lands; and, finally, the Ordinance N° 682/PRES – FUNAI, of June 24, 2008 (*Portaria N° 682/PRES – FUNAI – 24/06/2008*), which establishes the 'Manual of Physical Demarcation of indigenous lands' (*Manual de Demarcação Física de Terras Indígenas*).

Furthermore, it urges to register that FUNAI's main function, since its creation, but especially after Law Nº 6.001/1973 came into force, has always been to protect the interests of indigenous peoples, as well as their heritage, considering those relatively unable to practice self-representation. (ARAUJO, 2006)

In view of the approaches made so far, and based on the position of Araujo (2006), it appears that several measures have been taken, in recent years, so that the indigenous populations have their right to land respected, and from this derives the respect for other aspects intrinsic to indigenous peoples, such as customs, traditions, culture, religion, etc. If the laws, although still precarious in the sense of protection, have been encouraging the territorial desires of the indigenous people, it's necessary that the conducts and procedures are more viable and agile.

Thus, on the other hand, "one or the other" wouldn't be allowed to have absolute power over decisions that defer, or not, the administrative processes of demarcation of indigenous lands, thus, avoiding that errors remain surrounding the indigenous peoples to effectively exercise their power in their lands.

### 3 LEGAL AND POLITICAL OBSTACLES FOR DEMARCATION OF INDIGENOUS LANDS IN SOUTHERN BRAZIL

It's not possible to specify the time when the first inhabitants started to occupy the territories in South America, and, consequently, in the south of Brazil, although it's estimated, through anthropological studies, that the human presence dates, in the southern region of Brazil 13 (thirteen) thousand years ago, migrating from North America to regions of South America, and, later, settling in the southern region of Brazil. (LISBOA, 2010)

The first written records of indigenous peoples in the southern region of Brazil date from 1626 and 1630, when the Jesuits, colonizers and politicians began to migrate to this region on missions that, as history indicates, had as main objective to put an end to disputes of the region between the Portuguese and Spanish crowns. (LISBOA, 2010)

In relation to the indigenous peoples encountered when the Europeans occupied southern Brazil, the following stand out: the Kaingang, Xokleng and Guarani. (LISBOA, 2010, p. 31). The conflicts with these peoples and the European colonizer had as main element of dispute the occupation of the indigenous lands.

In this process of established conflicts, the social figure of the so-called 'bugreiros' is pointed out, who were nothing more than 'Indian hunters', since these, cornered and with their areas and territories being occupied, destroyed and with their smaller lands, started to attack the cattle and the colonists' farms in search of plundering for survival. The way the aforementioned 'bugreiros' acted, exterminating and massacring indigenous populations, was highlighted in the southern region of Brazil, since the State was unable to provide the security that the colonizers demanded. (LISBOA, 2010)

Only with the creation of official indigenous entities, such as the *SPI*, for example, was it possible to observe the beginning of the demarcation of indigenous lands in the territories of

southern Brazil, and that, despite not having fulfilled their function, in many circumstances, as already highlighted, they prevented major massacres from being committed against the indigenous people and that, in some way, the demarcation of their lands began, as the legislation in force at the time prescribed. (LISBOA, 2010)

Thus, based on the provisions of the Constitution of 1988 and Decree N° 1.775/1996, the process of demarcating indigenous lands constitutes an administrative procedure aimed at identifying and signaling the limits of areas traditionally occupied by indigenous populations.

In relation to the aforementioned Decree, according to Araujo (2006), the procedure for demarcating indigenous lands, established in this Decree N° 1.775/96, is divided into some stages.

The first stage is the identification, in which FUNAI appoints an anthropologist who will prepare a study on the area to be demarcated. This study will support the work of a chosen technical group, preferably formed by members of the indigenous body, as a rule, of the FUNAI, "which will carry out complementary studies of an ethno-historical, sociological, legal, cartographic and environmental nature, in addition to the land survey for the delimitation of the limits of the Indigenous Land" (our translation into english). The work carried out must be presented to the president of the '*Fundação Nacional do Índio*', who will approve it, and the official document will be published soon after, in addition to being fixed on a public mural in the Municipality where the demarcation takes place. (ARAUJO, 2006, p.50)

The second stage is called contradictory. It's the next moment, when, the publication is made and the notice is posted on a municipal mural: the opportunity opens for States, Municipalities, or any other interested party to challenge the demarcation procedure, within the period of 90 (ninety) days from the publication, requesting and presenting evidence that may establish indemnity or point out defects in the technical report. "From then on, FUNAI has 60 days to give an opinion on the reasons of the interested parties and forward the procedure to the Minister of Justice" (our translation into english). (ARAUJO, 2006, p. 50)

Then, in the third stage, there is the 'declaration of limits', which is the moment when the Minister of Justice, within 30 (thirty) days, must make the declaration of the limits defined in the technical study, and, finally, determine the physical demarcation of the territory in question. "Instead, however, he may choose to prescribe due diligence to be carried out in another 90 days, or even disapprove of the identification through a reasoned decision, to also be published in the official press" (our translation into english). (ARAUJO, 2006, p. 50)

Once the previous steps have been completed and the Minister of Justice has declared the limits, without any request for diligence or disapproved of the identification, in the manner previously explained, it proceeds to the fourth stage of physical demarcation.

This stage will be carried out by FUNAI, which will place physical landmarks, place plaques, bites in the vegetation, among other ways of marking the limits of the area defined in the technical study. "Still at this stage, the National Institute of Colonization and Agrarian Reform, as a priority, will resettle any non-Indian occupants" (our translation into english) (*Instituto Nacional de Colonização e Reforma Agrária - INCRA*). (ARAUJO, 2006, p. 50-51)

The fifth stage is the Homologation, being that "the entire demarcation procedure will, finally, be submitted to the President of the Republic for ratification by means of a decree" (our translation into english). (ARAUJO, 2006, p. 51)

Finally, the sixth and final step consists of Registration. "The demarcated and homologated Indigenous Land will be registered, within 30 days, at the Real Estate Registry Office of the corresponding district and at the Union Patrimony Secretariat" (*SPU - Secretaria de Patrimônio da União*) (our translation into english). (ARAUJO, 2006, p. 51)

In this way, the administrative procedure for the demarcation of indigenous lands can be considered an 'act of a purely declaratory nature'. In other words, the administrative act of demarcating indigenous lands doesn't constitute any right, but only, recognizes an existing right, which, as described above, is an original right, arising from the Constitution of 1988.

In addition, as indigenous lands came to be considered as Union assets, they are, as already stated, inalienable and unavailable, as well as, the rights over them have become imprescriptible, and these lands currently house around 300 peoples throughout the national territory. Currently, it's possible to observe 462 indigenous lands regularized in Brazil, occupying around 12,2% of the national territory, with the largest concentration is in the area called the Legal Amazon (*Amazônia Legal*). Of these areas, the South and Southeast Regions have the lowest percentage of distribution. (FUNAI, 2018)

In the areas of greatest impact resulting from colonization, which developed economically more intensively, the possession of the Indians remained low and sparse, without taking into account the real needs of these peoples to maintain their way of life and their survival. It's precisely in regions such as Mato Grosso do Sul, and more especially the States of Paraná, Santa Catarina and Rio Grande do Sul that there are the greatest incidences of conflicts regarding the 'land tenure regularization of indigenous lands' and territorial disputes.

Regarding policies to encourage the regularization of indigenous lands, the following is extracted from the *FUNAI* online portal:

This occurs based on specific policies, tax incentives and transfer of federal resources exclusively destined to indigenous lands and to indigenous policies developed inside and outside indigenous lands (such as: ecological ICMS, transfers related to the territorial and environmental management of indigenous lands, transfers related to indigenous school education, resources related to housing policies aimed at indigenous lands, resources destined to actions of ethno-development, promotion of indigenous production and agricultural technical assistance in indigenous lands etc.). Especially in the states and municipalities located on the border, the demarcation of indigenous lands guarantees a greater presence and state control in these especially vulnerable areas and, in many cases, of remote access. (Our translation into english) (FUNAI, 2018)

It's observed in the text above that the Union, responsible for ensuring the application of constitutional and infraconstitutional rules, has policies to encourage Municipalities and States to implement and ensure the demarcation and regularization of indigenous areas, including with the transfer of resources and tax incentives.

In addition to the tax incentives and transfers of resources that benefit the federated entities, the regularization of indigenous lands brings, albeit indirectly, a benefit to society as a whole, starting with the reduction of conflicts over lands, understanding that these regularizations contribute to the construction of a multi-ethnic and multicultural society, and, finally, keeping alive the traditions and way of life of the indigenous populations, which end up enriching the country's cultural heritage. (FUNAI, 2018)

In addition to all the benefits and recognition of the right of human dignity of the Indians, it must be emphasized that the demarcation of indigenous lands brings benefits to the environment, and thus, has a direct impact on the international community, since the lands of the Indians are the ones that most maintains environmental protection.

However, according to Barros and Barcelos (2016), FUNAI faces multiple difficulties in equipping it, especially with regard to the lack of servers and qualified personnel to carry out the procedures required for the demarcation, which ends up being left to the Foundation, as rule.

Its possible to identify as main obstacles to the demarcation and regularization of indigenous areas, according to Barros and Barcelos (2016), budgetary and personnel restrictions at FUNAI, in addition to political pressures that stifle the constitutional right to land, the main claim of these peoples.

As stated by the employees, in a letter sent to the Government and the press, in 2016, FUNAI had 7 Regional Coordinations (*Coordenações Regionais - CR's*) and 297 Local Technical Coordinations (*Coordenações Técnicas Locais - CTL's*), decentralized units close to the indigenous people, and in many of this CTLs there are no employees, and when there are, there are only three. (BARROS E BARCELOS, 2016)

There are reports, including of cases in Paraná in which the Mayors of several Municipalities met to coerce and threaten the lives of CTL's employees, who even had to leave the regions, moving to Brasília. (BARROS E BARCELOS, 2016).

More than the obstacles caused by FUNAI's lack of structure, it's necessary to pay attention to the fact that the greatest obstacles to the effective demarcation and regularization of indigenous lands are to be found in the political and economic dispute.

Ruralist and agribusiness benches are the biggest obstacles to the realization of the demarcation of indigenous lands, since, driven by their own interests, landowners focused on agriculture and livestock, in addition to the large timber and mining companies, among other related companies to the extraction of natural resources, and all pressure the government politically so that the regularizations do not affect the progress of their businesses.

In the South Region of Brazil, the demarcation processes encounter numerous obstacles, especially due to the large number of registered property titles. This supposed regularity of lands duly registered in the name of owners who occupied them or obtained their titles many decades ago, makes political pressures more intense, including, with greater ease of articulation in the Judiciary. (BARROS E BARCELOS, 2016)

"In a context of reprimanding the country's exports, which has become even more dependent on agricultural and mining commodities, the contradiction with the indigenous agenda is evident again". (Our translation into english) (BARROS E BARCELOS, 2016, p. 1)

In addition, the judicial machinery is also outdated in relation to the number of civil servants, from technicians to magistrates and members of the Public Prosecutor's Office (*Magistrados e Membros do Ministério Público*), which has long been in existence. This lag of civil servants, as is known, makes Brazilian justice overly long, and, in one way or another, almost all administrative demarcation processes end up generating some kind of discussion in the judiciary.



Barros and Barcelos wrote (2016, p. 01):

In 2014, demarcations of three indigenous lands were canceled after a decision by the Second Panel of the Supreme Federal Court (STF). Two of these lands are at the epicenter of violence against indigenous peoples, Mato Grosso do Sul: TI Guyaroka, of the Guarani and Kaiowá peoples, and TI Limão Verde, of the Terena people. TI Porquinhos, belonging to the Canela-pãnjekra people of Maranhão, also had its demarcation canceled. The Supreme Court, however, has already adopted contrary positions. The court recently denied following a writ of mandamus requesting the revocation of the demarcation of the TI Morro dos Cavalos, in Santa Catarina, based on the timeline thesis. (Our translation into english)

In a general context it's possible to declare that the State, as a whole, has a lag of employees and trained personnel in all areas, ranging from *FUNAI*, which is responsible for the technical studies and stages of the administrative demarcation process, ending in the Judiciary, where most of the demarcation processes end.

In addition to the lack of state structure, it appears that private interests still tend to overlap with diffuse and collective interests, since one of the biggest, if not the biggest obstacles to the demarcation and regularization of indigenous lands are the political and economic sectors, in which agribusiness entrepreneurs, and other branches linked to the extraction of goods and products from the land, influence, through their benches, the decisions of the Executive, Legislative and Judiciary.

The right of indigenous peoples to lands, especially those they traditionally occupy, aims to: respect the cultures and traditions of native peoples, guarantee the reduction of territorial conflicts, promote sustainability and preserve the environment, in addition to ensuring that Municipalities and States fulfill their obligations to provide dignified care to their citizens. (FUNAI, 2018)

## 5 FINAL CONSIDERATIONS

During the first centuries of European occupation in Brazilian territory, indigenous peoples were massacred, killed, enslaved and, the most part, expelled or removed from the lands that they originally occupied. In the name of progress, civilization and private and governmental economic interests, indigenous peoples began to lose their traditions, customs, religions and forms of primary organizations, although, to a large extent, these peoples struggle to keep the ethnic memories of their people alive.

Regarding the procedures for the demarcation of indigenous lands, it appears that very few are the effective conducts, as the processes have been paralyzed due to the interests of certain economic groups or political groups. The dismantling that FUNAI, as a public space of the State that promotes public policies, has suffered includes reductions and cuts in budgets and personnel structure. This fact, combined with the procedural slowness of the Judiciary and the countless resources available to third parties interested in preventing demarcations, end up causing the delay in completing the demarcation processes of indigenous lands.



Throughout the Brazilian territory, especially in the South Region, the greatest obstacles to the demarcation and regularization of indigenous lands are to be found in the political and economic conflicts linked to the interests of agribusiness, in view of the fact that it's a region with high speculative capital of the land for the production of commodities. Therefore, disadvantaging those who are the original occupants of these territories and who end up being marginalized and excluded from any process of recognition of their original rights, especially the right over the land they live on.

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