LEGAL PLURALISM AND THE CONSUETUDINARY LAW OF INDIGENOUS COMMUNITIES WITHIN THE BRAZILIAN LEGAL ORDER

O PLURALISMO JURÍDICO E O DIREITO CONSUETUDINÁRIO DAS COMUNIDADES INDÍGENAS FACE AO ORDENAMENTO JURÍDICO BRASILEIRO

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ABSTRACT

The present work aims to analyze the customary law of the indigenous communities as a result of the legal pluralism within the Brazilian order. Legal pluralism is based on the idea that the Modern State is not the only legitimate agent to carry out the legal framework of the various forms of social relations. This perspective is opposed to the doctrine of legal monism, in which only the State has a monopoly for the production of legal norms, recognizing the multiplicity of sources and relations of law within the same legal system. The customary law of indigenous communities appears as a product of this multiplicity of sources and legal relations represented by the Federal Constitution of 1988 and the infraconstitutional rules. With this, the general objective of the research is to investigate the concept of legal pluralism, and as a specific objective we have the analysis of customary indigenous law as an element of the multiplicity of legal relations recognized by the Federal Constitution of 1988. In the end, we answer the questioning about customary law of indigenous communities as an expression of legal pluralism in the face of the national legal system. Therefore, from a bibliographic and qualitative survey, the descriptive and exploratory study of the theme was developed using the hypothetical deductive method of scientific approach.

Keywords: Legal pluralism. Customary indigenous law. Indigenous communities. 1988 Constitution.

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RESUMO

O presente trabalho visa analisar o direito consuetudinário das comunidades indígenas como resultado do pluralismo jurídico face ao ordenamento brasileiro. O pluralismo jurídico fundamenta-se na ideia de que o Estado Moderno não é o único agente legitimado a realizar o enquadramento legal das diversas formas de relações sociais. Essa perspectiva se contrapõe a doutrina do monismo jurídico, no qual apenas o Estado possui monopólio para a produção de normas jurídicas, reconhecendo a multiplicidade das fontes e das relações de direito no interior de um mesmo sistema jurídico. O direito consuetudinário das comunidades indígenas surge como produto dessa multiplicidade de fontes e relações jurídicas representada pela Constituição Federal de 1988 e as normas infraconstitucionais. Com isso, o objetivo geral da pesquisa é investigar o conceito do pluralismo jurídico, e como objetivo específico tem-se a análise do direito consuetudinário indígena como um elemento da multiplicidade das relações jurídicas reconhecido pela Constituição Federal de 1988. Ao final, responde-se ao questionamento acerca do direito consuetudinário das comunidades indígenas enquanto expressão do pluralismo jurídico face ao ordenamento legal pátrio. Para tanto, a partir de levantamento bibliográfico e qualitativo, o estudo descritivo e exploratório do tema desenvolveu-se por meio do método hipotético dedutivo de abordagem científica.

Palavras chaves: *Pluralismo jurídico. Direito consuetudinário indígena. Comunidades indígenas. Constituição de 1988.*

INTRODUCTION

Legal pluralism is a school of thought contrary to the doctrine of legal monism, by which the creation and legitimization of law is the sole prerogative of the state (WOLKMER, 2001, p.123). This opposition to a state monopoly arises from the cultural diversity present in all societies, understanding that said cultures include social, mythological, religious, symbolic and judicial elements apt to establish means of self-expression and interpretation of the surrounding world (CURI, 2005, p.100).

It is in this context that indigenous communities begin to configure an important contribution to the multiplicity of legal sources and relations in the Brazilian legal order. One notes that in the most recent census carried out by the Brazilian Institute of Geography and Statistics (Instituto Brasileiro de Geografia e Estatística), known as the IBGE, 12.5% of Brazil's national territory is indigenous territory.

In these territories indigenous communities emerge as notable representatives of legal pluralism within the Brazilian legal system, for indigenous social organization and customs configure their own social dynamic and create a legal system of their own, within the national legal system. The concept of an indigenous legal system made up of indigenous customary norms demonstrates the coexistence of two or more legal systems within the same geographic space, meaning that there may be a multiplicity of laws, by right of the recognition of differences. As such, pluralism legitimizes the diversity of legal sources coexisting within the same system.

In accordance with Rouland (2003, p.158-159) there are two ways to define legal pluralism. The first is considered the weaker concept, by which it recognizes the existence of different judicial mechanisms to handle the same situations within the same geographical space. The second is regarded as the stronger concept, based upon the existence of different social

groups, who go beyond the state's law, indicating, therefore, a multiplicity of legal orders that may coincide or diverge.

All the more, legal pluralism has as its chief objective demonstrating that the modern state is not the sole agent empowered to guarantee the legal relevance of the diverse new social relations that emerge. In this way, pluralists defend that legal pluralism does not intend to deny state law, but rather to legitimize other legal mechanisms existing in society.

As regards the legal systems of the indigenous communities, the acceptance of customary law was adopted by the Federative Republic of Brazil through the recognition of indigenous social organization, customs and traditions in the Federal Constitution of 1988, specifically in Chapter VIII, in the Statute of the Indian (Estatuto do Indio), as in the Convention 169 (Convenção 169) of the International Work Organization (Organização Internacional do Trabalho - OIT), ratified nationally by the Decree number 5051, dated April 19th 2004. Accordingly, constitutional recognition of the uses, customs and traditions of the indigenous, foreseen in the caption of article 231, and other rules that compose the national legal system, make possible the expression of legal pluralism dubbed independent, by which the internal organization of a given community is ruled by non-statal laws, which are the very customs of the indigenous communities.

Based on these legal clarifications, the present study has as objective the investigation of the concept of legal pluralism, and as a specific objective the analysis of customary indigenous law as an composing element of the multiplicity of legal relations recognized by the Federal Constitution of 1988, inquiring: does the customary law of the indigenous communities represent legal pluralism in the national legal system?

To that end, from bibliographical and qualitative research, the descriptive and exploratory study of the topic was carried out by means of the deductive-hypothetical method of scientific inquiry.

1 THE CONCEPT OF LEGAL PLURALISM

The concept of legal pluralism arose from the dialogue between anthropology and legal studies, furnishing an interdisciplinary approach denominated the anthropology of law or legal anthropology. For Korsbaek and Vivanco (2009), the anthropology of law is similar to the sociology of law, in that both study the law as a social phenomenon, seeking to identify the wellspring of law as an element of the social dynamic of which it is part.

Pluralism's points of reference regard the fact that a plural reality points to a factual inequality, which manifests itself in all facets of everyday life, even when the values comprising the conceptions of the different existing groups arise within the boundaries of the same country and share historical origins. (KOSBAEK; VIVANCO, 2009, p.156).

In this light, the Sociology of Law (SANTOS, 2010, p.100) has researched legal pluralism and identified the existence of the Law in multiple places, such as in rural areas, marginalized urban neighbourhoods, in sport, in church, in businesses, in professional organizations, without necessarily having their source in the activity of the legislature, but deriving rather

from the everyday and informal social interactions. The norms of this new Law, according to Santos (2010), are given the mark of infrastatal, informal, non-official and more or less customary. In this sense, the multiplicity of sources of Law is due to the existence of a living Law, reflected in social relations, habits and customs.

The legal system considered as that exclusively foreseen in legislation, in legal science or in case law becomes an arbitrary and fictitious law (EHRLICH, 1913 *apud* SÁNCHEZ-CASTAÑEDA, 2006). Understanding that the origin of the Law isn't necessarily a product solely of the state, but also of the different social relations apt to, additionally, be treated as an ensemble of rules that determine the position and function of individuals within a social group.

According to Bobbio (2007) it is possible to identify two phases of legal pluralism: the first phase refers to the conception and development of legal historicity, by way of the Historical School of Law, which affirms that rights emanate directly or indirectly from the common consciousness. As such, national legal systems are varied, given that there are many nations, each one with their own statal order. This first form of legal pluralism is characterized as statal.

The second phase refers to the institutional stage which has as a precondition the existence of a legal system, where an institution exists, translating into an organized social group. The consequence of this constitutional theory is the fragmentation of the universal idea of the Law and an enrichment of the existing problems between legal systems (BOBBIO, 2007, p.123).

Harmoniously, Woodman (1998) recognized the existence of a statal legal pluralism and a pluralism outside of state law. In the first scenario, there would be instances of plurality within the state system, such as, for example, different rules and means of judging commercial contracts. These contracts enjoy a certain independence in the determination of their rules but, at the same time, are obligatorily in harmony with state law that are above and contemplate these transactions. It would be a type of pluralism of control. The other form of pluralism would be unattached to the state, dubbed independent pluralism, in which the internal organization of a given society is governed by non-state laws, such as, for example, the autochthonous laws of the indigenous communities (WOODMAN, 1998, p.145).

2 LEGAL PLURALISM AND INDIGENOUS COMMUNITIES

In the indigenous communities legal pluralism is introduced in a solitary fashion. In statal society the state creates rules for the individual, whereas in indigenous communities the rules are communal, operated and recreated in reference to the collective (CURI, 2005, p.153). This collective is regarded as a subject of rights and obligations, which guarantees the self-determination of indigenous peoples are a group right to administer their society and determine their own destiny.

From this perspective a limit of interference is imposed upon the authoritative and centralizing state law. Accordingly, the state assumes the role of mediator of conflicts and interests, but no longer the role of intervener. The autonomy of the collective as a subject

commands respect in political, administrative, economical, cultural and judicial terms, both inside and outside of the indigenous community.

In this sense autonomy implies (KORSBAEK; VIVANCO, 2009, p.67): in the possibility of deciding about matters that affect your community, without interference and/or pressure from external legal mechanisms; in full participation in the democratic apparatus of the nation; in the use and administration of the resources available in your territory, in accordance with your own legal systems and in the recognition of the society relevant in your territory in the cosmogonical and material sense.

This autonomy of the indigenous communities that, as seen, implies in the right to their self-determination, many times enters into conflict with the current written law and the native rules of the indigenous communities. In this context, the position of the state may be to relativize the autonomy of the indigenous peoples by establishing rules derived from the values of the representatives of the national legislature. Conflicts arise with greater frequency in the matter of criminal law, in cases classified by the state's law as crimes against life, for these compose an ensemble of values considered superior to any other interest (CURI, 2005, p.157).

This because the western legal system is founded upon human dignity, which places a dignified life, a subjective cultural concept, as an universal value, legitimizing overt state action to restrain what the state itself has classified as an illicit act against life. Based on this, the state compromises the promotion of just treatment that should be allowed in criminal cases to the indigenous, their family members and, at times, their communities, for it ignores their cultural, social organization and value system (YAMADA; BELLOQUE, 2010, p.87).

Despite the Brazilian legal system recognizing the social organization of the indigenous communities, it is necessary to highlight that the intervention of state law in the communities is not yet adequately defined. If on the one hand legislation defined by the state must be applied throughout the national territory, on the other, the same state law guarantees different ethnic groups the right to live according to their uses and customs, which includes the collective right to define their internal rules. In relation to the indigenous peoples, this perspective of legislation - broad and, at the same time specific - is clear in the 1st article, single paragraph, of the Statute of the Indian, which establishes that the protection of the laws of the country extend to the indians and their communities, safeguarded their uses, customs and traditions (Law 6001/1973, Brasil).

It is also necessary to highlight the 9th article of the 169th Convention of the International Labour Organization (ILO), ratified by the Brazilian state, which establishes the following:

> 1. In so far as they are compatible with the national legal system and with internationally recognized human rights, all methods traditionally employed by these peoples for the punishment of crimes committed by their members must be respected.
> 2. Authorities and tribunals called upon to judge criminal matters must take into account the customs of these peoples about the subject matter (CONVENTION 169, ILO, BRASIL).

Convention 169 of the ILO guarantees respect for internal laws meant to stop crimes committed by indigenous people and places national legal systems and internationally recognized human rights above cultural rights. Collective rights must be observed, but must not

enter into conflict with the value system of the ruling society. This means that present legislation recognizes cultural diversity, but also continues to assume ethnocentric values, indicating that the realization of legal pluralism is still under construction, apt to spark doubtful interpretations and errors of judgement in relation to indigenous rights (CURI, 2005, p.160).

3 CONSUETUDINARY LAW

Consuetudinary law is defined as the aggregate of traditional social norms, spontaneously created by a people; unwritten and uncodified. The term "consuetudinary" means something founded upon customs, denoting a kind of customary law. Consuetudinary law is differentiated from written law, by right of the latter being legitimized by a constituted political authority, the state, from which all power emanates. Meanwhile customary law holds force and has effect independent of the existence of such an authority (CURI, 2005, p.140).

One must point out that, according to Manuela Carneira da Cunha (1990), customary law only exists in relation to written law and, thus, cannot be considered as anterior or autonomous before the state. Customary law, in this sense, only exists in opposition to written law and its own content is, partially or by contrast, informed by the existence of the state.

Customs represent important sources of Law, given how great a parcel of norms are structured in accordance with a society's way of life. On the other hand, current written law tints customs with a secondary value, framing customary law as something inferior or delayed, as if representing a bygone period prior to the constitution of the normative, written law emanating from the state (CURI, 2005, p.141). This view derives from evolutionary theses, which justified their theories with the idea that all of humanity successively passes through, in a single direction, a passage from simplicity to complexity, from irrationality to rationality, comprising three stages of development: savagery, barbarism and, at last, civilization.

The idea of the ruling society, which converts its culture into an universal paradigm, is that these people deemed "primitive" do not possess a legal system, for the absence of a state and written laws demonstrate their backwardness and the simplified character of their social structure. In the common parlance of this society, the indigenous peoples do not possess law, art or religion, but, at best, customs, craftwork and superstition (WOLFF, 2004, p.230).

In the same sense, traditional legal theory is unanimous in considering that codified law provides greater certainty to the Law than customary norms, this being the very reason that the law is placed above custom, affirming, moreover, that as societies evolve they abandon consuetudinary form and are transformed, progressively, into codified law (NADER, 1988, p.124).

4 THE CONSUETUDINARY LAW OF THE INDIGENOUS COMMUNITIES

To say the indigenous do not have laws is a common assertion in the legal world, this being the position found in common sense and among more conservative jurists (CURI, 2005, p.147). This understanding has its origin in the supposed "primitivity" of the social relations of indigenous communities. By such thinking, these conservatives affirm that traditional communities do not admit the characteristics of Law. Nevertheless, this consensus is based upon the evolutionary line of anthropology, which considered the indigenous a primitive stage of social evolution (CURI, 2005, p.150).

The cited evolutionary view became outdated within modern legal anthropology, thanks to studies which demonstrated that each society possesses its own organization, which does not serve as criteria to determine superiority or inferiority of social evolution. In this sense, Davis (1973), observes that "in every society there exists a body of cultural categories, of rules or codes that define the legal rights and duties between people; in every society disputes and conflicts arise when these rules are broken and, for the resolution of these divergences, there exist institutionalized means of reaffirming and/or redefining legal rules" (DAVIS, 1973, p.10).

Indigenous law is characterized as a consuetudinary or customary law, possessing the following specific traits: it finds itself immersed in a social body bound by all other aspects of culture, forming a unit; and their foundation is derived from communal strength and tradition, expressed through uses and customs. For the indigenous communities, customary law serves a worldview based on ancestral principles related to the natural order of events (CUEVAS GAYOSSO, 2000, p.111).

Rules are accepted and applied by indigenous societies by virtue of a collective consciousness that says these are good for men. The applications of these rules do not demand their inclusion in normative texts, for what legitimizes them is the common consciousness of the group that, knowing the general principles which determine their conduct, maintains the rules necessary for the resolution of specific problems (CURI, 2005, p.148). From this it is possible to see the difference between the customary law and written law of modern societies, which is the lack of separation between the social aspect and the legal aspect.

In the indigenous communities, the law acts submerged in the social body, in the shared uses and customs, involving oral tradition, hierarchies, and magical-religious reasonings that constitute the particular worldview of the community. And on the other hand modern societies separate these two aspects, the social and the legal, creating a dichotomy between form and content. In indigenous communities, customary law is a rule of communal organization founded upon their understanding of the cosmos, which makes possible the flexibility and profundity of indigenous consuetudinary law (CUEVAS GAYOSSO, 2000, p.112).

The term employed to define consuetudinary law is "rule", it being understood that it lacks the stringency of the term "legal norm", used for written law. The first permits adaptation within the society in which it manifests, in the measure that the second, present in a diverse context, is rigid and has its application in the imposition of the referent norm of conduct upon social phenomenon. Rules adapt themselves to the characteristics of society, converting into a common expression of an established group and with an inclination to upholding essential

values and principles. In this perspective, Cuevas Gayosso (2000) highlights the fundamental origin of customary rules, denominated "cosmological view".

The cosmological view is responsible for creating the diverse sources of consuetudinary law of the indigenous communities. In these, what creates the Law is not the will of the legislature, but the daily activities connected to the worldview of diverse social groups, which result in the creation of customary rules that are informally legitimized to discipline life in society. Thus, it also integrates customary law, which, despite being unwritten and uncodified, holds sway without the presence of the state (CURI, 2005, p.140).

5 THE RECOGNITION OF THE CONSUETUDINARY LAW OF THE INDIGENOUS COMMUNITIES BY THE BRAZILIAN LEGAL SYSTEM

The previous chapters discussed the concept of legal pluralism and the consuetudinary law of the indigenous communities. As such, the present chapter seeks to analyze the recognition of consuetudinary law by the Brazilian legal system represented by the Federal Constitution of 1988, and infra-constitutionally by the Statute of the Indian, the Law 6001/1973. The recognition of the consuetudinary law of the indigenous is given by article 231 of the 1988 Constitution, which recognizes the indians as regards social organization, customs, language, beliefs and traditions.

The Federal Constitution of 1988 inaugurated the constitutionalization of indigenous laws, recognizing the indigenous in accordance with their uses, customs and traditions, breaking with the assimilationist or integrationist paradigm. The non-recognition of the ethnic identity of the indigenous in previous Constitutions made the state conceive of them as a transitory reality, which would disappear to the degree that they were integrated in the national community. One highlights that the foundation of past constitutional texts were that the indigenous represented a primitive state of social evolution, as such it would be required that national society, ahead of them on the evolutionary scale, bring them out of the primitive stage (CUNHA, 1992, p.67).

This argument is derived from evolutionism, a strain of anthropology which arose in the 18th century, which cast the Indians as "good savages", witnesses of paradise lost and with the aspect of what westerners would have been in times past (ROULLAND, 2000, p.76). In the 19th century, began the second great phase of western colonization, during which evolutionary concepts became harder, creating the idea that colonization would serve the good of those peoples deemed primitive, helping them out of their evolutionary slowness (KAPLAN, 1975, p.167).

The first phase, known as unilineal evolutionism, exercised the greatest influence upon Brazilian constitutions in respect to the normative treatment rendered to Indians until the Constitution of 1988. Under this perspective, traditional societies live in a delayed state of human development, finding themselves in the infancy of so-called civilized society, the national community. As such, constitutional diplomas considered the indigenous as a transi-

tory reality, which would be incorporated into national society, the most advanced stage of social evolution, leaving behind their uses, customs and traditions (CURI, 2005, p.27).

With the recognition of indigenous laws, with their uses, customs and traditions the Constitution broke with evolutionism, which justified assimilation and began to recognize the indigenous in accordance with their ethnic identity. Throughout the whole constitutional text indigenous laws are recognized, however the 8th Chapter - Of the Indians demonstrates this most sensibly. As such, it is possible to extract various rights regarding the indigenous from article 231, the most evident being the right to their ancestral lands, but the recognition of uses, customs and traditions in the first part of the referred article brings the right to self-determination and the right to otherness, as well as the recognition of the consuetudinary law of the indigenous communities.

Consuetudinary law is not expressed in the text of article 231's caption, alongside the right to self-determination and the right to otherness, which is the right of the indigenous to live according to their uses, customs and traditions, and exercise them (BRASIL, 1988). Nevertheless, the respect for the internal (or customary) laws of the indigenous communities is affirmed intrinsically, for there is no means of recognizing the Indian's social organization without recognizing their own judicial systems.

The Statute of the Indian, the Law 6.001/1973, precedes the Federal Constitution of 1988 and thus conceived its normative policy under the auspices of unilineal evolutionism, whereby the indigenous were considered inferior to the national community and needful of incorporation into more advanced society. Consequently, the statute carried the contradiction of simultaneously protecting and incorporating the indigenous. The Constitution of 1988 adopted a different stance to the Statute, recognizing indigenous rights, such that all dispositions seeking their assimilation into the national community were revoked (LIMA, 2016, p.100). Nevertheless, the articles which sought the protection of indigenous rights remain in force, as does the protection of indigenous customary law:

> It befalls the Union, the States and the Counties (...), for the protection of indigenous communities and the preservation of their rights: to respect (...) the peculiarities inherent to their condition; to assure the indians the faculty of freely choosing their means of living and subsistence; to respect (...) the cohesion of indigenous communities, their cultural values, traditions, uses and customs (article 2, items III, IV and V). (Law 6001/1973, BRAZIL).

6 ILO's CONVENTION No. 169 AND INTERNATIONAL RECOGNITION OF THE CONSUETUDINARY LAW OF TRADITIONAL COMMUNITIES

The 169th Convention of the ILO (C169) becomes important in this context of legal pluralism and the recognition of the consuetudinary law of the indigenous communities by the Brazilian system, given the Federal Republic of Brazil ratified it by means of the decree numbered 5051, dated april 2004. The cited convention, together with the Constitution of 1988, legitimized the right of the indigenous to live according to their uses and customs. As

such it was also recognized that the indigenous and their traditional organizations should be involved in the planning and execution of development projects that affect them.

This materializes based upon the principles of respect towards the cultures, ways of living and consuetudinary law of these communities (CONVENTION 169 ILO, BRAZIL). Among the mechanisms used to legitimize indigenous rights adopted by the convention, two fundamental points are repeatedly cited to guarantee them: the necessity of consulting indigenous communities, through appropriate procedures, when legislative or administrative measures might affect them directly; and the right to define their development in accordance with their aspirations and own way of life, that is, the right to choose their priorities and further their own economic, social and cultural development (CONVENTION 169 ILO, BRAZIL).

In regards to the consuetudinary laws of the indigenous peoples, the C169, in its 8th article, determines:

> When it comes to applying national legislation to the concerned peoples, due consideration will be given to their customs or their consuetudinary law. These peoples will have the right to preserve their customs and own institutions, so long as these are not incompatible with the fundamental rights defined by the national legal system nor internationally recognized human rights. Whenever necessary, procedures must be established for the resolution of the conflicts which may arise in the application of this principle (CONVENTION 169 ILO, BRAZIL). In light of this provision, one verifies that the internal laws of the indigenous peoples, called consuetudinary law by the written law, are as recognized by the international system as by the Brazilian system. However, this recognition is with reserve, for the consuetudinary law of the indigenous cannot be incompatible with the fundamental laws of the States and international human rights. This is what the following chapter will analyze.

7 THE CONFLICT OF RULES BETWEEN THE WRITTEN LAW AND THE CONSUETUDINARY LAW OF THE INDIGENOUS COMMUNITIES

The Brazilian system is founded upon the Democratic State of Law and has as its fundamental principle the dignity of the human person. In this sense, the principle of human dignity serves as a foundation for the whole legal order, permeating the entire constitutional text. The dignity of the human person is listed as one of the bases of the Federal Republic of Brazil in the 1st arcle, item III, but also in other parts of the constitutional text, such as the caption of article 170, which states “the economic order, based on the appreciation of human effort and free initiative, has as its finality the assurance of dignified existence, in accordance with the dictates of social justice”. In the 7th paragraph of article 226, it is expressed that family planning must be founded upon the principles of the dignity of the human person and responsible parenting (BRAZIL, 1988).

Human dignity may be defined by two elements: the intrinsic value of all human beings and the autonomy of every individual, being that said autonomy may be limited by some

restrictions in the name of social values, or state interests, and for communal values (BARROSO, 2013, p.72). The intrinsic value represents the characteristics inherent to human beings, which differentiates them from other species. This characteristic occasions various fundamental rights guaranteed by law, chief of which is the right to life. Autonomy is the right of the individual to make their own choices, which in the legal sphere is ruled by private autonomy and public autonomy. Communal values represent the role of the state in the institution of goals to be met collectively, as well as restrictions imposed upon individuals in name of the greater good (BARROSO, 2013, p.73).

The three defined elements become important in order to understand eventual conflicts of rules between written law and the consuetudinary law of traditional communities. As previous chapters demonstrated, the Federal Constitution of 1988 recognized indigenous rights, inaugurating the constitutionalization of traditional laws (BARBIERI, 2009, p.69), even though consuetudinary law was not mentioned *ipsis literis* it is possible to infer it from the recognition given to the indigenous of their uses, customs and traditions in the caption of article 231. In this sense, where consuetudinary law does not violate human dignity, that is, does not violate the right to life nor place it under risk, it can be inferred that the written legal order will recognize it, for it composes indigenous identity and is recognized by the constitutional text.

The recognition of the consuetudinary law of the indigenous by the written Brazilian legal order, when it does not violate human dignity (the right to life) represents materially the consolidation of the Democratic State of Law. This consolidation materializes in the conjugation of a pluralist, free, just, fraternal and solidary society (SILVA, 2016, p. 345), which recognizes and protects the social differences existing in as diversified a society as Brazil. With this, it becomes necessary to highlight the notion of human dignity in its negative aspect, for this aids the comprehension of consuetudinary law of the traditional communities.

The negative aspect means that each member of a society must be respected and esteemed by state and by the other members of society in their individual greatness, without any chance of abasement, exploration, discrimination, exclusion or inhumane treatment. In this sense, and in the context of the consuetudinary law of the traditional communities, it may be understood that the legal body of the social organization of the indigenous will prevail insofar as it respects the human being, and its dignity, given these integrate their individual greatness. Therefore, written law may regard it given this consuetudinary law integrates indigenous ethnic identity.

CONCLUSION

As analyzed, legal pluralism does not admit a state monopoly on the elaboration and legitimization of rules. This opposition is due to the cultural diversity existing inherently in any society, and how said diversity involves social, mythology, religious, symbolocal and legal aspects apt to construct modes of self-expression and interpretation of the surrounding world. Thus, traditional communities represent an important element among the multiplicity of legal sources and relations within the Brazilian order. All the more given how indigenous

communities and their social organization were recognized and legitimated by the Federal Constitution of 1988, which dedicated Chapter 8 especifically to indigenous rights.

By recognizing the social organization of the indigenous communities, the constitutional text admitted their consuetudinary law, configuring legal pluralism in existence and effect. In this way, indigenous communities are governed by collective rules, which are respected, recreated in the person of the collective and accepted by the written Brazilian system in the measure that it respects the human dignity of those involved. The crucial difference between written and consuetudinary law is that the former creates rules for the individual, whereas indigenosu communities establish rules for the community. Considering that this collective figure of the "community" is understood as a subject of law, this makes possible the right of the indigenous to self-determination and government in accordance with their own rules.

With this the Brazilain state assumes the role of mediator in conflicts and interests of the consuetudinary law of the indigenous that arise, when it collides with human dignity, and intervenes with its written law only in order to protect the right to life. When the consuetudinary law of the indigenous communities does not threaten life, as well as human dignity, it may be affirmed that it will prevail, once the Statute of the Indian already foresaw this protection alongside the constitutional text. In the said statute it is clear that it befalls the federative entities to respect the peculiarities inherent to their condition; as well as securing the indians the possibility of freely choosing their means of life and subsistence, and respecting the communal cohesion inherent to their cultural values, traditions, uses and customs.

The recognition of the community laws by the Brazilian system was once again affirmed by the ratification of the ILO's Convention 169 (C169). The international document recognized indigenous human rights on an international level, one of these being the consuetudinary law of the indigenous. According to the convention the consuetudinary laws of the traditional communities must always be considered, for these compose their traditional social organization. The customary law of the indigenous, which involves their customs and institutions, must be respected when compatible with the fundamental laws and human rights based upon the protection of human dignity. And when conflicts eventually arise between the rules of written and consuetudinary law, the one which most protects human life and dignity must be taken into account.

All the more, the Federal Constitution of 1988 broke with the assimilationist paradigm that orientated previous constitutional texts by recognizing indigenous rights, basing itself upon the dignity of the human person that is one of the pillars of the Democratic State of Law. Thus, this essential principle of the Brazilian state is ratified as one of its foundations, which makes the existence of legal pluralism possible; on the one hand there is the written legal system and, on the other, the system of the consuetudinary rules of the traditional communities. In this sense, the consuetudinary laws of the traditional communities coexist within the written system of the Brazilian state when they show themselves compatible with human dignity and life.

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