

Breaking the circular argument:
the rights of indigenous and other socio-ethnic distinct peoples in Brazil

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ABSTRACT

This thesis argues that the current interpretation of constitutionally recognized rights of indigenous and other socio-ethnic distinct peoples in Brazil is entrenched in a *circular argument* logical fallacy. The argument consists in the denial by the State of the full enjoyment of constitutionally recognized rights of indigenous peoples, and to some extent, other socio-ethnic distinct peoples, by maintaining that these peoples lack agency to exercise such rights. The circularity of the argument resides in the fact that this perceived lack of agency is often the result of State practice. The perpetuation of the *circular argument* within decision-making processes of all branches of government is described and their connection to patterns of exclusion promoted by the State is established. A pluralist constitutional reinterpretation perspective is presented as a potential contribution to break the *circular argument*.

RÉSUMÉ

Cette thèse propose que l'interprétation actuelle des droits constitutionnellement reconnus aux peuples autochtones et d'autres peuples socio-ethniquement différenciés au Brésil est consolidé par un faux raisonnement classifié ici comme un *argument circulaire*. L'argument repose sur la négation, par l'État, de la pleine jouissance des droits constitutionnellement garantis aux peuples autochtones et, dans une certaine mesure, d'autres peuples socio-ethniquement différenciés, sur l'affirmation que ces peuples ne possèdent pas l'autonomie cognitive pour exercer ces droits. La circularité de l'argument réside dans le fait que cette apparente absence d'autonomie cognitive est souvent le résultat des actions de l'État. La perpétuation de l'*argument circulaire* dans les processus de prise de décisions des trois pouvoirs gouvernementaux est décrite et sa connexion avec les modes d'exclusion promues par l'État est mise en évidence. Une perspective de réinterprétation constitutionnelle pluraliste est alors proposée comme une contribution potentielle à la rupture de l'*argument circulaire*.

RESUMO

Argumenta-se que a interpretação dos direitos constitucionalmente reconhecidos dos povos indígenas e outros povos sócio-etnicamente diferenciados no Brasil consolida-se por meio de um sofisma definido como *argumento circular*. Este argumento consiste na negação, por parte do Estado, do exercício pleno de direitos constitucionalmente garantidos aos povos indígenas, e em certa medida, a outros povos sócio-etnicamente diferenciados sob a justificativa de que tais povos não possuem autonomia cognitiva suficiente para exercer estes direitos. A circularidade do argumento reside no fato de que esta aparente falta de autonomia cognitiva resulta, frequentemente, de práticas promovidas pelo próprio Estado. A perpetuação do *argumento circular* nos processos de tomada de decisões dos três poderes de governo é descrita e sua conexão com modos de exclusão promovidos pelo Estado é evidenciada. Uma perspectiva de reinterpretação constitucional pluralista é proposta como potencial contribuição para a quebra do *argumento circular*.

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INTRODUCTION

Places, Symbols and Hypotheses

Serendipity or symbolism? The 60th Anniversary of the *Universal Declaration of Human Rights*¹ was celebrated on December 10th, 2008. Courts marked the special occasion all over the world, and the *Supremo Tribunal Federal*, the highest court with constitutional jurisdiction in Brazil was no exception. That day's sessions began highlighting the Declaration's relevance nationally and internationally.

Interestingly, this date had also been set in the Court's agenda for the Justices to present their arguments orally and potentially reach a decision regarding a highly publicized human rights case that had been under the judiciary's analysis for more than thirty years.² The hearing of human rights cases before constitutional courts is not unusual, the interest and irony lay, however, in the fact that the opinions and the votes cast referred to a controversial question of protection of indigenous peoples' lands. Unlike similar cases heard before this one, the controversy did not concern divergent judgements about the rights in question. The aura surrounding Human Rights Day set the tone for the discussions, but as the legal arguments surfaced, it became clear that the discussion on this specific day was more serendipitous than truly symbolic. This was the first case decided after Brazil's public General Assembly vote in favour of the *United Nations Declaration on the Rights of Indigenous Peoples* and like many other cases before it, it showcased how legal formalism and the active hermeneutic safeguarding of the legal and political *status quo* take preponderance over judicial activism towards the consolidation of human rights. At the end of the day, a procedural factor caused the rendering of the final decision to be postponed to March 19th, 2009.

¹ *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

² The long judicial battle concerning the *Terra Indígena Raposa Serra do Sol* has been one of the two cases singled out in the Organization of American States, *Report on the Situation of Human Rights in Brazil* (1997), Inter-Am. Comm. H.R., at chapter VI, §38-62, OEA/Ser.L/V/II.97/doc. 29 rev.1.

In Brazil, indigenous peoples' rights, including land rights, have constitutional status, hence, the final word is always granted to the Supreme Court. The above-mentioned decision may have been in relation to a small chapter of the long story of the *Raposa Serra do Sol* lands. The Court, however, seized this highly publicized opportunity to clearly define and consolidate the judicial power's opinion on the constitutional rights of indigenous peoples. The case has drawn considerable media attention for the size of the land and also for the several high profile stakeholders alongside the indigenous peoples that had, have or believed to have a say on the delimitation of the land and the rights to the use of the land.

The decision refers to a petition on behalf of farmers, regular and irregular owners of rice plantations within the area homologated in 2005 as the *Terra Indígena Raposa Serra do Sol*, seeking an injunction against their removal from the lands and the annulment of the indigenous land title claiming formal and material irregularities in the process of delimitation, demarcation and homologation of the land. The federated state of Roraima, where the indigenous land is located, was admitted as a legitimate party in the proceedings and argued that the demarcation of such a large land mass for the usufruct of a few thousand indigenous peoples was an affront to the federated State's economic development objectives protected by constitutional law.³

The Supreme Court is formed by eleven Justices, ten of whom voted against the claims; and consequently, for the indivisible territorial demarcation of the lands traditionally occupied by indigenous peoples. However, the outreach of the decision went above and beyond the object in question, a very unusual move within the deeply rooted civilian tradition in force in Brazil. In addition to refusing the external stakeholders' claims to the land and to settling the legality of the demarcation process, the Court imposed nineteen conditions to the effective demarcation of this land, explicitly defining that those conditions establish a precedent for any cases pending decision or new cases brought before the Court. The imposition of these

³ This summary of the claims of the State and rice farmers is presented in the *Report on the Situation of Indigenous Peoples in Brazil* by James Anaya, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, A/HRC/12/34/Add.2, 14 August 2009 at §33 [Anaya, *Brazil Report*]. The report, presented to the United Nations Human Rights Council in September 2009, follows the Special Rapporteur's mission to Brazil between 18-25 August 2008.

conditions, the vocabulary and tone of the oral votes and written judgement and the Court's explicit definition of the case as a precedent are very troublesome, especially considering the Brazilian civil law context in which jurisprudence is not considered a primary source. Some of the conditions restrict the land rights confirmed by the same decision as well as other indigenous peoples' rights guaranteed by previously enacted legislation and public policy.

As noted in the United Nations *Report on the Situation of Indigenous Peoples in Brazil*, released August 14th 2009, "these conditions go far beyond the specific wording of the Constitution or any applicable legislation, in what the federal Attorney General and some observers have deemed a questionable exercise of the court's authority as a judicial, rather than a legislative, organ".⁴ Moreover, the one dissenting vote, which concedes validity to the claim for the annulment of the demarcation as is, does so not against or in contrast with indigenous peoples' rights, but due to a deep void in the duty to consult all stakeholders, including the indigenous peoples concerned.

The core hypothesis of this thesis is that the constitutional drafting processes and the present constitutional interpretative discourse at the legislative, executive and judicial levels in Brazil often and openly produces a logical fallacy, a ***circular argument***. This *circular argument* consists, *grosso modo*, in denying indigenous peoples, through the authority vested in the State, the full entitlement and enjoyment of their rights by arguing that they lack agency to exercise their rights. This perceived lack of agency is, however, ultimately and intrinsically connected to historical policies of segregation, assimilation and integration, some still widely practiced and exercised by the State (see annex 1, fig. 1).

The hypothesis proposed is built on the basis of the premise that the *circular argument* approach exists by means of the State's hegemonic decision-making parameters.⁵ This idea is reinforced

⁴ *Ibid.* at §39.

⁵ The term hegemonic discourse, especially in the legal field, was initially and most notably developed in Boaventura de Sousa Santos, *Toward a New Common Sense: law, science and politics in the paradigmatic transition* (New York: Routledge, 1995) at 428-441 [Santos, *New Common Sense*].

by the dominant society's self-referent discourse,⁶ employed by the executive, legislative and judicial powers towards the enactment and interpretation of indigenous peoples' rights in addition to blatantly and consistently disrespecting consultation rights. This discourse is also employed, to a certain extent, by the media, civil society and public opinion in general by suggesting that indigenous peoples lack agency to fully enjoy constitutionally guaranteed rights or to be active legislative and policy decision-making stakeholders (see annex 1, fig. 2). Furthermore, the argument is reinforced by a lack of political will to recognize relatively autonomous legal and political orders within the State. Self-determination rights, for instance, the right to self-government, are not recognized because indigenous peoples are thought to lack the agency to establish and manage their own legal and political structures.

The ways in which the *circular argument* is advanced and some of its consequences are illustrated and discussed in chapters one to three, followed by chapter four in which a self-determining reinterpretation of rights is proposed. The objective of the thesis, however, is to address broader concerns and contribute to the indigenous rights debate beyond Brazilian borders. A contextual analysis of the Brazilian case is a methodological choice that contributes to the development of the hypothesis of the *circular argument* and the argument's rupture, towards a more inclusive and cohesive interpretation of international and constitutional rights regarding indigenous peoples and other socio-ethnically distinct peoples with similar claims. The aim, nevertheless, is the formulation of theoretical perspectives that to a smaller or larger extent contribute to breaking *circular arguments* of this type in any context.

Other groups or communities have recently been recognized as peoples who are entitled to the same or similar rights as indigenous peoples. For instance, the Inter-American Court of Human Rights has extended the application of its indigenous peoples-related jurisprudence to non-indigenous peoples considering that certain groups are more akin to indigenous communities than they are to other ethnic, linguistic or religious minorities.⁷ This approach is

⁶ The concept of self-reference is taken from Carlos Frederico Marés de Souza Filho, *O Renascer dos Povos Indígenas para o Direito* (Curitiba: Juruá, 2001) at 161 [Marés, *Renascer*]. Self-reference or self-cultural reference emphasise a trend that consists in the use of the dominant society's cultural paradigm as valid for all as an underlying principle in legislation and public policy.

⁷ *Case of Moiwana Village (Suriname)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 124 [*Moiwana Village*] and *Case of the Saramaka People (Suriname)* (2007), Inter-Am. Ct. H.R. (Ser. C) No. 172 [*Saramaka People*].

of relevance to the analysis proposed because ethnically, linguistically and culturally differentiated communities formed by descendants of run-away slaves and commonly known as *maroon* peoples exist throughout the Americas, including the *quilombola* peoples in Brazil who are entitled to constitutional rights that are very similar to the protection granted to indigenous peoples.⁸ Both peoples enjoy constitutional guarantees of fundamental rights related to their socio-ethnic distinctiveness and regularization and protection of the lands they traditionally occupy.

Other groups, communities or peoples are considered akin to indigenous peoples as well in their ethnic heritage and/or for their socio-cultural practice and claims and, foremost, for their *sui generis* connection to the land in order to preserve traditional socio-economic practices of sustainable livelihood and development. In Brazil these other groups are generally known as traditional peoples and communities and, to some extent, they have been granted constitutional protection for social and cultural rights. Examples of traditional peoples are the rubber-tappers from the Amazon, the *caiçara* fishers from the South-Southeastern Coast, the *babaçu* breakers from the Northern States, amongst others.⁹

Traditional peoples and communities have diverse social, economic and sometimes linguistic and religious backgrounds, the common feature, nevertheless, rests in their traditional and sustainable livelihood and methods of exploitation of the land, which are intrinsically connected to their existence as a people. It is also what draws them very near to indigenous and *quilombola* peoples in terms of rights associated to socio-ethnic distinctiveness and the need for a *sui generis* protection of lands traditionally occupied and exploited in order to ensure the sustainability of their practices and their continued existence as a people.

⁸ Besides the *quilombola* peoples in Brazil, *maroon* people communities exist, for instance, in Ecuador, Colombia, Nicaragua, Honduras and Suriname.

⁹ Most of these traditional peoples or communities have indigenous, black or mixed indigenous and white, indigenous and black/quilombola or white and black/quilombola descent. Legislation and policies that address traditional peoples and communities usually include indigenous and *quilombola* peoples as well – referring, therefore, to all those considered socio-ethnic distinct peoples.

Sadly, the parallels among indigenous peoples and other socio-ethnic distinct peoples also mirror the patterns of exclusion as a result of the implementation of hegemonic nation-building scenarios dominated by colonial and post-colonial contexts. The agency discourse is formed through the dominant society's historical perception of a natural inferiority of indigenous peoples justifying the internal colonization and involuntary incorporation of their territories along with social and political structures. The agency perception also fuelled the claim that the assimilation towards a civilized existence as part of the hegemonic western society was necessary to overcome the backwardness of indigenous peoples attributed lifestyles. *Quilombola* and other socio-ethnic distinct communities emerged after the occupation and colonization of the Americas often as a result of colonization methods or as an alternative to them but their socio-political and economic strategies are easily associated with the indigenous distinct lifestyles and structures. While in the present times, the association is mostly positive as it extends rights guaranteed to indigenous peoples to other socio-ethnic distinct peoples; through Brazilian history and within the *circular argument* context, the similarities with indigenous peoples alongside the distinct appearance denoting ethnic *metissage* of other traditional peoples; their linguistic backgrounds formed by *creolized* variations of the colonizers' language and the collective-based organization of production contributed to the extension of the hegemonic lack of agency discourse to other socio-ethnic distinct peoples as well. The degree of extension and the effects this association brings to community life, however, vary considerably between other ethnically and culturally diverse peoples and indigenous peoples.

The main elements that contribute to the formation of *circular arguments* as the one described here are grounded in the internal colonization of indigenous peoples and the postcolonial constitutional nation-building scenario. This context is undoubtedly shared by other jurisdictions, namely in the Americas, where the chronological steps of constitutional and legal categorization of indigenous peoples, and sometimes other peoples with similar claims followed policies of segregation, assimilation, integration and presently seek pluralism.¹⁰

¹⁰ This idea is developed by Yrigoyen Fajardo who proposes a four-model timeline of the recognition of indigenous law by State law. The model is proposed for Guatemala but it accurately mirrors the trajectory of indigenous law recognition throughout Latin America. The first model is the colonial segregation of indigenous

The proposed strategy to break the *circular argument* is built upon international law and theoretical perspectives that originate outside of Brazilian borders – with some small local contributions also being explored. The theory could not be constructed and focus only on one specific jurisdiction, which adds to the broader contribution offered by the thesis to contribute to an emancipatory interpretation of the rights of indigenous and other socio-ethnic distinct peoples.¹¹ The core element proposed towards the rupture of the *circular argument* is a reinterpretation of the Brazilian constitutional context on the basis of the principle of self-determination of peoples. Moreover, in order to surpass hermeneutical patterns associated with indigenous peoples and other socio-ethnic peoples' entitlement to self-determination, the reinterpretation must include legal pluralism perspectives¹² and the postmodern emancipatory theories developed by Boaventura de Sousa Santos regarding *a new legal common sense, reinvention of a subaltern paradigm of recognition and redistribution, the grammar of time toward a new political culture, the erudite ignorance and beyond abyssal thinking*.¹³ Self-determination is understood here not only as an axiological goal, it also represents a right consolidated in the international regime by legislation and jurisprudence.

peoples on the basis of their argued natural inferiority. The second model is assimilation on the basis of progress towards a civilized existence as part of the hegemonic western society. The third model is integration by which constitutions preserve the nation-state ideal by including indigenous rights as minority rights without acknowledging the plural composition of the State. The fourth model is pluralism with the recognition of indigenous law as an intrinsic part of the State law. Raquel Yrigoyen Fajardo, *Pautas de coordinación entre el derecho indígena y el derecho estatal* (Guatemala: Fundación Myrna Mack, 1999) at 46-51 [Yrigoyen Fajardo, *Pautas*].

¹¹ The term indigenous and traditional peoples or indigenous and other socio-ethnic distinct peoples is used throughout this thesis in the widely known sense of the concept but also includes peoples akin to indigenous peoples who may not identify with the traditional concept of indigenous or tribal peoples.

¹² The core critical legal pluralism perspectives follow the theory and approach proposed in Martha-Marie Kleinhans & Roderick A. Macdonald "What is a *Critical Legal Pluralism*?" (1997) 12 Can. J. L. & Soc. 25; Roderick A. Macdonald & David Sandomierski, "Against Nomopolies" (2006) 57:4 N. Ir. Legal Q. 610 and Roderick A. Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15 Ariz. J. Int'l & Comp. L. 69 [Macdonald; "Metaphors"]. The analysis also includes works addressing traditional legal pluralism or legal pluralism in general.

¹³ Santos, *New Common Sense*, *supra* note 5, *A Crítica da Razão Indolente: contra o desperdício da experiência*, 2d ed. (São Paulo: Cortez, 2000) [Santos, *Crítica da Razão Indolente*]; "Nuestra America: reiventing a subaltern paradigm of recognition and redistribution" (2001) 18 Theory, Culture & Society 185 [Santos, "Nuestra America"]; *Toward a New Legal Common Sense: Law Globalization, And Emancipation*, 2d ed. (London: Butterworths LexisNexis, 2002) [Santos, *New Legal Common Sense*]; *A Gramática do Tempo: para uma nova cultura política* (São Paulo: Cortez, 2006) [Santos, *Gramática*]; "Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges" (2007) 78 Revista Crítica de Ciências Sociais 45 [Santos, "Beyond Abyssal Thinking"]; "From an Epistemology of Blindness to an Epistemology of Seeing" in Boaventura de Sousa Santos, ed., *Cognitive Justice in a Global World: prudent knowledges for a decent life* (Lanham: Lexington Books, 2007) 407 [Santos, "Epistemology"]; "A filosofia à venda, a douta ignorância e a aposta de Pascal" (2008) 80 Revista Crítica de Ciências Sociais 11 [Santos, "A filosofia à venda"].

Journeys, New Places and Metaphors

Doctoral candidates usually develop a very unique relationship with their theses and it has been the same with me. As many others before me, I do not picture my thesis as a black-and-white volume. I picture it as a colourful and asymmetrically-shaped backpack. I feel I have been carrying this backpack everywhere and for several years even before calling it my doctoral thesis backpack. It has been omnipresent in my life, always on my mind, or making me feel ever so guilty if it was not occupying my mind. The first things placed into the backpack were general ideas and hypotheses developed during the preparation of my Master's thesis, and many versions of this project's research proposal. Backpacks are very useful for journeys, so the next step was to take the thesis on a journey – both metaphorically and physically. In August 2004 I moved from Southern Brazil to Canada to pursue my doctoral degree at McGill University. The backpack came filled with those first ideas; the baggage from my undergraduate training in a strongly-rooted civilian legal framework; and, my graduate studies knowledge loaded with questions and possible answers about social justice and traditional legal pluralism; and, heavily seasoned with emancipatory and postmodern theories taken from the works of Boaventura de Sousa Santos, my *alma mater's* strongest theoretical reference.

When I started my doctoral studies, the reality for research or even the enforcement of minority rights and the rights of indigenous peoples in Brazil was harsh. The country had recently gone through considerable political change, which had shaken, both in a positive and a negative way, legal frameworks and public policy concerning those rights. One example of the tension in those days was the Brazilian Foreign Relations' unconditional opposition to the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*. One of the reasons for choosing to come to Canada to bring this project to fruition was that Canada seemed to be very close to the other end of the spectrum. Academic literature and public debate on minority and indigenous peoples' rights as well as legal pluralism had been abundant since the early 1990s and Canada had been a supporter, contributor and strong advocate for the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*.

At nearly the end of the journey, the path through which I carried this backpack had several twists and turns from inside and out. Several lectures, seminars, discussion groups, personal reflection and advisory meetings later, the backpack still kept some of its elements inside but looked completely different from the outside. Other theoretical perspectives that are interesting and relevant for this thesis' analysis and results came to coexist inside the backpack with the perspectives provided by Santos. Most of Santos' work used for this analysis is from the Portuguese version of *Toward a New Common Sense: law, science and politics in the paradigmatic transition*, called *Crítica a Razão Indolente: contra o desperdício da experiência* and from the English version of *Toward a New Legal Common Sense: Law, Globalization, And Emancipation*. *Toward a New Common Sense* was first published in English and the Portuguese version contains the author's revision of some of his propositions in the original English version.¹⁴ The English version of *Towards a New Legal Common Sense* updates and develops from *Crítica da Razão Indolente* which is envisioned by the author as the first part of a series of four books. The second and third volumes of this proposed series have not yet been published, but the fourth volume was published halfway through my thesis' bibliographical review process and a full year after I undertook my comprehensive exam. This new book, aptly named *A Gramática do Tempo: para uma nova cultura política* without an English language equivalent thus far, brings new and renewed nuances to Santos' work. *Gramática do Tempo* deeply shifts perspectives; and, the 'new political culture' proposed by Santos in this volume have become a much more suitable tool for the development of the hypotheses proposed here.¹⁵ Since publishing *Gramática do Tempo*, Santos published articles in English and Portuguese describing and complementing the theories presented in the book.¹⁶

¹⁴ Santos, *New Common Sense*, *supra* note 5; Santos, *Crítica da Razão Indolente*, *supra* note 13; Santos, *New Legal Common Sense*, *supra* note 13.

¹⁵ Santos, *Gramática*, *supra* note 13.

¹⁶ Santos, "Beyond Abyssal Thinking", *supra* note 13; Santos, "Epistemology", *supra* note 13; Boaventura de Sousa Santos, "Human Rights as an Emancipatory Script? Cultural and Political Conditions" in Boaventura de Sousa Santos, ed., *Another Knowledge is Possible* (London: Verso, 2007) [Santos, "Human Rights"] and Santos, "A filosofia à venda", *supra* note 13. Santos, "Nuestra America", *supra* note 13 published before *Gramática*, complements approaches from *New Common Sense*, *supra* note 5, *Crítica da Razão Indolente*, *supra* note 13 and *New Legal Common Sense*, *supra* note 13.

On par with the theoretical developments natural to the doctoral studies process and the innovations brought by new publications are some significant legal, political and, consequently, academic changes in the field that happened in both national contexts and in the international arena in the past five years. One example was the adoption, by the United Nations General Assembly of the *Declaration on the Rights of Indigenous Peoples*,¹⁷ after almost two decades of negotiations. It was hard to believe that at the end of the day, Brazil voted for and Canada against the adoption of the Declaration. This symbolic turn of events, however, is easily explained by screening the political agendas of the governments in power in both countries at the time of the United Nations General Assembly's vote in 2007.

In the Brazilian case, which is the object of this thesis, this symbolic pro-Declaration vote at such a meaningful international forum surfaced a latent but extremely deep discrepancy at the national level between the political or executive power decision-makers and the judiciary power on the subject of indigenous peoples rights or any 'politics of difference' initiative. The country's participation and opinions it expresses at international *fora*, notably in the past six years, are absolutely incommensurable with the Supreme Court's understanding of these same issues and the Court's vision of the role of international law within national borders. This debacle contributed, in large scale, to a phenomenon described by academics and the media in Brazil as the judicialization of politics and the politization of the judiciary. While the executive power officially expresses the the country's adherence to international declarations and conventions that can hardly be enforced at the local and national levels without the judiciary's collaboration, the judiciary, when presented with the opportunity, vehemently and indiscriminately denies the applicability of rights and principles internationally enounced citing the preservation of the independence of the country's legal system from external forces. When the issue revolves around the Amazon Region or other regions rich in natural resources, the impasse is ever more evident as the *Raposa Serra do Sol* case illustrates. This veiled power struggle within the high echelons causes backlash in the enforcement of rights and represents a backwards march that is adverse, and ultimately hypocritical, to the leading position the country has been adopting at the international *fora*.

¹⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GAOR, 107th and 108th Meetings, UN Doc. A/RES/61/295 (2007). The Declaration was adopted on 13 September 2007 with 143 votes in favour, including Brazil, 4 against, including Canada and 11 abstentions.

A recent development that contributes to bridging the gap between international and national spheres regarding indigenous peoples was a mission and subsequent release of a report by the United Nations *Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*. The eight-day mission took place in August 2008, the *Report on the Situation of Indigenous Peoples in Brazil* was released in August 2009 and presented to the Human Rights Council in September of that same year. It focuses “on the issues of indigenous peoples of Brazil in relation to the realization of their right to self-determination and related human rights”, and highlights that “the Government of Brazil has manifested a commitment to advance the rights of indigenous peoples in accordance with relevant international standards” but further efforts are needed to ensure that they “are able to fully exercise their right to self-determination within the framework of a Brazilian state that is respectful of diversity, which means exercising control over their lives, communities, and lands; and effectively participating in all decisions affecting them in accordance to their own cultural patterns and authority structures”.¹⁸

The Rapporteur praises the constitutional guarantees and legislation in force but also highlights shortcomings in the enforcement of the right to self-determination as a generalized problem and recommends that such matters could be solved through the effective implementation of international agreements the State has already committed to. It should also be noted that the only concrete case study included in the Report was the *Raposa Serra do Sol* decision as an example of a “clash of two opposing visions of development and the place of indigenous peoples in relation to it” and to illustrate the background and context of the dubious victory for indigenous peoples.¹⁹

¹⁸ Anaya, *Brazil Report*, *supra* note 3 at 2 (summary).

¹⁹ *Ibid.* at §34-35. The dubious victory refers to the Court’s decision to uphold the demarcation of the *Raposa Serra do Sol* lands as a contiguous territory while pronouncing an array of limiting conditions to enforcement of land rights in this and future cases.

Scenarios, Challenges and Choices

Constitutional ethnographers maintain that the study of one jurisdiction in depth, especially if the researcher is already familiar with that jurisdiction, may bring results that are more substantial and closer to reality than the comparative study of several jurisdictions the researcher learns about only superficially.²⁰ This premise has motivated the methodological choice of addressing a global issue through the lens of one jurisdiction. A bibliographical review of the existing publications in the field of indigenous and other socio-ethnic distinct peoples in Brazil demonstrates that the analyses undertaken focus on topical issues such as land rights and discrimination rather than the hegemonic argumentation of the entire discourse towards indigenous and/or other socio-ethnic distinct peoples' rights as proposed here.²¹ Moreover, very few of these analyses have taken place in the legal field but rather in anthropological and sociological studies involving legal frameworks.²² The choice to pursue such an innovative approach of legal discourse critique outside of its scope of action has certain challenges, for instance, a considerable amount of the information used in the analysis relies on primary and secondary sources published in a language other than the one in which the thesis is written; and some descriptions are necessary for the understanding of the socio-legal scenario in which the practical framework of the thesis takes place. Although such descriptions permeate the entire text of the thesis, what follows are some introductory facts and premises that contextualize the socio-legal scenario that form the thread of this thesis backpack.

²⁰ Kim Lane Scheppele, "Constitutional Ethnography: An Introduction" (2004) 38:3 Law & Soc'y Rev. 389 at 401.

²¹ See e.g. Marés, *Renacer*, *supra* note 6; Carlos F. Marés de Souza Filho, "O Direito Envergonhado: o direito e os índios no Brasil" in Luis Donisete Benzi Grupioni, ed. *Índios no Brasil* (São Paulo: Global, 1998) 153 [Marés, "Direito"]; Maria Lucia Pires Menezes, *Parque Indígena do Xingu: a construção de um território estatal* (Campinas: Editora da Unicamp, 2000); Enio Cordeiro, *Política Indigenista Brasileira e Promoção Internacional dos Direitos das Populações Indígenas* (Brasília: Instituto Rio Branco, 1999); Deborah Duprat, ed., *Pareceres Jurídicos: Direito dos Povos e Comunidades Tradicionais* (Manaus: UEA, 2007) [Duprat, *Pareceres*]; Joaquim Shiraishi Neto, ed., *Direito dos Povos e das Comunidades Tradicionais do Brasil* (Manaus: UEA, 2007) [Shiraishi, *Direitos*].

²² See e.g. Mércio Pereira Gomes, "O Caminho Brasileiro para a Cidadania Indígena" in Jaime Pinsky & Carla B. Pinski, eds., *História da Cidadania* (São Paulo: Contexto, 2003) 419 [Gomes, "Cidadania"]; Alfredo Wagner Berno de Almeida, *Terras de Quilombo, Terras Indígenas, "Babaçuais Livres", "Castanhais do Povo", Faxinais e Fundos de Pasto: Terras Tradicionalmente Ocupadas*, 2d ed. (Manaus: PGSCA-UFAM, 2008) [Almeida, *Terras*]; Antonio Wagner Berno de Almeida, ed., *Conhecimento tradicional e biodiversidade: normas vigentes e propostas*, 2 v. (Manaus: PGSCA-UFAM, 2008) [Almeida, *Conhecimento tradicional*].

After nearly twenty years of oppression, the 1988 *Constituição da República Federativa do Brasil*, the eighth and most recent Brazilian Constitution²³ welcomed democracy back to the country in great style. Nevertheless, in the rush to show the world and Brazil's own citizens that a new era had begun, the text is lengthy and filled with 'fear clauses' that provide guarantees against dictatorial measures. Surprisingly, however, the Constitution is still zealously protective of territorial, political and legal centralization.

The preamble of the Constitution institutes a democratic State formed by a fraternal and pluralist society that is free of discrimination. The plurality in the composition of the population was acknowledged for the first time in the country's constitutional history. Compared to its Latin Americans counterparts; and the theories and practice in the field in the 1980s, the text of the Brazilian Constitution is inspirational but falls short on the recognition of indigenous peoples' and other minority groups' rights. This recognition, however weak, was welcomed by civil society, indigenous peoples and other groups in 1988 as a watershed in the relationship between ethnically and culturally diverse peoples and the State and it is still praised as such by courts and politicians. The euphoria of this recognition, at least for indigenous and other socio-ethnically distinct peoples' rights advocates was soon replaced by disappointment when the official position turned its focus almost exclusively to land issues from an economic perspective. Lobbying and power struggles between the executive power and a politicized judicial power, as well as the disconcert between the legislative, executive and judiciary regarding the enactment and implementation of legislation and policy concerning indigenous and other socio-ethnically distinct peoples have continuously placed obstacles for the 1988 Brazilian Constitution to reach its pluralist potential. These obstacles usually take the shape of the *circular argument* or establish an even stronger foundation for it. The theoretical framework and the debates in the international community have evolved considerably in the twenty years since the promulgation of the Brazilian Constitution. If the language and compromise had

²³ *Constituição da República Federativa do Brasil*, 5 October 1988, consolidated text as amended until the *Emenda Constitucional n. 64*, 4 February 2010 [*Constituição*, 1988]. There is a debate as to whether this is Brazil's seventh or eighth constitution. The Constitution in force before 1988 was promulgated in 1969 as an amendment of the 1967 Constitution as part of a political manoeuvre to facilitate its approval. The amended constitutional text, however, differs significantly from the original text and the 1969 Constitution is considered by many as a new constitution, therefore, the seventh Brazilian Constitution by its content and not the form used to promulgate it. See e.g. José Afonso da Silva, *Curso de Direito Constitucional Positivo*, 17th ed. (São Paulo: Malheiros, 2000) at 88-89.

fallen short of the framework in place in 1988, the call for change is yet more evident in the present time.

Brazil's ethnic diversity is common knowledge. A melting pot that gathers indigenous peoples; afro-Brazilians who are in their majority descendants of slaves and several other ethnic groups who descend from the first Portuguese settlers as well as the many waves of immigrants that arrived in the country mostly from Europe and Asia since the colonial period. Anthropological theories from the first half of the 1900s have built an ethnic and cultural relation paradigm by promoting the idea of the Brazilian people sustained by three pillars: white, black and indigenous; and proposing that all three were equally relevant in the nation-building process and interrelated from the core since the start of the country's history.²⁴ The idea of ethnic and cultural miscegenation permeates the collective imaginary and still remains the stereotypical view of the Brazilian population. In the second half of the 1900s and the beginning of the 2000s, however, a different discourse emerged suggesting that racial democracy is a myth, that discrimination is more widespread than it was previously believed and that deep social inequalities are resolutely related to ethnic belonging.²⁵ Even though this thesis draws inspiration and develops some critiques that corroborate this renewed understanding, it also highlights discrepancies in the formulation and response of this new approach to ethnic relations in Brazil.

The emergence of strong political lobbying of the Black Movement since the late 1990s and the national election of a labour/socialist-oriented government in 2003, re-elected for another four year term in 2007 with a very strong platform towards reparative and restorative justice has culminated in a large number of legal and administrative provisions that create government agencies and policies to address systemic social discrimination on ethnic grounds. Social

²⁴ Classic books that describe Brazil's nation-building process are, for example, Darcy Ribeiro, *O Povo Brasileiro: a formação e o sentido do Brasil*, 2d ed. rev. (São Paulo, Companhia das Letras, 1995); Gilberto Freyre, *Casa-Grande & Senzala*, 50th ed. rev. (São Paulo: Global Editora, 2005) and Sérgio Buarque de Holanda, *Raízes do Brasil*, 26th ed. (São Paulo, Companhia das Letras, 1995).

²⁵ Some perspectives in this regard are offered by Antonio Sérgio Alfredo Guimarães, *Classes, Raças e Democracia* (São Paulo: Editora 34, 2002) and Jan Hoffman French, *Legalizing Identities: becoming Black or Indian in Brazil's Northeast* (Chapel Hill: The University of North Carolina Press, 2009).

inequality is a given in Brazil and is unequivocally related to historical wrongs such as slavery, consequently and inexorably relating poverty to ethnicity in the case of the Afro-Brazilian population.²⁶ Although this relationship is easily established and the acknowledgement of the overlap of ethnicity and poverty was long overdue, matters cannot be simplified with an ethnic discrimination label. Corruption, dictatorships, democratic and economic transition policies, and historically unequal structures - not necessarily based on ethnic grounds - form part of the present unequal scenario. Access to education, health, justice, and other fundamental rights is undeniably restricted but has never been legally or socially exclusive on the basis of ethnic belonging. The obstacles are socio-economic and strongly related to poverty affecting any economically underprivileged citizen regardless of their ethnic belonging.

Advocacy groups and government policies have been interpreting the constitutional guidelines and addressing social issues as if they had ethnic roots by transplanting to the Brazilian realm a system of inclusion and affirmative action more apt to States which experienced segregation laws and policies.²⁷ Moreover, in order to confer higher legitimacy to government actions, legislation and policies addressed mainly to Afro-Brazilians are usually coupled with the same rights being granted to indigenous peoples. This opportunistic and artificial association puts in jeopardy the indigenous cause, and compromises further the cause of other socio-ethnically distinct peoples. Such policies have divided public opinion and caused social commotion and backlash, for instance, the re-emergence of pejorative visions of indigenous agency.

Such a populist approach, therefore, falls short of long term solutions and worse, as this thesis intends to demonstrate, contributes in more harmful than positive ways to the ethnic groups which, unlike the Afro-Brazilian majority, do not share the cultural and social organization of the dominant society. While the Afro-Brazilian population claims inclusion in the mainstream

²⁶ According to World Bank statistics in 2006, despite recent advances, the poorest one-fifth of Brazil's population account for only a 2.4% of the national income and the country is second in a world ranking of income inequality, online source: World Bank <www.web.worldbank.org>.

²⁷ See e.g. Ali Kamel, *Não Somos Racistas: uma reação aos que querem nos transformar numa nação bicolor* (Rio de Janeiro: Nova Fronteira, 2006); Roberta Fragoso Menezes Kaufmann, *Ações Afirmativas à Brasileira: Necessidade ou Mito?* (Porto Alegre: Livraria do Advogado, 2007) and Demétrio Magnoli, *Uma Gota de Sangue: História do Pensamento Racial* (São Paulo: Contexto, 2009).

society, other ethnically differentiated groups demand legal, social and cultural reinterpretation of existing structures or creation of new structures to reach their potential individually and collectively and claim the full effectiveness of a pluralist and diverse society.

The recognition of constitutional diversity and plurality in Brazil is studied in this thesis from a path less explored. Although taking into account existing ethnic-related legislative approaches, it addresses the constitutional and legal status of socio-ethnic distinct peoples towards the reinterpretation of existing structures on the basis of the constitutionally guaranteed premise of pluralist and diverse co-existence. The thesis proposes suggestions to redress the inequality caused by the ineffective constitutional text in force. The approach undertaken considers firstly, that despite the pluralist and anti-discrimination compromises, the constitutional text is deeply embedded in a dominant society's hegemonic discourse of self-cultural reference and secondly, that the Constitution makes no differentiation between populations, minority groups and peoples and adopts an extremely traditional concept of individual-oriented, citizenship-as-right-bearing-status equally valid and equally applicable to all legal residents of the State. The unsatisfactory legal discourse is redressed through the reinterpretation of the concept of citizenship, intrinsically grounded in legal pluralism; self-determining co-presence of different legal and political structures; and the *glocalization* of international legal standards, thus enabling the promotion and sustainability of specific international human rights standards and the support and encouragement of local governance.

Indigenous peoples were subjected to internal colonization²⁸ and were successively placed under segregationist, assimilationist and integrationist models of enforcement of the dominant society legislation and policies.²⁹ *Quilombola* peoples are mostly rural communities that share a common ethnic identity formed by the descendants of run-away or freed slaves. Their self-identification is the result of a confluence of factors, chosen by the *quilombolas* themselves: shared common ancestry with presumption of connection to slave-trade-related historical

²⁸ The idea of internal colonization is proposed by James Tully, "The Struggles of Indigenous Peoples for and of Freedom" in Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 36 [Tully, "Struggles"].

²⁹ Yrigoyen Fajardo, *Pautas*, *supra* note 10.

resistance; use of distinctive vocabulary and language inflections, and, sometimes distinctive religion as well; and shared social and political organization.³⁰ As a people originated from resistance to slavery and discrimination against former slaves, the *quilombolas* developed their own governance systems which maintained and reproduced their ways of life and community values. Once their status of social outcasts or outlaws ceased, the governance practices were adapted to a new reality but did not merge with mainstream society.

The indigenous, *quilombola* and other socio-ethnic distinct peoples do not represent large demographic figures in Brazil; and their representation is considerably small if compared to the entire population, in spite of stereotypical media or tourism related images of the country's inhabitants. The reduced numbers explain, perhaps, the lack of political interest in addressing these issues considering there are so many other core violations of fundamental rights and freedoms that affect the population as a whole. The recognition of self-determination and the enlargement of the scope of legal and political pluralism it entails are not proven to increase or guarantee electoral successes in order to convince politicians that this is a cause worth pursuing.

Despite controversial figures, it is estimated that at the time of the Portuguese arrival in Brazil in 1500, the indigenous population was above one million.³¹ In 2000, the most recent census, 734.127 persons³² self-declared themselves as indigenous.³³ The entire Brazilian population is

³⁰ These are the consensual elements that form the *quilombola* identity according to several publications by the organized *quilombola* civil society groups. The same elements are expressed in the legislation that regulates the constitutional processes of identification and demarcation of *quilombola* lands: *Decreto n. 4.887*, 20 November 2003 at art. 2.

³¹ Survival International, *Disinherited: Indians in Brazil* (London: Survival International & Waterside Press, 2000) available online: <www.survival-international.org> [Survival International, *Disinherited*]; and Instituto Brasileiro de Geografia e Estatística, *Tendências Demográficas: Uma Análise dos Indígenas com Base nos Resultados da Amostra dos Censos Demográficos de 1991 e 2000* (Rio de Janeiro: Instituto Brasileiro de Geografia e Estatística, 2005) at 5, online: IBGE <www.biblioteca.ibge.gov.br> [IBGE, *Tendências*].

³² One of the core concepts of the thesis is the politically loaded concept of peoples implicit in any debate in the public international law realm regarding the principle or right of peoples to self-determination. The United Nations and some of its member states have, in the past, repeatedly attempted to avoid discussions on the claims of self-determination by indigenous and other tribal peoples by referring to them as a people and not as peoples. The thesis clearly advocates for the full entitlement and implementation of the right to self-determination, therefore, to avoid confusion, when referring to individuals, the terms used are 'person' in the singular form and 'persons' in the plural; and, when referring to collectivities, the singular form used is 'people' and the plural 'peoples'.

of approximately 190 million people, meaning that only 0.4% of Brazilians are indigenous. They are members of 220 different peoples and speak 170 different languages. Systemic policies of segregation, assimilation and integration and other factors over the course of five centuries, have, as in many other countries, reduced the indigenous population in numbers and have also reduced the strength of the indigenous population as peoples. Meanwhile, it is estimated that there are 1000 *quilombola* communities formed by 2 million *quilombola* persons, who live within 24 of the 26 States of the federation.³⁴ Similar to the situation of indigenous peoples, the *quilombolas*, although widespread in the national territory, represent only 1% of the Brazilian population. Persons belonging to other types of traditional communities, whose self-identification may sometimes overlap with indigenous or *quilombola*, represent approximately 4 million persons or 2% of the Brazilian population.³⁵

Nation-building processes in Brazil, and more generally in Latin America, hold essential differences with those same processes in the United States and Canada. The territorial history of former Portuguese and Spanish dominions rather than being shaped by treaties and agreements with the indigenous populations upon the arrival and settlement of Europeans in the New World was defined as the Iberian Era of Great Navigations progressed. Treaties between Spain and Portugal were signed dividing recently discovered or undiscovered lands in the Americas amongst Spain, Portugal or amongst them and other European powers. The possession of the territories previously occupied by indigenous peoples was nearly undisputable and the lack of interest and effort by both Spain and Portugal to forge lasting relationships with the local inhabitants of the land was mostly due to the legal and power certainty granted by bilateral treaties or international agreements, often sponsored by the Church.

³³ IBGE, *Tendências*, *supra* note 31 at 12.

³⁴ *Comunidades Quilombolas no Brasil*, online: Comissão Pró-Índio de São Paulo <www.cpis.org.br>; United Nations Development Program, *Projeto de Melhoria da Identificação e Regularização de Terras das Comunidades Quilombolas Brasileiras*, online: PNUD Brasil <www.pnud.org.br/projetos>.

³⁵ It is difficult to establish with precision how many persons self-identify themselves as belonging to traditional peoples or communities. The figure is from the then Minister for the Environment official speech when the *Política Nacional de Desenvolvimento Sustentável de Povos e Comunidades Tradicionais* was launched on 2 August 2006, online: <<http://www.socioambiental.org/nsa>>.

The most prominent of these treaties and agreements are *The Bull Inter Caetera* of 1493, the *Treaty of Tordesillas* of 1494 between Spain and Portugal and *The Bull Ea Quae*, 1506.³⁶ Disputes eased from 1580 to 1640 while the Spanish-Portuguese joint empire lasted. Finally, in 1750, in face of the political changes in both kingdoms and the somewhat peaceful Portuguese expansion in South America west of the line imposed by the *Treaty of Tordesillas*, the two States signed the *Treaty of Madrid* in 1750 defining the limits between Spain and Portugal territorial possession in the Americas, determining that previous borders and the treaties and Papal Bulls that established them were void.³⁷ Treaties between Spain and Portugal and between Portugal and other European States were signed and enforced regarding territorial protection, maritime and land-based trade from 1668 to 1778.³⁸ Accounts of alliances with local indigenous populations exist, especially when indigenous peoples sided with the Portuguese to defend the territory against French and Dutch attempted invasions but there is no record of legally-binding documents, agreements or treaties signed between European powers, including the Portuguese, and indigenous nations within the Brazilian territory.

This territorial indisputability and other aspects of the Portuguese colonial rule, that differ slightly from the Spanish rule and even more significantly from the British or French colonial enterprises form the foundation of a persisting model of decision-making processes regarding indigenous peoples in Brazil. Most of the legislation and policy decisions were and in some instances still are unilateral declarations by the colonial or government powers of the day. The social, legal and political subjectivity and agency of indigenous peoples and later, of other socio-ethnic distinct peoples as well received different interpretations throughout the country's history, nevertheless, always from a colonialist or paternalistic perspective.

³⁶ *The Bull Inter Caetera* (Alexander VI), 4 May 1493; *Treaty between Spain and Portugal concluded at Tordesillas*, 7 June 1494; *The Bull Ea Quae* (Julius II) 24 January 1506. For transcriptions of the original texts and respective English translations, see: Frances Gardiner Davenport, ed., *European Treaties bearing on the History of the United States and its Dependencies*, 4 v. (Gloucester, Mass: Peter Smith, 1917) at vol. I, 71-78; 84-100 and 107-111.

³⁷ *Treaty of limits between Spain and Portugal*, Madrid, 13 January 1750 and reinforced by the *Treaty of the peace and territorial limits between Spain and Portugal*, San Ildefonso, 1 October 1777 and the *Treaty of friendship, guaranty, and commerce between Spain and Portugal*, Pardo, 11 March 1778; transcriptions of the original text and English translation in Davenport, *supra* note 36 at vol. IV, 77-78 and 138-141.

³⁸ Bilateral treaties to directly or indirectly safeguard the Portuguese dominion in South America were signed, e.g. between Portugal and France in 1536; 1641 Portugal and Netherlands in 1641; Portugal and Great Britain in 1654; 1661. *Treaty of peace between Portugal and Spain*, Lisbon, 13 February 1668; *Treaty of Alliance between Spain and Portugal*, Lisbon, 18 June 1701; *Treaty between Portugal and Spain*, Utrecht, 6 February 1715; transcriptions of the original texts and translations in Davenport, *supra* note 36 at vol. I, 199-204 and 329-346; vol. II, 31-35; 57-62; 157-165; vol. III 29-38 and 245-251.

Although restorative and redistributive justice initiatives have been put in place in recent years to acknowledge and redress the often abusive relationship of the past, no nationwide or top-bottom official effort has been made to ‘renew and restructure the relationship’³⁹ or to move towards a unified and healed nation.⁴⁰ These concepts are taken from Canadian and Australian government initiatives to access and gather testimony about the relationship between indigenous and non-indigenous peoples as well as investigate abuses against indigenous peoples. These initiatives also proposed practical solutions and standards for a joint way forward on the basis of principles such as human dignity and equality. Although both initiatives have received criticism in their home countries they have also demonstrated positive results that advance the indigenous cause in those States in comparison to countries where structures of this kind were not put in place upon the transition from the integrationist to the pluralist models of enforcement of legislation and policy.

It is argued by politicians, civil society and academics that the Brazilian Constitution of 1988 represents the most symbolic and significant transition into a pluralist society built upon mutual respect and tolerance between all segments of the Brazilian society.⁴¹ Moreover, the Constitution also represents the country’s transition from a dictatorial to a democratic State and it is precisely for this reason that the entitlement of rights is defined in relation to the democratization of the entire country and all its citizens without distinctions of ethnic or social belonging. At many levels and in a myriad of structures, the Constitution represents a certificate of re-birth of a nation in which all citizens enjoy civil and political rights in equal

³⁹ Canada, *Report on the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back*, vols. I & II (Ottawa: The Commission, 1996) at vol. I, 675-697 and vol. II, 105-1014. According to the Royal Commission on Aboriginal Peoples findings, basic principles for a renewed relationship are mutual recognition, mutual respect, sharing and mutual responsibility. The following step is the restructuring of the relationship, addressing themes as governance, lands, resources, and, economic development.

⁴⁰ This concept is proposed by Judith Pryor when analysing the influence of the *Mabo* decision in the reconstitution of Australia in Judith Pryor, *Constitutions: Writing Nations, Reading Difference* (Abingdon: Birkbeck Law Press, 2008) at 125-164. In this context, Pryor considers the following documents as influential to this idea: Council for Aboriginal Reconciliation, *Sharing history: a sense for all Australians of a shared ownership of their history* (Canberra: Australian Govt. Pub. Service, 1994) and Human Rights and Equal Opportunities Commission, *The Bringing Them Home Report* (Sydney, NSW: Commonwealth of Australia/Sterling Press, 1997).

⁴¹ See e.g. Flávia Piovesan, *Direitos Humanos e o Direito Constitucional Internacional*, 4th ed. (São Paulo: Max Limonad, 2000) [Piovesan, *Direito Constitucional*]; Alcida Rita Ramos, “Cutting through State and Class: Sources and Strategies of Self-Representation in Latin America” in Kay B. Warren & Jean E. Jackson, eds. *Indigenous Movements, Self-Representation and the State in Latin America* (Austin: University of Texas Press, 2002) 251; Gomes, “Cidadania”, *supra* note 22.

measure. The 1988 Constitution was meant by the constituent assembly and has been consistently interpreted by courts as a clean slate that potentially remedies all matters of social exclusions in the country.

The Constitution promulgation date has become a controversial temporal frame of reference for different types of claims. Some legislation and jurisprudence relating to indigenous and *quilombola* peoples claims define and refer back to 5 October 1988 as the precise date when the right to lands they traditionally occupy started taking effect even if recognizing that the occupation may have been immemorial. This temporal paradigm⁴² is not expressly endorsed by the Constitution and it could be argued that it represents an example of the self-referent perspective that permeates the *circular argument* context explored here.

In the Brazilian legal system, certainly influenced by its civilian roots, jurisprudence does not acknowledge or recognize indigenous or traditional laws, customs or property titles as part of the State legal framework or as having a part to play in indigenous, *quilombola* or other traditional peoples' claims.⁴³ It could be argued that, in general terms, the civil law system is intrinsically more self-referent than the common law tradition. It has also been observed that in the civilian tradition, the growth of the formal law of the State necessarily implies a decline in other forms of social cohesion.⁴⁴ The civilian system's operational methods offer an ideal arena for assimilation and integration approaches that deny agency and worth to indigenous or traditional legal systems. The civilian paradigm, in which the Brazilian judicial system operates, assumes that if a right has not been enshrined in a document, it is not a legal right and cannot be considered or enforced by courts.⁴⁵ Legislators, judges and practitioners follow the civilian

⁴² *Constituição*, 1988, *supra* note 23 at art. 231. See *e.g.* that in relation to indigenous peoples' land rights jurisprudence, this interpretational dogma can be identified in the opinions of four of the Justices in the *Terra Indígena Raposa Serra do Sol* case: see *Notícias STF*, Celso de Mello, *infra* note 778; PET 3388, Peluso; and PET 3388, Menezes Direito, *infra* note 167; and PET 3388, Grau, *infra* note 775; and in relation to *quilombola* land rights, the trend is identified in a legal text, through the enactment of the *Decreto n. 3.912*, see *infra* text accompanying note 427.

⁴³ See generally Marés, *Renascer*, *supra* note 6 at 160-162; Marés, "Direito", *supra* note 21; Yrigoyén Fajardo, "Pautas" *supra* note 10; and Raquel Yrigoyén Fajardo, "Legal Pluralism, Indigenous Law and the Special Jurisdiction in the Andean Countries", *Beyond Law* n. 27, 32 at 37-45 [Yrigoyén Fajardo, "Special Jurisdiction"].

⁴⁴ The idea of a presupposition of the decline of other forms of social cohesion is highlighted by H. Patrick Glenn, *Legal Traditions of the World*, 3d ed. (Oxford: Oxford University Press, 2007) at 137.

⁴⁵ Borrows & Rotman defend this definition in reference to Canada in general, therefore, not only in the context of the civil law tradition. They establish this same parallel, *e.g.* between an aboriginal rights to self-government and constitutional law in Canada. John Borrows & Leonard Rotman, *Aboriginal Legal Issues: Cases, Materials & Commentary*, 2d. ed. (Markham: LexisNexis Butterworths, 2003) at 693.

principle that it is a tradition of explicit rationality in law, a rationality that must be very logical, always choosing between contradictory things.⁴⁶ It should be noted that with the politization of the judiciary phenomenon, the Supreme Court has actively engaged in decisions that reflect law-making trends, an example being the *Raposa Serra do Sol* case. The same decision, however, contains proclamations that defend the civilian canon of denial of judicial law-making.⁴⁷

The most comprehensive piece of legislation in force in Brazil regarding indigenous peoples is the outdated *Estatuto do Índio*,⁴⁸ enacted under the 1969 constitutional order and, therefore, consistent with the integrationist agenda of the time. As any legal document superseded by a new constitution, the interpretation of the *Estatuto do Índio* considers the principles set forth in the 1988 Constitution, which are pluralist rather than assimilationist or integrationist. The 1973 *Estatuto do Índio* determines that “the uses, customs and traditions of the indigenous communities and their effects shall be respected when pertaining to family relations, the order of succession, property regimes and in the transactions among indians, except if they opt for the application of the regular law”.⁴⁹ The bill that proposes to replace the *Estatuto do Índio* was last revised in 2001 and maintains the same wording in this regard, adding that “the internal relations of an indigenous community will be regulated by their uses, customs and traditions”.⁵⁰ The bill is a step forward towards a pluralist approach if compared to the legislation in force as it brings several provisions that guarantee access to justice with clauses that take into consideration indigenous ways of life and their geographical accessibility to courts. Indeed, the formula enables ample participation in the existing system by, for instance, determining the competence of federal courts to judge “disputes over the application of indigenous laws”.⁵¹ However, even though some progress is made, indigenous laws would still not integrate this

⁴⁶ Glenn, *supra* note 44 at 145-146.

⁴⁷ The concept of denial of judicial law-making as a feature of the civil law tradition is taken from Glenn. *Ibid.* at 136.

⁴⁸ *Lei n. 6.001*, 19 December 1973, as regulated by the *Decreto n. 88.985*, 10 November 1983, the *Decreto n. 94.946*, 23 September 1987 and the *Decreto n. 27*, 4 February 1991; complemented by the *Decreto n. 1.775*, 8 January 1996 and interpreted according to the *Constituição*, 1988, *supra* note 23, online: <www.camara.gov.br> [*Estatuto do Índio*]. *Projeto de Lei 2.057/91*, 9 November 1991 -- a bill proposed in 1991 to replace the *Estatuto do Índio* and altered in 1994 and 2001 has since been awaiting further discussion and approval by the federal bicameral legislative power. It is now consolidated as *Proposta Substitutiva ao Projeto de Lei n. 2.057/91*, 18 May 2001, online: <www.camara.gov.br> [*Projeto de Lei n. 2.057/91*]. In 2009, the Ministry of Justice proposed a new version of *Projeto de Lei n. 2.057/91* to the *Congresso Nacional* but it has not thus far replaced the 2001 version developed by the legislative power.

⁴⁹ *Estatuto do Índio*, *supra* note 48 at art. 6 [translated by author].

⁵⁰ *Projeto de Lei 2.057/91*, *supra* note 48 at art. 52 [translated by author].

⁵¹ *Ibid.* at art. 56 [translated by author].

potential new legal order. Judges can refer to and interpret indigenous law but only when prompted to act in specific disputes, thus only slightly shifting the paradigm in force as they may use their own self-referent standards in the interpretation of the provisions. Indigenous laws, therefore, are never considered as a source of law and indigenous legal systems may exist only under and subjected to the self-referent interpretation of the official legal system.

The indigenous legal systems that the legislation affirms to exist, even if not calling them law, are overshadowed in their existence by the federal legislation and policy that establishes practices to be followed within indigenous lands in accordance with existing official law and practice. Indigenous legal and political systems can hardly be enforced within the communities because the *circular argument* is in place and they do not enjoy the right to internal self-determination and, perhaps, that is precisely the reason why the system is settled and enforced in this postcolonial manner.

The right to self-determination of peoples is stated in public international law and it is also stated, even if in a restricted manner, in the Brazilian Constitution itself.⁵² The entitlement to the right, however, is not of a right to be granted. It emerges from within each people who claim it. The right or principle of self-determination is an inherent attribute, flowing from sources within a people rather than external sources. Borrows & Rotman expose a similar approach to the concept of sovereignty of an aboriginal people or nation as an inherent attribute.⁵³ Sources from Canadian and other common law jurisdictions occasionally use the terms sovereignty and self-determination as synonyms. In the international arena and jurisdictions outside of the British and French colonial models, the term sovereignty is more easily linked to the external aspect of self-determination that presupposes independence claims and, naturally, leads to debates that limit the understanding of self-determination to the 1960-1980s decolonization framework.

The evolving trajectory of the right to self-determination is understood in this thesis as an indivisible principle that encompasses both an internal and an external dimension. Consequently, the theme is addressed without reference to sovereignty claims, although

⁵² *Constituição*, 1988, *supra* note 23 at art. 4, III.

⁵³ Borrows & Rotman, *supra* note 45 at 678.

recognizing that the proposition is undeniably connected to the concept of indigenous sovereignty as understood, for instance, in Canada from a historical and even contemporaneous treaty negotiation perspective.

It is precisely because the right emerges from within the peoples who claim and enjoy it that the effective exercise of the right to self-determination is closely connected to critical legal pluralism and approaches such as post-abyssal thinking.⁵⁴ It is precisely this combination that could dissipate the interpretational and ontological fallacies that permeate the Brazilian Constitution, legislation and jurisprudence; and ultimately break the *circular argument*. The statement of the right in public international law, the constitution or eventually, infra-constitutional legislation does not grant the right, which the peoples already have, but provides guidelines that direct the executive, legislative and judicial powers on how to recognize and enforce the rights of the peoples concerned and (re)conciliate efforts as well as diverging needs towards the effective exercise of the right within the State by all those who inhabit it.

The right to self-determination of peoples is interchangeably referred to, notably in public international law, as the principle of self-determination of peoples. Indeed, it represents a right that is much more value-based than many others and, according to theorists who adopt a generational classification of human rights, self-determination belongs to the latest human rights generation, as an intrinsically collective solidarity right.⁵⁵ The characteristics and the making of the right in itself conveys that engaging in the debate of self-determination, its recognition and enforcement and the recent enlargement of its subjectivity realm necessarily entails dealing with an axiological approach by and to the legal instruments that materialize it.

Self-determination is a type of right that is easily inserted in positivist legislation as a symbolic token of respect to pluralism, diversity and a people's integrity. The fluid and multi-faceted

⁵⁴ See Santos, "Beyond Abyssal Thinking", *supra* note 13. Santos theorizes that post-abyssal thinking is the necessary solution to the existing abyssal thinking framework of reference in social relations. The metaphor proposes that abyssal lines divide social reality into two realms and the division is so strong that what is 'on the other side of the line' vanishes as reality and is (re)produced as not existing in any relevant or comprehensible way.

⁵⁵ See e.g. Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (Cambridge: Cambridge University Press, 1995) 1-57 [Cassese, *Self-Determination*]; United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Historical and Current Development on the Basis of United Nations Instruments*, report by Aureliu Cristescu, E/CN.4/Sub.2/404/Rev.1 (New York: UN, 1981) at 1-45.

possibilities of implementation and enforcement of the right are difficult to measure and many initiatives that address pluralism and diversity can be labelled as the exercise of the right to self-determination. It is also a right that exists both in the present and the future and its full enjoyment by a people can easily be transferred to a moment that is further beyond the 'right now' in a linear timeline. Progressive implementation of the right to self-determination, although ideal in most cases, can be turned into a politically imposed deadlock that will only be solved in the distant future. When the harmonization of conflicting interests turns challenging, it can be easily framed as an incommensurable obstacle to the implementation of the right usually to the disadvantage of the people entitled to it.

Considering this scenario and also the axiological nature of the right, its existence, both in international and national law is often symbolic. In the Brazilian case, both the enunciation of the right to self-determination as well as the statement of the rights specific to traditional peoples and communities is embedded with symbolism that implies a far-fetched implementation in 'better times' still to come. The entire 1988 Constitution, nicknamed 'the citizen constitution' is iconically symbolic. The symbolism of constitutional texts is a given in comparative and multi-ethnic States constitutional studies. Those studies unanimously highlight the role of constitutions in the redefinition of inherent rights and the reconciliation of plural and multicultural States.⁵⁶ The 1988 Brazilian Constitution's main goal was to symbolize inclusion, fairness and the democratization of the State. The clear intention of the constituent assembly was to return Brazil to its rightful place among respected States that value democracy, civil and political rights, socio-political integrity and human dignity after a long period in which those terms were defined in considerably greyer shades by a secretive military dictatorship.

The principle-based aura of the 1988 Constitution is actually considered its most positive feature. It is precisely because of the symbolic and future-stretching nature of the Constitution that diversity-related rights included in its lengthy text, rather than distance the system from

⁵⁶ See e.g. Pryor, *supra* note 40; Marcelo Neves, *A constitucionalização simbólica* (São Paulo: WMF Martins Fontes, 2007); James Tully, *Strange multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995) [Tully; *Strange multiplicity*]; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2002) [Macklem; *Indigenous Difference*].

the *circular argument*, contribute to shrouding it within the constitutional order rendering inherent or *de facto* rights, such as the right to self-determination, nearly unenforceable.

This constitutionally-led structure as presently interpreted hardly redresses historical wrongs and does not acknowledge that its text, as it is, is both directly and indirectly entrenched with the right of self-determination and rights that may derive from it. Negotiations between different governmental levels and traditional peoples are not part of the constitutional culture mostly due to the persistence of the *circular argument* conjuncture. The socio-legal cultures of assimilation and integration are much more ingrained in the national political mindset than, for instance, a culture of case by case consultation and negotiation. The analysis of the case *Terra Indígena Raposa Serra do Sol* as well as the legislation and policies in force are a throughout and sad demonstration of this grim reality where corruption, political influence and other issues take priority in the public power's agenda.

The constitutional text and the international legislation Brazil has signed and ratified or otherwise endorsed have the potential to motivate judicial interpretation that is more in sync with the implementation of the right to self-determination rather than a *circular argument*-based integrationist approach. The intersection between international and national law happens naturally in today's state of affairs, and most notably, if the rights' subjectivity transcends borders and its object is universally protected and enforced even if implemented locally. The international legal existence of the right to self-determination has served, in many contexts, as an escape goat to the perpetuation of *circular argument* contexts in different national jurisdictions. Brazil is no exception to this rule. Traditional conceptualizations of sovereignty and non-intervention emerge any time the right to self-determination is directly or indirectly under analysis by courts, notably, the *Supremo Tribunal Federal*.

The theme is usually dismissed from courtrooms on the pretext that it shall not be discussed at the national level because international law itself guarantees the State its national sovereignty and territorial integrity. This is an outdated and inaccurate idea of the context in which self-determination ought to be discussed as this thesis aims to illustrate. Even if the traditional

approaches to national sovereignty and territorial integrity are brought to the equation it is international law itself that has enabled renewed and enlarged possibilities of enforcement of the right to self-determination through an internal dimension that does not affect the nation-state model. The judicial, legislative and executive powers must have good will and creativity to engage in ways of interpreting and implementing the right, always in consultation and negotiation with the affected peoples and communities. International law offers an interesting perspective for the ideal implementation of self-determination. This perspective has become a premise for this thesis and is indispensable to this analysis. The premise is that self-determination is a human right and can ascertain effective standards of compliance to several other rights derived from it, many of which are fundamental human rights enjoyed individually and collectively.

The perspective that self-determination is a human right is endorsed by international law and academics alike. Anaya, for example, considers the internal dimension of the principle of self-determination of peoples as a necessary premise for the efficient fulfilment of international human rights standards of indigenous peoples and effective pluralist initiatives.⁵⁷ This type of academic testimonies develops in parallel to the advancements in the international legislation in the field. The recent approval by the UN General Assembly of the *Declaration on the Rights of Indigenous Peoples* as well as the increasingly broader interpretation of the self-determination provisions in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*⁵⁸ can be envisaged as catalysers of this renewed approach. Other international instruments can be added to this list, notably, regional agreements sponsored by the Organization of American States, as the *travaux préparatoires* and text of the *Proposed Declaration on the Rights of Indigenous Peoples*⁵⁹ and the jurisprudence and opinions issued

⁵⁷ S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. (Oxford, Oxford University Press, 2004) at 98-103 [Anaya, *Indigenous Peoples*].

⁵⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171; *International Covenant on Economic, Social and Cultural Rights*, 19 December 1966, 993 U.N.T.S. 4.

⁵⁹ Organization of American States, *Proposed Declaration on the Rights of Indigenous Peoples*, Inter-Am. Comm. H. R., 1997 95th Sess., OEA/Ser.L/V/II.95 doc.6, revised by *Consolidated Text of the Draft Declaration prepared by the Chair of the Working Group*, Committee on Juridical and Political Affairs, 17 June 2003, OEA/Ser.K/XVI GT/DADIN/doc.139/03 [OAS, *Proposed Declaration*].

by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.

The understanding and application of the right to self-determination in Brazil does not seem to consider the revolution in information technology and other effects of globalization in the transmission of information to communities and peoples that are still considered by many as dwellers of far away forests or communities who live in isolation from the so-called civilized society. In truth, there are many communities and peoples who live in isolated areas of the country but nowadays that does not necessarily mean lack of information. Crucial information about the advancements of indigenous and traditional peoples' rights in the international arena easily reach and educate these communities about what can and should be done to ascertain and improve their enjoyment of rights as distinct peoples.

As a consequence of this phenomenon, indigenous and traditional peoples around the world, Brazilians included, began to perceive international law as the conveyer of a type of law that is truly concerned with legal and political pluralism and acts as a powerful tool to hold national systems accountable for their lack of interest in issues of recognition and diversity-related rights, usually addressed in the international arena in a clearer and more straightforward manner in relation to national legal systems.

In this context, international law is considered a symbol of hope that, unlike most national provisions, manages to bridge the gap between abstract legislation at the global level and local or community-based legal spheres, transforming international law into *glocal* law.⁶⁰ In a recent trend, inclusion debates seem to by-pass law that emanates from the State and advocate for a more horizontal structure of law from the international to the local level without the vertical hierarchy imposed by the national level legal and political structures. This *glocal* law perception offered by indigenous peoples and some advocacy groups focuses on compliance with

⁶⁰ The term *glocal* is a neologism in English with similar variations in other languages. It has been used mostly within the jargon of multinational businesses and international organizations - it is formed by the combination of the words global and local and usually refers to the ability of thinking globally and acting locally.

standards established in international law as the main tool to achieve effective internal self-determination. International law as *glocal* law enables a dialogue scenario described by Santos as *diatopical hermeneutics*: the establishment and permanent evaluation of intercultural dialogues and the intercultural construction of concepts of equality and difference.⁶¹

The current tools that emanate from international and national law and the interplay between them are factored in the analysis proposed, as are the perspectives towards international and national law by indigenous and other socio-ethnic distinct peoples and the context in which this dialogue and struggle takes place, in other words, the Brazilian postcolonial, peripheral, emerging geopolitical space. Far from proposing a definitive answer to the multi-faceted consequences brought by the *circular argument* intricacies, the aim is to present an informed critique of the current context and propose perspectives that contribute to the self-determining recognition and enforcement of rights related to dignity, sustainability, diversity and pluralism.

⁶¹ Santos, *Gramática*, *supra* note 13 at 131-134; 447-455.

CHAPTER 1

Encounters: Internal Colonization, Diversity and the 1988 Constitution

*“El mismo suelo que piso seguirá, yo me habré ido; rumbo también del olvido no hay doctrina que no vaya, y no hay pueblo que no se haya creído el pueblo elegido”.*⁶²

This chapter focuses on the identification of patterns in legal and political encounters between indigenous peoples and, to a certain extent, *quilombola* peoples and dominant society. The aim is to present a critical description of the evolution of the legal status of socio-ethnically distinct peoples in Brazil in order to identify circumstances and trends in which legal and political choices emerged and were entrenched in the legal theory and practice. The goal is to prepare the terrain for further analysis regarding the perpetuation of the *circular argument* as well as suggestions to break the *circular argument* by redressing and reinterpreting constitutional discourse and existing rights.

Initially, the analysis of the *circular argument* proposed for this thesis focused on the core relations between the dominant society and indigenous peoples as members of societies that pre-date the discovery and colonization of the Brazilian territory. An expansive review of recently enacted public policy and legislation at national and international levels, however, demonstrates that the *quilombolas* and other socio-ethnically distinct peoples are very akin to indigenous peoples in the social, legal and political realm, consequently, the analysis was expanded considering that legislation and policy targeting also other socio-ethnically distinct peoples may contribute to the (re)creation of a *circular argument* that is very similar or quite the same as the *circular argument* faced by indigenous peoples.

The emergence of an organized civil society formed by and to represent other socio-ethnically distinct peoples in addition to existing indigenous social movements that contest expanded and

⁶² Jorge Drexler, *Milonga del Moro Judío*, CD Eco2, 2005. “The lands in which I now walk will still be here when I am gone, just as much as there are no doctrine that is not eventually forgotten and no people that has not believed to be the ‘chosen’ people” [translated by author].

nuanced manifestations of the *circular argument* reinforces the need to study the legal and political status of *quilombolas* and other traditional peoples as well as factor them into the reinterpretation proposed. Nevertheless, it should be considered that although, *a priori*, the *circular argument* is similarly experienced by all distinct peoples in Brazil, the analysis also uncovers inequalities within the inequality generated by the *circular argument*. It is often the case that the biased perception of agency and standards of sustainability by the dominant society become entrenched in legislation and policy and affects, disproportionately, only indigenous peoples in the strict sense of the concept rather than traditional peoples as a whole.

1.1 Indigenous Peoples: Internal Colonization and Involuntary Incorporation

In the case of indigenous peoples, the observation of encounters and the consequent interaction between the conquered and the conqueror, in other words, the colonized and colonizer peoples, are useful pathways that assist in the identification of socio-political-cultural circumstances and ethnic-based claims motivated by them. Many colonization methods can be perpetuated after the independence of conquered peoples, especially if internal colonization occurred, and, if the social, legal and political system of the colonized peoples were completely destroyed or were partially incorporated into the colonizer's societal model.

Internal colonization is understood here as the phenomenon by which a colonizing society is built on the territories of societies that were formerly free. Colonization, internal or external, is often based in oppression paradigms such as appropriation of labour or depopulation through genocide or ethnocide. What differentiates internal colonization from its external counterpart is that in an internal colonial enterprise the grounds of the relation are appropriation of the land, resources and jurisdiction, not only for resettlement and exploitation but also for the territorial foundation of the dominant society.⁶³ Within the processes of internal colonization of the Americas, societal incorporation happened through conquest as well as the forcible or surreptitious relinquishing or transferring of power and territory to the colonizer. The partial incorporation or complete extermination of the legal and socio-political systems of colonized

⁶³ Tully, "Struggles", *supra* note 28 at 39.

societies remains at the core of the liberal characterization of indigenous peoples' rights. Full fledged incorporation usually define and describe the early period of the relationship between colonizer and colonized in the Americas and it is precisely this pattern of incorporation that has enabled the development of a discourse about indigenous peoples that does not require or include aboriginal participation in any form.⁶⁴

Processes of incorporation in the Americas, and most certainly the process that took place in Brazil, are defined as involuntary incorporation occurring when one cultural community is invaded and conquered by another and/or when its homeland is overrun by colonizing settlers.⁶⁵ Kymlicka observes that "many countries throughout the world are multinational, in the sense that their boundaries were drawn to include the territory occupied by pre-existing, and often previously self-governing cultures".⁶⁶ The perpetuation of this incorporating internal colonialism can similarly manifest itself under the guise of postcolonialism assuming many shapes and forms. Brazil is no exception to this rule and has a very similar trajectory as most of the States that now form the Americas. As Dussel illustrates "after the geographical recognition of a territory, one proceeded to control the bodies of the inhabitants, since they needed to be *pacified*, as it was customary to say in that epoch".⁶⁷

The internal colonization and incorporation processes include the relinquishment of sovereignty. These processes are widely known to have been unjust, and their validity must be reassessed. This reassessment is relevant and serves to rectify past injustices, but its main goal ought to be a renewal of the political relationship on the basis of more just foundations.⁶⁸ It is argued that if incorporation processes were involuntary, the political relationship might have been established on premises that lack legitimacy and, consequently, should be renegotiated⁶⁹

⁶⁴ Dale A. Turner, "This is not a Peace Pipe": Toward an Understanding of Aboriginal Sovereignty (PhD Thesis, Department of Philosophy, McGill University, 1997) [unpublished] at 2-22.

⁶⁵ Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995) at 11 [Kymlicka, *Citizenship*].

⁶⁶ *Ibid.* at 13.

⁶⁷ Enrique Dussel, *The Invention of the Americas: Eclipse of 'the Other' and the Myth of Modernity* (New York: Continuum, 1995) at 38 [emphasis in the original] [Dussel, *Invention*].

⁶⁸ Turner, *supra* note 64 at 20-21.

⁶⁹ Kymlicka, *Citizenship*, *supra* note 65 at 117.

in fairer, cohesive and mutually informed terms. The patterns of internal colonization and involuntary incorporation in the early encounters between indigenous and non-indigenous peoples in Brazil are crucial to understanding the pathways towards the current socio-legal and political scenario and also to envisage the possibilities of reassessment of the relationship in fairer terms. The existence of these patterns and the evidence of their legacy in the current legislation and constitutional interpretation are twofold: they demonstrate the current precarious and discriminatory relationship and also constitute the foundation for justifying the chosen criteria of reinterpretation of the relationship between the State and indigenous and other socio-ethnically distinct peoples.⁷⁰

Much has been written within the Brazilian context on the abuses perpetrated against indigenous peoples throughout the country's history, namely during the colonial and imperial periods.⁷¹ Rich characterizations of the subjugation of indigenous peoples are found, for instance, in sociological and anthropological descriptions contained in the travel and biographical memoirs of European, North American and local naturalists.

The renowned book *Tristes Tropiques* by Lévi-Strauss recounts the time he spent in Brazil in the 1930s teaching at universities and studying indigenous groups in field trips throughout the

⁷⁰ Kymlicka, for example, observes that peoples that have been subjected to conquest and involuntary incorporation could be entitled to a morally consistent approach to self-determination that would recognize its applicability at least in the form of a right to territorial autonomy. Will Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford: Oxford University Press, 2007) at 206 [Kymlicka, *Odysseys*].

⁷¹ Brazil was officially discovered in 22 April 1500 by a Portuguese fleet. According to the *Treaty of Tordesillas* of 1494 between Spain and Portugal as well as other Papal Bulls and Treaties of the time, *supra* notes 36 and 37, the territory of what now is Brazil was officially claimed and expanded by Portugal. Brazil was a Portuguese colony from 1500 to 1822 when independence was declared. From 1816 to 1822, the territory was part of the *Reino Unido de Portugal, Brasil e Algarves* following the transfer of the Portuguese Royal Family to Rio de Janeiro in 1808 to escape Portugal's invasion by Napoleon's forces and still retain the right to the throne once they returned to Europe. Although life in the colony changed considerably after the arrival of the Royal Family and the upgraded political status of the colony, the situation remained much the same for indigenous peoples and black slaves. Independence was declared by Dom Pedro I, son of Dom João VI the king of Portugal. A constitutional monarchy was established and Dom Pedro I ruled as the Emperor of Brazil from 1822 to 1831, followed by a regency period until, Dom Pedro I's son, Dom Pedro II was crowned Brazil's second Emperor governing from 1840 to 1889 when a military coup successfully proclaimed the Republic, a year after slavery was fully abolished in Brazilian territory.

Brazil's Southeast.⁷² In the midst of anthropological elocutions on the indigenous peoples' lifestyle, Lévi-Strauss includes comments such as "the coastal Tupi had quickly been mopped up by the colonists"⁷³ and "[the Gê] may have kept going until 1935, for they had learnt from the ferocious persecutions of the previous hundred years to keep themselves entirely hidden from the outer world".⁷⁴ One of the most significant and comprehensive works on the life and challenges faced by indigenous peoples in Brazil and their interactions with non-indigenous peoples is the trilogy *Red Gold: The Conquest of the Brazilian Indians*; *Amazon Frontier: The Defeat of the Brazilian Indians*; and, *Die If You Must: Brazilian Indians in the Twentieth Century* authored by anthropologist John Hemming.⁷⁵

Contact between non-indigenous and indigenous coastal inhabitants during the sixteenth and seventeenth centuries included government-run frontier enterprises and the open relocation of indigenous populations for economic development. The exploitation of natural resources from the seventeenth to mid-twentieth century has greatly influenced legal enactments and public policy concerning indigenous peoples as well as their legal status. The methods of colonization varied slightly between the Spanish and Portuguese administrations, as did the social and political organization of the indigenous peoples in the Spanish and Portuguese dominions in the Americas. The monoculture agricultural economy established in Brazil from the seventeenth to the early twentieth centuries and the ethnic origin of the workers forcefully or voluntarily employed were, unlike other places in the Americas, a decisive factor to the ethnic composition and geographical concentration of the population within the Brazilian territory.

⁷² Claude Lévi-Strauss, *Tristes Tropiques* (Paris: Plon, 1955). Direct citations in English were taken from Claude Lévi-Strauss, *Tristes Tropiques*, trans. by John Russell (New York: Atheneum, 1967).

⁷³ *Ibid.* at 134.

⁷⁴ *Ibid.*

⁷⁵ John Hemming is Canadian-born British citizen who presided the Royal Geographic Society for twenty-one years. His work describes in detail the past and present social organization and history of most indigenous peoples throughout the Brazilian territory, their voluntary and involuntary migrations and the adaptation process, since the early colonial period to the early 2000s, *Red Gold: the conquest of Brazilian Indians*, 2d (rev) ed. (London: Papermac, 1995) [Hemming, *Red Gold*] was first published in 1978 and covers the period from 1500 to 1760; *Amazon frontier: the defeat of Brazilian Indians* 2d ed. (London: Papermac, 1995) [Hemming, *Amazon Frontier*], originally published in 1987 covers roughly the period of time from 1760 to 1910. *Die if you must: Brazilian Indians in the Twentieth Century* 2d ed. (London: Pan Macmillan, 2004) [Hemming, *Die if You Must*] first published in 2003 describes in detail the social, legal and political relationship between all stakeholders in the field of indigenous issues through anthropological lenses. Contrary to what the title may suggest, *Die If You Must* does not refer to the demise or forceful integration of indigenous peoples within the 'non-indigenous' society. The phrase "die if you must but never kill" was the motto of non-indigenous agents who worked for the *Serviço de Proteção ao Índio*, the first government service for the protection of indigenous peoples and cultures operational from 1910 to the 1967.

Indigenous peoples living in Brazil at the time of discovery by the Portuguese are described as naked nomadic peoples who “were hunter-gatherers or primitive farmers in no way comparable to the sophisticated Aztecs or Incas with their metal-working, art and architecture and their elaborate economic, religious and political structures”.⁷⁶

Naturally, this perception has fuelled the image of the *noble savage* without agency or cultural worth that should surrender land, resources and jurisdiction to a dominant society. Indigenous peoples in Brazil were perceived to be even more inferior in terms of agency and development than the indigenous peoples who inhabited other parts of the Americas. Territorial encroachment and appropriation of natural resources was hardly negotiated and evangelization was perceived as a pacifying factor enabling the cohabitation of indigenous and non-indigenous peoples in the Brazilian outback. Negotiations or power disputes were perceived as not necessary or plainly non-existent – consequently, assimilation and full integration of indigenous peoples within the dominant society’s way of life were assumed to be the only option from the outset.

The decimation of the indigenous population followed the patterns common in the Americas. Epidemics from Afro-Eurasian diseases to which indigenous peoples had no immunity, slavery and forced labour killed many and were the main cause of the starvation and famine that followed and killed many more. The conquests were consolidated by persuasive religious indoctrination by missionaries and the relatively few colonists fathered many children of mixed-descent. Convinced of their religious and technological superiority, the colonists fought ferocious frontier wars and treated indigenous peoples with scorn or condescension.⁷⁷ Hemming observes, however, that to some extent, the Portuguese administration hoped to involve indigenous peoples as its subjects in Brazil, to integrate them into colonial society and turn them into God-fearing citizens in contrast to the British and the French in North

⁷⁶ Hemming, *Red Gold*, *supra* note 75 at 24.

⁷⁷ *Ibid.* at 139-160.

America, where elaborate treaties were signed with the indigenous nations, but the settlers wanted the land rid of its original inhabitants.⁷⁸

Another common pattern in Brazil was the great contribution by indigenous peoples to the expansion of the territory through their invaluable assistance as trackers, hunters, woodsmen and canoers; expeditions opened the territory to Europeans even further and “ultimately doomed its native peoples to destruction”.⁷⁹ The patterns of legal and political interaction, or lack thereof, between indigenous and non-indigenous peoples, however, depict an initial contact that is followed by social interactions that usually maintain a segregationist legal and political *status quo*.

The asymmetric relationships between indigenous and non-indigenous peoples and the premise that “different is not necessarily the same as unequal or inequivalent” are the basis of the theory developed by Yrigoyén Fajardo to describe and study the timeline of the relations between State law and indigenous peoples’ legal traditions.⁸⁰ Yrigoyén Fajardo’s study addresses the recognition of legal pluralism and indigenous law in the Andean countries; nevertheless, the classification provided in her work is extremely useful for other studies of the legal and political relations from conquest to contemporary relations. The timeline of four steps or models that she identifies have parallels with the steps followed by legislators and policy makers in Brazil and form a useful methodology of analysis of historical patterns as contributors to the creation and perpetuation of the *circular argument*. The four models proposed by Yrigoyén Fajardo are segregation, assimilation, integration and pluralism.

The timeline proposed by Yrigoyén Fajardo presupposes that States operate in an order that recognizes only State law as the legitimate and truly legal system in force. This legal and political monism adopted by State authorities since colonial times resulted not only in the

⁷⁸ *Ibid.* at 179-180.

⁷⁹ *Ibid.* at 182.

⁸⁰ Yrigoyén Fajardo, *Pautas*, *supra* note 10 at 8 [translated by author].

violation of fundamental principles of law but also the absence of rights to peoples not culturally represented in the State's official law.⁸¹

The first of the four models in Yrigoyén Fajardo's theory is the *segregationist model*. It is described as a legal-political model of separation between indigenous and non-indigenous peoples in order to retain the ethno-racial differences in isolation from one another, and, therefore, justify tutelage or guardianship regimes and to exploit indigenous persons on the basis of their supposed 'natural inferiority'.⁸² In Brazil and many other Latin American territories, indigenous persons were considered legal minors and entrusted to missionaries, such as Jesuit orders.⁸³ The Iberian monarchs believed in their evangelizing duty but knew that the missionary activity was nullified by abuse and enslavement of indigenous peoples, consequently, all laws of the time concerning indigenous peoples were flawed and contradictory. Any liberal measure favouring indigenous peoples could provoke immediate outcries amongst settlers and often led to violence⁸⁴ but the decimation of indigenous peoples was not in any of the stakeholders' interest. Any attempt to explore the dense tropical forests and their natural resources were valueless without indigenous knowledge; settlers demanded their semi-enslaved labour; missionaries wanted to convert them in order to increase productivity in their missions and royal authorities wanted them as subjects to be used on public works or to defend the territory against other European powers.⁸⁵

Political controversies taking place simultaneously in the colony and the mainland ultimately caused the expulsion of the Jesuits and other missionaries from Brazil in the late 1700s and

⁸¹ *Ibid.* at 17-19.

⁸² *Ibid.* at 46.

⁸³ See, e.g. Hemming, *Red Gold*, *supra* note 75 at 318-319.

⁸⁴ *Ibid.* at 317-318. Hemming comments on this paradoxal *modus operandi* of the colonizing authorities influenced by the powerful ecclesiastical lobby led by the renowned Dominican Bartolomé de las Casas. The understanding at the time was that slavery and forced labour of Indians were wrong even if they reconciled themselves to enslaving Africans because their skins were darker.

⁸⁵ *Ibid.* at 460. See also Gomes, "Cidadania", *supra* note 22 at 421 who observes that a substantial part of the population did not die of natural causes but was subjugated and taken possession of by the colonial system and was therefore reduced and conducted to be a population politically submissive, socially rendered inferior and culturally transfigured. Indigenous peoples were forcefully assembled in small villages by missionaries, by royal administrators, then settlers and pioneers, close to sugar mills and farms, at the seashore and roadsides and ended up forming a formally free but culturally and socially dominated population.

most of their evangelizing missions were deactivated.⁸⁶ Efforts to convert indigenous peoples - whose original religions and beliefs are usually of an animist and polytheist nature - remain to this date. The end of the State-sponsored missionary era, nevertheless, marks a relevant transition in the relations between indigenous and non-indigenous peoples.

Evangelization is one of the most powerful forms of assimilation; however, after the missionaries left, the official legislation definitively replaced religious norms and the political evangelization era began. Yrigoyén Fajardo proposes that the *segregationist model*, centred in separate despite unequally ranked lifestyles, was followed by the *assimilationist model* through which different cultures and lifestyles were acknowledged but one of them was superimposed on the other. In other words, the concept of assimilation proposed refers to the legal and political imposition of the dominant society's legal and political structure to the entire population, regardless of socio-ethnic and cultural differences. The main goal of the assimilationist paradigm was the creation of a nation-building project on the basis of physical and cultural métissage.

The *assimilationist model*, according to Yrigoyén Fajardo, is based on the ideals of the Nation-State, an ideal much in vogue in Europe at the time⁸⁷ and reinforced by the autonomous existence of the colonies in the western continent since the late 1700s and, later on, with the independence of the Latin American States. The Nation-State premises were thus instilled in the New World's constitutions, namely through the 'one culture, one language, one official religion' ideal. In the Americas, this model aimed at the assimilation of the indigenous culture within a *métis* nation under the ideology of progress eventually overcoming the 'indigenous backwardness'.⁸⁸

⁸⁶ Jesuits were replaced by Portuguese layman as directors of the mission villages after a proposal that the indigenous peoples were to administer their own communities after the departure of the Jesuits was refuted by the colonial Governor. See e.g. Heming, *Red Gold*, *supra* note 75 at 496-497.

⁸⁷ Brazil is no exception to this trend. The presence of the Portuguese Royal Family in Brazil from 1808 to 1822 granted the territory a much enjoyed legal and political autonomy further consolidated with Brazil's independence in 1822.

⁸⁸ Yrigoyén Fajardo, *Pautas*, *supra* note 10 at 47.

In 1755, legislation geared to safeguard the legitimacy of the Portuguese authority with a supplementary and, at the time, unclear goal to assimilate indigenous peoples within the dominant society, the Portuguese Crown enacted legislation proclaiming that it was in its best interest that the Portuguese dominions in the Americas were populated, therefore, the Crown encouraged mixed marriages between settlers and indigenous persons.⁸⁹ The legislation's goal was to encourage, rather than condemn mixed marriages,⁹⁰ thus, representing a clear-cut transition from the segregationist ideal previously in vogue and the assimilationist model in force at this point in time, although mixed marriages had existed *de facto* several years previously to the enactment of the law.⁹¹

Brazilians of mixed white and indigenous heritage are known as '*brasilíndios*' or *caboclos*.⁹² The 1755 legislation not only encouraged inter-ethnic marriages but also ensured that those who were part of inter-ethnic couples as well as their children should not be subjected to infamatory treatment and should be considered equal to other citizens in all aspects of life thus enabling what was in effect an early example of anti-discrimination legislation.⁹³ The decree also encompassed relationships that pre-dated its enactment. The 1755 law forbade the use of the word *caboclo* or any other pejorative term referring to mixed-couples or persons of mixed-descent and established a legal procedure to hear claims related to the law's anti-discriminatory provisions. Interestingly, nowadays, the popular significance of the word *caboclo* refers not only to this mixed heritage in a positive sense but also refers to skilled forest or rural workers who according to current legislation, fall into the category of 'other traditional peoples and communities'.

⁸⁹ *Alvará de 4 de abril de 1775*, Collecção da Legislação Portuguesa, 1754-1755, online: Projeto Ius Lusitaniae, Universidade Nova de Lisboa <<http://iuslusitaniae.fcsh.unl.pt>> Unlike most legislation of the period and beyond, this piece demonstrates cohesiveness in the anti-discrimination policies it proposes expressing full gender awareness. The anti-discrimination provisions to settlers who marry indigenous persons textually address men settlers who marry indigenous women as well as women settlers who marry indigenous men and the children of both types of unions.

⁹⁰ See especially Buarque de Holanda, *supra* note 24 at 56.

⁹¹ See especially Freyre, *supra* note 24 at 160. Freyre observes that the inter-ethnic formation of the Brazilian population did not always occur following legitimate ways of family composition of the times. Regardless of the formal or informal nature of the parents' liaison, the Brazilian territory had an ethnically mixed population since the early days of its existence.

⁹² Ribeiro, *supra* note 24 at 106, 307.

⁹³ This legislation opposes the understanding in many other jurisdictions in the Americas and Oceania that enacted legislation and policy on the basis of the believed inferiority of half-castes or children of inter-ethnic parentage.

At the time the decree was enacted, political power and, consequently, the legislation enforcement emanated almost exclusively from royal governors and officials, taking into account that the missionaries allowed to remain in the Brazilian territory had been removed from all temporal or civil control of indigenous villages and were to confine themselves to evangelical work – their role after 1755 was mainly ‘to attract and convert new tribes’.⁹⁴ The scope of legislation had become centralized, seeking to unify the territories under common grounds such as one ethno-culturally diverse society that used Portuguese as the *lingua franca* and had Catholicism as the shared religion.

The 1755 legislation was in fact a double-edged sword. Hemming characterizes it as ‘false freedom’ for indigenous peoples⁹⁵ and Marés and Buarque de Holanda directly identify it with the assimilationist agenda that sought the eventual disappearance or dissolution of the indigenous population within the dominant society.⁹⁶ Although hardly mentioning the word ‘assimilation’, practice of the Portuguese Crown is very much in sync with Yrigoyén Fajardo’s description of the *assimilationist model*. Assimilation and the quest for a unified nation became even stronger in this same time period because encounters with another distinct ethno-cultural people were happening due to the height of the Atlantic slave trade and the forceful migration of millions of Black Africans to the Americas.

The monoculture agricultural model adopted in Brazil since the early colonizing enterprise is well known for the extensive use of Black slave labour and remained a widespread practice for almost eighty years after Brazil’s independence. Practices of separation of slaves from the same ethnic origin once they arrived in Brazilian lands impeded the retention of their original African cultural heritage⁹⁷ and Portuguese soon became the *lingua franca*. Informal relationships between the white bourgeoisie and black persons “particularly during the period of slavery, has

⁹⁴ Hemming, *Amazon Frontier*, *supra* note 75 at 3-4.

⁹⁵ *Ibid.* at 4-18.

⁹⁶ Marés, *Renascer*, *supra* note 6 at 53-56 and Buarque de Holanda, *supra* note 24 at 55-56.

⁹⁷ Pierre Van den Bergue, “Brasil” in Ellis Cashmore, ed. *Dictionary of Race and Ethnic Relations*, 4th ed. (London: Routledge, 1996) at 57.

created a continuum of phenotypes described by an elaborate nomenclature of racial terms”.⁹⁸ Indeed, ethnic self-consciousness is a recent phenomenon in Brazil. Moreover, ethno-social descriptions vary regionally, situationally and according to socio-economic criteria.⁹⁹

Besides the *caboclos*, who descend from both white and indigenous persons and *mulatos*, who are descendants of white and black persons, there are also *cafusos* who descend from black and indigenous persons although they represent a much smaller proportion of the population. The three groups are generally referred to as *pardos*, a synonym of the colour brown representing the colour of the skin. Until 1980, census categories referred only to self-identification of skin colour – black, white, *pardo* and yellow – rather than the ethnic belonging to a group. Since 2000, the categories remain related to the self-declared colour of the skin and not ethnic group with the exception of indigenous persons.¹⁰⁰ In 1991, 294.131 persons declared themselves as indigenous while 734.127 did so in 2001. This considerable quantitative increase prompted the *Instituto Brasileiro de Geografia e Estatística* to study its causes.¹⁰¹

The conclusions of the study demonstrate that the annual growth of indigenous peoples in Brazil from 1991 to 2000 was of 10,8% conveying a high rate of change in the patterns of self-declaration of indigenous persons who previously identified themselves in other categories, rather than an actual demographic growth.¹⁰² The interdisciplinary research group that authored the study included anthropologists, demographers, epidemiologists and sociologists¹⁰³

⁹⁸ *Ibid.* at 58.

⁹⁹ *Ibid.*

¹⁰⁰ According to the study IBGE, *Tendências*, *supra* note 31 at 5, the skin colour or ethnicity was not surveyed in the 1900 and 1920 census; in 1940, the survey included the categories black, white, yellow and other, and reports of that census classify all those who self-identified themselves as other in the *pardo* category (encompassing those who declared being indigenous, *caboclo*, *mulato*, *moreno*, etc.). The 1950 census included *pardo* as a category; the 1960 and 1980 limited the categories to black, white, *pardo* and yellow and in the 1970 census skin colour or ethnicity were not surveyed. In 1991 and 2000 the indigenous category was added. It should also be noted that persons who self-identify themselves as whites are not usually the descendants from the first Portuguese settlers but rather the descendants from immigrants that arrived in Brazil from the mid-nineteenth century until mid-twentieth century as low-cost rural and urban labourers to meet the demand of work in the aftermath of the abolition of slavery in 1888. This period also marks the arrival of the persons who self-declare themselves as yellow and whose descendants continue to declare themselves as such.

¹⁰¹ IBGE, *Tendências*, *supra* note 31.

¹⁰² *Ibid.* at 12-13.

¹⁰³ *Ibid.* at 3.

and offers a non-exhaustive list of possibilities that could explain the exponential increase in the indigenous population. First, a natural increase in the vegetative growth rates as a result of improvements in health and education policies. Second, the increase in immigration from Bolivia, Ecuador, Paraguay and Peru, countries with a high contingent of indigenous peoples. The conclusions highlight that although relevant, those first two factors could not explain a 10,8% increase in the indigenous population. Therefore, the third and most significant conclusion points to an increase in self-identification, most notably by indigenous persons living in urban areas.¹⁰⁴ Many factors and historical developments have influenced the inter-ethnic relations as well as the increase in self-identification of indigenous and other socio-ethnically distinct peoples as such. Most political developments as well as the legislative and policy evolution from the 1600s to date are analysed in detail here.

1.2 *Quilombolas*: Diversification of Socio-Ethnic Distinctiveness

The monoculture agriculture model adopted in Brazil from the late 1600s to the late 1800s has entailed, as mentioned above, the forcible transfer of great numbers of Africans to Brazil doomed to perform slave labour. The presence of Africans who would eventually be the ancestors of today's large Afro-Brazilian population deeply changed ethnic relations within Brazilian territory. Further changes, however, were the result of resistance movements to slavery – the stronger of which resulted in the formation, still during the colonial period, of another socio-ethnically distinct people that later on would be considered akin to indigenous peoples: the *quilombola* peoples.

A Brazilian quilombo or *mocambo* is generally conceptualized as “a remote settlement originally founded as a refuge by fugitive slaves or their descendants” while in Africa, notably in Angola, quilombo means “a fortified residence or encampment [and] the political or military

¹⁰⁴ *Ibid.* at 28. See also Yrigoyén Fajardo, *Pantas*, *supra* note 10 at 48-51. The pluralist approach includes the recognition of indigenous peoples as a socio-ethnically distinct society and represents a full paradigm shift from the integrationist model in terms of discrimination and interrelational legislation and policy. Although somewhat flawed, as analysed below, the pluralist shift in Brazil in the late 1980s may have motivated many indigenous persons to embrace their indigenous identity.

institutions associated with [it]”.¹⁰⁵ The African origins of the word and its meaning in Angola clearly illustrate the resistance aspect of the origins of the *quilombola* peoples in Brazil.¹⁰⁶ Schwartz observes that the term quilombo “came to mean in Brazil any community of escaped slaves, and its usual meaning and origin is given as the Mbundu word for war-camp”, also highlighting the timeline in the interchangeable use of the words quilombo and *mocambo*: “by the eighteenth century the term [quilombo] was in general use in Brazil, but it always remained secondary to the older term *mocambo*, a Mbundu word meaning hideout”.¹⁰⁷

Originated during the 1600s by freed or run-away slaves who settled in remote or isolated areas in the Brazilian outback, quilombos or *mocambos* usually did not focus on isolation or escapism from the slave-trade system; they focused on resistance and autonomy.¹⁰⁸ An average of 1000 quilombos existed simultaneously throughout the Brazilian territory from the 1600s to the late 1800s as semi-autonomous entities. They developed their own governance systems in order to preserve and reproduce community values. O’Dwyer defines them as “groups that developed daily practices of resistance to maintain and reproduce their characteristic ways of life and the consolidation of their own territory”.¹⁰⁹

This phenomenon and the socio-ethnically distinct communities that this shared past would contribute to form are fairly common throughout the Americas. It has been observed that those who attempted to create such communities in the Region “faced largely similar problems

¹⁰⁵ *The Oxford English Dictionary Online*, September 2009, *s.v.* “quilombo”, informing further that (the remaining quilombo communities were granted special land rights under the Brazilian constitution of 1988). See especially Stuart B. Schwartz, *Slaves, Peasants and Rebels: Reconsidering Brazilian Slavery* (Urbana: University of Illinois Press, 1992) at 128 (there is enough evidence to suggest that the introduction of the term *quilombo* into Brazil in the late seventeenth century was not accidental and that it represented more than simply a linguistic borrowing) [Schwartz, *Reconsidering Brazilian Slavery*].

¹⁰⁶ It should be noted that the establishment of quilombos were not the only form of resistance to the slave-trade regime in force in Brazil until 1888. There were three basic forms of active resistance: fugitive slave settlements; attempts at seizure of power; and armed insurrections which sought neither escape nor control but amelioration as noted by R. K. Kent, “Palmares: An African State in Brazil” (1965) 6:2 *The Journal of African History* 161 at 162. Conversely, not all quilombos were formed as a result of insurrections or by rebellious freed or escaped slaves as noted by Eliane Cantarino O’Dwyer, “Os quilombos e a prática profissional dos antropólogos” in Eliane Cantarino O’Dwyer, ed., *Quilombos: identidade étnica e territorialidade* (Rio de Janeiro, Editora FGV, 2002) 13 at 18.

¹⁰⁷ Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 125.

¹⁰⁸ *Comunidades Quilombolas no Brasil*, *supra* note 34.

¹⁰⁹ O’Dwyer, *supra* note 106 at 18.

and arrived at broadly comparable solutions”.¹¹⁰ Thus, anthropological and historical studies associate the quilombo movement as *marronage* – one of many initiatives against the slavery regime in the Americas in the colonial period.¹¹¹ Although the terms *maroon* or *marronage* are widely used by English speaking theorists to describe initiatives such as the *quilombola* movement since the 1600s it is rarely used in the Brazilian quilombos or *mocambos*’ literature.

Resistance initiatives against the slave-trade are not as well documented by travellers or local inhabitants in comparison to the idyllic description of indigenous lifestyles and the post-colonization struggles of indigenous peoples. Describing those who were regarded as outlaws during the colonial and imperial periods may not have seem as interesting and relevant to European and North American visiting naturalists, most definitely not from an anthropological or sociological point of view at the time. Kent noted in 1965 that local academic literature focused on the assimilation of Afro-Brazilians rather than their divergence, thus it is not surprising that resistance to slavery has not received comparable attention and is consequently less known.¹¹²

There is not much socio-historical data available about quilombos since chroniclers were more interested in the military techniques that could be employed against them rather than their internal organization and customs.¹¹³ The documents or travel chronicles were usually

¹¹⁰ Richard Price, ed., *Maroon Societies: Rebel Slave Communities in the Americas*, 3d ed. (Baltimore: The Johns Hopkins University Press, 1996) at 4.

¹¹¹ *Ibid.* at 1-4 (known variously as *palenques*, *mocambos*, *cumbes*, *ladeiras* or *mambises*, these new societies ranged from tiny bands that survived less than a year to powerful states encompassing thousands of members and surviving for generations or even centuries; today their descendants still form semi-independent enclaves in several parts of the hemisphere, remaining fiercely proud of their maroon origins and, in some cases at least, faithful to unique cultural traditions that were forged during the earliest days of Afro-American history).

¹¹² Kent, *supra* note 106 at 161-162. Divergence rather than assimilation literature of Afro-Brazilians emerged as such after the promulgation of the 1988 Constitution as analysed below. In addition to land and cultural rights granted to *quilombola* peoples and all subsequent legislation and policy to improve education and employment conditions of Afro-Brazilians, the Ministry of Culture created an agency to promote and protect the Afro-Brazilian contributions to the nation-building project. The agency was named Palmares, after the largest quilombo in Brazilian history. In 2003, 20 November was established as the *Dia Nacional da Consciência Negra* by *Lei n. 10.639*, 9 January 2003. The date chosen coincides with the death of Zumbi, one of the last leaders of the Palmares quilombo, killed by Portuguese authorities in 1694.

¹¹³ Roger Bastide, “*The Other Quilombos*” in Price, *supra* note 110, 191 at 195 [Bastide, “Quilombos”].

produced by the commanders of the military operations sent to destroy the quilombos¹¹⁴ taking into account that quilombos were regarded as a threat to the Portuguese and later Brazilian-led plantation and mining systems and were rarely allowed to last long.¹¹⁵ After the military resistance cells of the quilombos were dismantled by local forces, the existence of the quilombo as a socio-political structure usually remained and once their status as social outcasts or outlaws ceased with the abolition of slavery in 1888, the internal governance practices were adapted to new realities without, however, merging with mainstream society.

The processes of formation of quilombo communities followed very similar patterns throughout Brazil's vast territory, entailing also an efficient network system within the resistance movement. The early *quilombolas* took advantage of their strategic hideout locations and at first lived off hunting, fishing and gathering, at times forging partnerships with neighbouring indigenous communities, sometimes on the basis of kinship and others merely for economic and military purposes. Furthermore, as the population increased at the *quilombos*, agriculture became a widespread source of subsistence but also exchange, usually for money, arms and ammunition.¹¹⁶ Contrary to common knowledge about quilombo resistance, Schwartz demonstrates that while some communities existed in remote locations, the vast majority remained "close to towns and farms, although often in inaccessible locations".¹¹⁷ The internal economy of the quilombos increased their position as outlaws. The proximity to settled areas was a prerequisite for success and longevity; and rather than return to African pastoral pursuits, *mocambo* economies "were often parasitic, based on highway theft, cattle rustling [and] extortion",¹¹⁸ including the sporadic raiding of its immediate neighbours.¹¹⁹ Schwartz observes that "they stole from slaves and free people of color as well as whites".¹²⁰

¹¹⁴ Flávio José Gomes Cabral, "Palmares entre sangue e fogo", online: Revista de História da Biblioteca Nacional <<http://www.revistadehistoria.com.br/v2/home>> at §7. See also Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 112 (the varied and disparate documents that mention the activities of escaped slaves in Brazil reveal little about the social and political organization within the fugitive communities).

¹¹⁵ Kent, *supra* note 106 at 162.

¹¹⁶ Gomes Cabral, *supra* note 114 at §8.

¹¹⁷ Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 108.

¹¹⁸ *Ibid.* at 109.

¹¹⁹ Stuart B. Schwartz, "The *Mocambo*: Slave Resistance in Colonial Bahia" in Price, *supra* note 110, 202 at 218 [Schwartz, "*Mocambo*"].

¹²⁰ Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 117.

When observed through this lens, quilombos had surpassed their status as acts of resistance and had become a threat to social morals and property within the white settler system. While those activities were usually complemented by agriculture, the *mocambos* rarely became self-sufficient and completely isolated from the society that often feared them.¹²¹ Price interestingly observes that to some extent the ‘economic dependence’ of “maroons on colonial society was a matter of choice, and it bespeaks a kind of *westernization* which, though limited in scope is more profound than simply the knowledge of the skills picked up on the plantation”.¹²² A surprising amount of collusion by persons of all social classes with the *maroons* is reported whenever it served their self-interest.¹²³

It could be speculated that dependence on essential items from colonial society was a choice of quilombo communities. The use of the word ‘choice’ in this context is circumstantial because the forcible transfer and labour of Africans or the use of descendants of Africans born in Brazil as slaves does not entail freedom at all. The choice to become an ‘in between’ society – in other words, a people ‘in between’ the colonial society and an alternative model on the basis of African socio-political structures and creative institutions developed in Brazil and most of the Americas differentiates the encounters between the settler society and quilombo communities from those encounters and relations between the colonial settler enterprise and the internally colonized indigenous peoples.

It could also be argued that this phenomenon has heavily contributed to shape stereotypical perceptions of the agency and internal governance abilities of both indigenous and *quilombola* peoples. Nowadays, they are both subjected to extensive discrimination regarding their collective access to traditional lands and on socio-ethnic grounds. Within the *circular argument* context, however, it could be speculated that during slave-trade period *quilombola* peoples were perceived and often still are perceived as closer to Eurocentric civilization ideals when contrasted with indigenous societies. When describing the quilombo settlements, Bastide proposes that rather than being the living product of a ‘counteracculturation’ phenomenon, the

¹²¹ *Ibid.* at 109.

¹²² Price, *supra* note 110 at 12.

¹²³ *Ibid.* at 13.

mocambo movement was closer to a syncretist model, similar to the tendencies observed within the Afro-Brazilian religious context.¹²⁴ If this same theoretical approach is used to compare the *quilombola* and the indigenous peoples' scenario, the involuntary incorporation and internal colonization of the first inhabitants of Brazil could be broadly categorized as 'counteracculturation'. The observation of these ideological standpoints by and through the lenses of the dominant society may have led to the subtly differentiated agency stereotypes regarding indigenous and *quilombola* peoples that, to a certain extent, still exist.

From a socio-ethnic perspective, Kent's definition of Palmares, the largest quilombo in Brazilian history and formed by a near-confederation of smaller quilombos,¹²⁵ is clearly applicable to the *quilombola* phenomenon as a whole in Brazil because it was "a reaction to a slave-holding society entirely out of step with the forms of bondage familiar to Africa" that usually cut across "ethnic lines and draw upon all those who managed to escape from various plantations at different times".¹²⁶ Palmares, similarly to other quilombos, "did not spring from a single social structure" but was rather a "political system which came to govern a plural society and this gave continuity to what could have been at best a group of scattered hideouts".¹²⁷ The initially harsh environments where communities settled were the object of

¹²⁴ Bastide, *supra* note 113 at 199. Religious syncretism is usually identified as the process of merger or juxtaposition of two or more religious traditions to consolidate a new religion or new modality of religious observance. It is a widespread and much studied phenomenon in Brazil where traditional African religions merged with Amerindian and Christian religious traditions. See e.g. Peter B. Clarke, ed., *New Trends and Developments in African Religions* (Westport: Greenwood, 1998).

¹²⁵ Robert N. Anderson, "The Quilombo of Palmares: A New Overview of a Maroon State in Seventeenth-Century Brazil" (1996) 28:3 J. Lat. Am. Stud. 545 at 557. According to Anderson, from the earliest arrival of African slaves in the captaincies of Alagoas and Pernambuco slaves have fled to the interior. No later than 1606, a *mocambo* of some reputation has formed in the region that became known as Palmares. In the 1630s, it received a great number of fugitives partly related to the Dutch invasion of Northeastern Brazil. During the Dutch dominion and after the Portuguese reconquest of the territory in 1654 there were occasional incursions in Palmares without great success. Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105, notes that because of its reputed size of over twenty-thousand inhabitants, longevity, and the continual colonial contact with it, more is known about its internal structure of Palmares than most of the Brazilian *mocambos*. European observers did not always understand what they saw but from their descriptions it is clear that Palmares was an organized state under the control of a king with subordinated chiefs in outlying settlements, suggesting the existence of a royal lineage. Paradoxically, slavery existed in Palmares, as it did in other African societal models at the time. An unfulfilled peace treaty was signed with the Crown in 1678 but Palmares was destroyed in 1694 after years of intense combat against government forces. Anderson highlights that in the last days of the siege, approximately 500 *Palmarinos* were taken prisoners, 500 died in battle and another 200 hurled themselves or were forced from a nearby precipice.

¹²⁶ Kent, *supra* note 106 at 166.

¹²⁷ *Ibid.* at 169.

remarkable adaptations on the basis of the quilombo's "collective cultural experience and creativity".¹²⁸

The direct or indirect transfer of knowledge resulting from the encounters between *quilombolas* and indigenous peoples were also extremely relevant to expedite the development of economic and social survival techniques in the quilombos.¹²⁹ While most encounters existed in the back country, Price also identifies the development of technical knowledge through the interaction of indigenous peoples and Africans or Afro-Brazilians while both worked as slaves on plantations.¹³⁰ Encounters between indigenous and *quilombolas* were a fact of life in most communities and those encounters were very diverse.¹³¹ Indigenous peoples could be both the best allies and the most effective opponents of slave fugitives.¹³²

They worked on opposing sides when indigenous peoples were hired by colonists to track down and fight maroons in many areas.¹³³ Schwartz describes that indigenous troops or auxiliaries led by Portuguese officers "were consistently and successfully employed against *mocambos* from the sixteenth to the eighteenth centuries."¹³⁴ Groups of maroons and indigenous peoples are known to have merged in a wide variety of political and cultural arrangements.¹³⁵ Schwartz observes that Portuguese authorities feared the disruptive and potentially dangerous nature of such contacts and ordered blacks, mixed bloods, and slaves be prevented from penetrating the interior where they could join forces with indigenous groups hostile to the dominant society.¹³⁶ As the dominant society began to penetrate to the interior, the *quilombola* peoples found themselves coming into ever-increasing contact with the indigenous peoples

¹²⁸ Price, *supra* note 110 at 5. Furthermore, Price observes that the economic adaptations of maroons to their new environments were just as impressive as their military achievements.

¹²⁹ See *e.g. ibid.* at 11.

¹³⁰ *Ibid.* at 12.

¹³¹ *Ibid.* at 15.

¹³² Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 111.

¹³³ Price, *supra* note 110 at 9. See also *ibid.* at 108, affirming that black and mulatto freedman, "tame" indigenous persons, and black militia units were all used in expeditions to annihilate the quilombos and describing the use of indigenous fighters and backwoodsmen from São Paulo as innovations in the dominant society's campaign against quilombos late 1600s, most notably against Palmares.

¹³⁴ Schwartz, "Mocambo", *supra* note 119 at 214.

¹³⁵ Bastide, "Quilombos", *supra* note 113 at 196-200; Price, *supra* note 110 at 15.

¹³⁶ Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 110.

who had previously been displaced towards the interior as well. Schwartz states that “for the runaways and unreduced tribes there was a common ground of opposition to the European-imposed system and slavery, which led naturally to cooperation”.¹³⁷

Furthermore, Bastide observes that each time such a fusion took place; it was the *quilombolas* who took charge of the new community, whether by reducing the indigenous peoples to slavery or becoming their military or religious leaders.¹³⁸ Bastide contradicts this assertion, however, by also stating in a broad generalization that the social systems in these culturally, often genetically merged communities,¹³⁹ combined the dual and clan-like organization of indigenous groups with the African tribal federation under the rule of a monarch-priest.¹⁴⁰ Indeed, this is an hypothesis that complements and may fuel the debate described above about the perception of agency or even oppressive encounters between *quilombolas* and indigenous peoples. The deduction of such parallels by Bastide, however, is flawed and could not be substantiated by other sources after extensive research. Bastide justifies his claim through the example of the encounters that propagated religious syncretism. This claim highlights a relevant facet to this analysis regarding the reality on the ground at the time: “this syncretism encompassed elements of white culture as well and the [*quilombolas*] became an instrument for the diffusion of Portuguese Catholicism, albeit in a modified and corrupt form, among the [indigenous peoples]”.¹⁴¹

The population of Palmares is a representative sample of the general composition of the quilombos. Initially, it harboured runaways born in Africa and some native-born slaves, the *crioulos*. By 1670, it was a multiethnic and mostly *creole* community largely composed by persons who were native-born of African descent. They were runaway slaves, slaves and free persons

¹³⁷ Schwartz, “Mocambo”, *supra* note 119 at 215.

¹³⁸ Bastide, “Quilombos” *supra* note 113 at 196.

¹³⁹ See *e.g.* Schwartz, “Mocambo”, *supra* note 119 at 216 (considerable contact took place, producing physically identifiable offspring known *cafusos*).

¹⁴⁰ Bastide, “Quilombos”, *supra* note 113 at 196.

¹⁴¹ *Ibid.* at 196. The words used to refer to the peoples were replaced in the text by those currently accepted and with which the peoples concerned self-identify themselves with. The avoidance of derogatory words, even in citations from times when those terms were scientifically appropriate, is a methodological choice used in this thesis a whole on the ideological basis that the perpetuation of derogatory terms contributes to the perpetuation of the *circular argument* itself.

captured in raids, colonials who had suffered political reversals as a consequence of the reconquest of Pernambuco by the Portuguese from the Dutch, and poor free immigrants of all racial backgrounds”.¹⁴² Kinship relations were predominant in the quilombo communal setting, in Palmares, e.g. “people called each other *malungo* or comrade, a term of adoptive kinship”,¹⁴³ a key aspect in the quilombo social organization, also represented in the communal use of the lands rather than the implementation of models of individual land tenure.¹⁴⁴

Archaeological excavations at the site of Palmares also confirm indigenous presence, presumably among the women.¹⁴⁵ Many authors highlight the gender imbalance of the slave population that consequently affected quilombo communities.¹⁴⁶ Schwartz, for example, pinpoints that runaway communities seemed to suffer from a chronic lack of women, which led to the capture of women during raids – black, mulatto and indigenous women were often targeted rather than European women.¹⁴⁷ The inter-ethnic encounters and the intricate gender relations established, clearly demonstrate the multicultural environment where the *quilombola* peoples flourished and continue to exist. This may also be the greatest example of their uniqueness as a people, especially when in contrast to the Afro-Brazilian population in general, who are by their turn an integral part of the dominant society, albeit also being disadvantaged and discriminated on social and ethnic grounds.

It is very relevant to note, furthermore, that one historical perspective differentiates indigenous and *quilombola* communities from a peoplehood standpoint – a difference that may be argued to affect how these peoples are presently perceived, most notably when contrasted with each other in terms of public policy and constitutional rights. Unlike the practice towards indigenous communities, “in a remarkable number of cases throughout the Americas, the whites were forced to bring themselves to sue their former slaves for peace”.¹⁴⁸ This structure

¹⁴² Anderson, *supra* note 125 at 559.

¹⁴³ Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 124.

¹⁴⁴ See generally Almeida, *Terras*, *supra* note 22.

¹⁴⁵ Anderson, *supra* note 125 at 559.

¹⁴⁶ See e.g. Schwartz, “*Mocambo*” *supra* note 119 at 219; Kent, *supra* note 106 at 170-175; Price, *supra* note 110 at 19.

¹⁴⁷ Schwartz, “*Mocambo*”, *supra* note 119 at 219.

¹⁴⁸ Price, *supra* note 110 at 3.

and relations between the colonial and imperial governments and the *quilombolas* bears much resemblance to a ‘nation-to-nation treaty relationship’. Price describes this phenomenon in detail and identifies it as a regional trend: “in their typical form, such treaties which we know from Brazil, Colombia, Cuba, Ecuador, Hispaniola, Jamaica, Mexico and Surinam offered maroon communities freedom, recognized their territorial integrity, and made some provision for meeting their economic needs”, the reciprocity demands consisted in agreements “to end all hostilities toward the plantations, to return all future runaways, and often, to aid the whites hunting them down”.¹⁴⁹

In Brazil one treaty is considerably well known although not very well documented. The ‘*acordo do Recife*’ was signed in 1678 between the colonial representatives and the *palmarista* leader Ganga-Zumba. Kent states that the solemnity that surrounded the negotiations process gave real importance to the *quilombola* state “for this was no pact of a strong party concluded with disorganized bands of fugitive [slaves]”.¹⁵⁰ According to Schwartz, the *quilombola* leader promised loyalty to the crown and return of new fugitives “in exchange for recognition of the quilombo’s freedom”.¹⁵¹ The treaty also granted liberty for those born in Palmares and the reallocation of the quilombo to an area ceded by the crown further away from the original location, where the *quilombolas* would have the right to engage in commercial activities with neighbours and crown outposts.¹⁵² The terms were accepted but soon violated by both parties; the Portuguese continued their constant warfare-like offensives against the quilombo and a revolt took place amongst the *palmarinos*: the accommodationist Ganga-Zumba, broker of the agreement, was overthrown and killed by his nephew Zumbi¹⁵³ who led Palmares until its destruction twenty years later.

¹⁴⁹ *Ibid.* at 3-4.

¹⁵⁰ Kent, *supra* note 106 at 172.

¹⁵¹ Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 123.

¹⁵² Gomes Cabral, *supra* note 114 at §10.

¹⁵³ Schwartz, *Reconsidering Brazilian Slavery*, *supra* note 105 at 123. Zumbi was a war strategist, born in Palmares and abducted from the quilombo as a child. He was raised within the dominant society by a Jesuit missionary. He returned to Palmares as a teenager and became the most well-known and iconic *quilombola*. Many communities foster the mythical belief that all *quilombolas* descend from Zumbi. See Anderson, *supra* note 125 at 549-566.

These nation-to-nation style agreements and the nature of the relations between the *quilombolas* and the dominant society were probably underscored by the fact that although possessing an otherness label, *quilombolas* were and still are, in a sense, a by-product of the dominant society. Quilombo communities naturally retained or chose to use dominant society's social and political structures; making adaptations to such formulas of social organization and also creating new structures depending on the different realities faced. As quilombo communities flourished and were progressively considered a part of the settlement enterprise, land tenure patterns emerged and those patterns were different than those enforced towards indigenous peoples. The *quilombolas* had not been internally colonized, therefore, their land tenure status had been of occupation, sometimes, even the occupation of indigenous lands generating conflict, fusing indigenous and quilombo communities or displacing even further inland the indigenous peoples who traditionally occupied such lands.

The quilombos consisted in great part of settlements in vacant and isolated lands but also settlements in lands legally inherited by some or all of its inhabitants; donations; lands that had been received as payment for services provided to the State; purchase of lands; or, the lease of lands in larger properties for agricultural purposes.¹⁵⁴ In 1850, after the independence but under imperial rule, *Lei n. 601* was enacted, regulating the land tenure structure of the colony.¹⁵⁵ A process of private land title was established, granting the property of lands to all those who possessed tracts of land previously to the enactment of the law as long as the tracts had crops. Almeida pinpoints this legislative provision as the one that created the modalities still known as '*terra de preto*' and '*terra de quilombo*' – granting titles to communities or freed individuals and inhabited by *quilombolas* after the abolition of slavery in 1888. Other modalities were the '*terras de índio*' granted to indigenous individuals or groups that applied for the title and fulfilled the agricultural production criteria. Almeida lists also the '*terras de santo/a*' which according to the 1850 legislation belonged to parishes or other religious orders or emerged as unoccupied lands after the expulsion of the Jesuits as well as the '*terras de herdeiro*' or '*terras de ausente*', land that belonged to a family and whose heirs claimed the official title. Other types of land such as the '*terras de caboclo*' and '*terras soltas ou abertas*' were occupied by rural workers and

¹⁵⁴ *Comunidades Quilombolas no Brasil*, *supra* note 34.

¹⁵⁵ *Lei n. 601*, 18 September 1850, *Collecção das Leis do Império do Brasil*, 1850, Tomo XI, Parte I, Rio de Janeiro, Typographia Nacional, 307, online: Câmara dos Deputados <www.camara.gov.br> at arts. 1-3.

titles were issued upon application. They were usually collectively occupied and harvested and the socio-ethnic background of these communities was usually connected to inter-ethnic relations between white settlers and indigenous peoples.¹⁵⁶

The 1850 agrarian reform legislation improved the land tenure situation of some *quilombola* and indigenous communities. Nevertheless, it could be argued that the association of land title rights with agricultural productivity may have resulted in the disenfranchisement of those socio-ethnically distinct communities that dedicated themselves to other activities rather than the agricultural cultivation of the land or those who, unaware of the legislation and its procedural requirements, lost the opportunity to claim the lands they traditionally occupied. These lands were either reclaimed by the State or sold by the State to private dominant society stakeholders. Some ‘*terras de santo/a*’, ‘*terras de herdeiro*’ and ‘*terras soltas*’ later became traditionally occupied by *quilombolas* or indigenous peoples – with or without the official transfer of land tenure title. This legislative instrument legally formalized the concept of lands traditionally occupied by *quilombolas* and these implications have been widely discussed since 1988, because the Constitution grants property land rights for the quilombo communities who do not possess a land title or the appropriate title to the lands they traditionally occupy.

This constitutional provision equates, to a certain extent, land claims scenarios of indigenous and *quilombola* peoples. Indigenous and *quilombola* peoples are the only socio-ethnically distinct peoples in Brazil with constitutionally granted rights to the lands they traditionally occupy. These land rights and other rights inherent to their distinctive socio-ethnic status demonstrate that they have a shared social, political and legal history but highlights different perceptions of agency by establishing different and separate legislation and policy avenues for each people. Indeed, several factors justify different provisions for indigenous and *quilombola* peoples but it is relevant to note that, in some instances, the differentiation reinforces burdens and resuscitates patterns of internal colonization of indigenous peoples.

¹⁵⁶ Almeida, *Terras*, *supra* note 22 at 17-68.

1.3 Integrationist Model as the Foundation of the *Circular Argument*

The Nation-State based practices enforced from the early 1900s to the 1980s left a considerable legacy on the way the Brazilian population is composed and how it perceives ethno-cultural relations to this date. Returning to the debate over the historical evolution of the policy and legislation towards indigenous peoples that contributed to the formation of the *circular argument* and the status indigenous peoples enjoy today, the assimilationist practices described above were complemented by integrationist practices that only deepened the social and economic exclusion of ethno-cultural groups distinct from the dominant society during the 1900s.¹⁵⁷

Connected segregation and assimilation policies contributed to the indissociable and undeniable overlap between ethnicity and social condition in Brazil. The gap widened even further with the introduction of a new path in the relations between State authorities and the country's peoples in the twentieth century which reshaped the encounters between indigenous and non-indigenous peoples described by Yrigoyén Fajardo as the *integrationist model*. The assimilationist model acknowledged different cultures and lifestyles and emerged as an ethnically and culturally diverse entity oriented by the socio-political structure of the dominant society. The integrationist perspective, by its turn, denied the relevance of co-existence of different cultures and sought to regulate a homogenous nation-building model on the sole basis of the settler society's legal, economic, cultural and socio-political models. The integration approach presupposes that socio-political and cultural perspectives from socio-ethnically distinct peoples would not be incorporated to the Nation-State model. Minority rights were usually recognized as provisional measures presupposing the eventual integration to the national homogenous societal project of those who originally belonged to socio-ethnically distinct groups.

¹⁵⁷ As exposed below, the biggest flaw in current legislation that seeks to redress exclusion and poverty of different ethno-cultural groups may represent a negative backlash for the advancement of indigenous peoples' rights. Moreover, it is relevant to note, as observed by Van den Bergue when addressing the relationship between 'white' Brazilians and Afro-Brazilians that "[It] may be described as a society where class distinctions are marked and profound, where class and color overlap but do not coincide, where class often takes precedence over color. Brazil is definitely race conscious, but not a race caste society. It is not a racial paradise, but neither is it a racially obsessed society". Van den Bergue, *supra* note 97 at 59.

The political model of integration started taking shape in constitutions throughout the Americas since the late 1800s. The *integrationist model* was entrenched in constitutional law, maintaining the idea of Nation-State but also recognizing specific rights to indigenous peoples labelled as minority rights, without however, explicitly recognizing the plural composition of the nation.¹⁵⁸ One of the first accounts of this phenomenon is probably the one offered by Lévi-Strauss who notes in his Brazilian journey memoir that “for the most part they had been rounded up towards the year 1914, and the Brazilian government had corralled them with the object of ‘integrating them into modern life’”.¹⁵⁹

It was in the early 1900s, at the height of the integrationist model enforcement that the patterns of encounters between indigenous and non-indigenous peoples in Brazil became increasingly loaded with stereotypes and self-referent¹⁶⁰ representation ideals. The reality had not changed much since the establishment of the segregationist and assimilationist models, but now any form or shape of difference was wiped out of sight in the search for a unified society that followed the ‘civilizational standards’ imposed by the dominant society.

Legislation and policies enacted in Brazil from the early 1900s to the 1980s, several of which are still in force, follow a pattern that Santos describes as *abyssal thinking*. This pattern is described by Santos as a method entrenched in modern western reasoning and consisting of a system of visible and invisible distinctions in which the invisible distinctions are the foundation of the visible ones. The invisible distinctions “are established through radical lines that divide social reality into two realms, the realm ‘on this side of the line’ and the realm ‘on the other

¹⁵⁸ Yrigoyén Fajardo, *Pautas*, *supra* note 10 at 49.

¹⁵⁹ Lévi-Strauss, *supra* note 72 at 134. Hemming follows suit and complements this idea by adding to the equation that the integration of indigenous peoples in the dominant society also benefited the economy. The ‘rubber boom’ occurred in the late 1800s and early 1900s and indigenous peoples had traditional knowledge for the production of rubber and fiercely defended most of the territories ideal for rubber extraction. See Hemming, *Amazon Frontier*, *supra* note 75 at 261-301.

¹⁶⁰ The concept of legislation loaded with ‘unlimited intolerance and self-cultural reference’ is taken from and is recurrent in the work of Marés de Souza. It highlights a trend that consists in the use of the dominant society’s cultural paradigm as valid for all as an underlying principle in legislation and public policy; see *e.g.* Marés, *Renascença*, *supra* note 6 at 161.

side of the line”¹⁶¹. The division is so strong that what is on the ‘other side of the line’ vanishes as reality and becomes non-existent, and is produced and reproduced as non-existent, thus, not existing in any relevant or comprehensible way.¹⁶²

Distinct forms of indigenous and other socio-ethnically distinct peoples’ knowledge, traditions and normativities clearly reside ‘on the other side of the line’ and vanish from legislation and policy in force from the early 1900s to the 1980s and beyond. Encounters between indigenous and non-indigenous peoples take a polarized and paternalistic turn. Previous views of indigenous peoples as less civilized peoples gather strength as the dominant society comes to believe in its duty to assist and protect indigenous peoples from external threats, and, in the minds of some, to protect indigenous peoples from themselves. An era of patronized participation of indigenous peoples in the State-led legal and political systems had definitely begun, motivating the continuation or implementation of paternalistic approaches. Classic conceptions of paternalism are clearly identified such as those that suggest that “paternalism is some form of intervention that fails to respect an agent”, or that in which “one agent can better know what is conducive to the welfare, good, happiness of another” justifying “the overriding of that agent’s own views, choice and subsequent action”, thus producing “an intervention in the choice and action of the competent agent, for the sake of the agent’s good, that does not treat the agent as capable of making her own decisions”.¹⁶³

Legislation and policy produced in this period solidly contribute to the current public image and social, legal and political struggles of indigenous peoples and sometimes other socio-ethnically distinct peoples in Brazil. It is relevant to note, once again, that most of the legislation is still in force or influences the interpretation of more pluralist legislation enacted in the 1990s and 2000s.

¹⁶¹ Santos, “Beyond Abyssal Thinking”, *supra* note 13 at 45.

¹⁶² *Ibid.* at 45.

¹⁶³ Jules Holroyd, “Relational Autonomy and Paternalistic Interventions” (2009) 15:4 Res Publica 321 at 327.

The integrationist pattern, amongst other factors analysed below, usually defines indigenous identity as frozen in time and links this identity to natural resources, the environment, civilizational backwardness and ‘unchristian’ practices and ways of life reproducing the ideal of incommensurability between indigenous and non-indigenous legal and political organizations.¹⁶⁴ Legal provisions that are less ‘abyssal’ but integrationist in relation to this pattern did exist during the twentieth century but were applied to restricted issues or geographical areas, or were interpreted to serve particular economic and political interests.¹⁶⁵

Some pejorative language used in the legislation from the sixteenth to the nineteenth centuries was replaced and laws enacted from the 1920s and mid-1980s use the term *silvícolas* (forest dwellers). Even though the terms *silvícolas* as well as *tribos* (tribes) have been eliminated from most legislation and public policy enacted after the late 1980s, many others are still in force. The legislative reference to the term *silvícola* as an anachronistic characterization of indigenous peoples as forest dwellers carries a strong connotation of primitiveness.¹⁶⁶ Recent legislation does not make an expressive effort to revisit the terminology that is still widely used by courts, for example, as a synonym of indigenous person.¹⁶⁷

Beyond terminologies, this integrationist position by the legislator, public authorities and judges has contributed to the alienation and creation of obstacles for indigenous peoples' self-recognition and agency within and without the Brazilian legal and political systems.

¹⁶⁴ The idea of (in)commensurability between legal traditions is from Glenn, *supra* note 44 at 43-47.

¹⁶⁵ *Lei n. 601*, *supra* note 155 (granting possession of land rights to the ‘remaining’ indians); *Decreto n. 5.484*, 27 June 1928, *Collecção das Leis da República dos Estados Unidos do Brasil de 1928*, Vol. I, *Actos do Poder Legislativo*, 111, online: Câmara dos Deputados <www.camara.gov.br> (regulates the situation of indians born in national territory) and the Statute of the *Serviço de Proteção ao Índio*: *Decreto n. 8.072*, 20 June 1910, online: <www.camara.gov.br>. Hemming, *Die if you must*, *supra* note 75 at 1 describes the mandate of the SPI, established in its Statute: “to provide protection and assistance to the Indians of Brazil, guaranteeing the native’s lives, liberty and property, defending them from extermination, rescuing them from oppression and exploitation, and sheltering them from misery – whether they live settled in villages, united in tribes, or intermingled with the *civilizados* [neo-Brazilians or colonists]” [footnotes omitted].

¹⁶⁶ Ramos, *supra* note 41 at 268-269.

¹⁶⁷ See *e.g.* opinions issued by Justices Menezes Direito and Peluso leading up to the final decision on the *Raposa Serra do Sol* case. Supremo Tribunal Federal, PET 3388, Min. Menezes Direito, Voto Vista Oral, 10 December 2008, Podcast n. 15-13-56 Parte 1 Manhã; Podcast n. 15-25-30 Parte 2 Manhã, online: <radiojustica.jus.br> [PET 3388, Menezes Direito] and Supremo Tribunal Federal, PET 3388, Min. Cezar Peluso, Voto Oral, 10 December 2008, STF Podcast n. 18-32-11 Parte 5 Tarde, online: <<http://www.radiojustica.jus.br>> [PET 3388, Peluso].

Notwithstanding the relatively vast number of legal dispositions that refer to indigenous peoples, the majority addresses only issues related to land. Most of the provisions, however, rather than protecting the indigenous peoples' right to land; usually impose limitations over indigenous occupation of those lands.¹⁶⁸

In a precise illustration of the 'abyssal thinking' that characterized the integrationist period described above, Marés observes that what indigenous peoples thought, did or wanted to do was not devised by the legislator or the judiciary as the existence of other cultures and other social practices were not at all taken into account by the dominant society.¹⁶⁹ A telling example of the inclusion and progressive application of the integrationist model towards indigenous peoples in Brazil is the mandate; working methods; and, development of the governmental bodies in charge of indigenous peoples issues, which is briefly described below.

The *Serviço de Proteção aos Índios* (SPI) was established in 1910 and extinguished in the 1960s. Despite being formally dismantled after evidence of corruption and abuse of power, the original ideals of the SPI are of extreme relevance to the analysis proposed here. Although mirroring social, economic and political interests common at the time, the mandate and corresponding legislation and policy of the organ that replaced the SPI, the *Fundação Nacional do Índio* (FUNAI) are considered retrogressive when compared to the SPI's original mandate and regulations.¹⁷⁰

The mandate of the SPI, despite being integrationist in nature, could be considered a lot closer to the pluralist rather than the assimilationist end of the spectrum proposed by Yrigoyén Fajardo.¹⁷¹ Paradoxically, FUNAI's mandate and working methods while also deeply integrationist are closer to the assimilationist rather than the pluralist side of the spectrum even though it was created many years later to replace the SPI.

¹⁶⁸ Marés "Direito", *supra* note 21 at 158.

¹⁶⁹ *Ibid.* at 158.

¹⁷⁰ See Marés, *Renacer*, *supra* note 6 at 102.

¹⁷¹ Yrigoyén Fajardo, *Pautas*, *supra* note 10 at 46-51.

The SPI was a government department led by liberal activists and staffed by lay public servants,¹⁷² and, it purposely excluded missionaries from its ranks in order to safeguard freedom of creed.¹⁷³ SPI's mandate was to bring protection and assistance to indigenous peoples in their homelands;¹⁷⁴ to put in practice the most effective ways of avoiding that 'the civilized' invaded indigenous land and vice-versa;¹⁷⁵ ensure that the 'tribes' independence, internal organization, customs and institutions were respected, intervening to alter them only when unavoidable with gentleness and persuasion;¹⁷⁶ and motivate the improvement of the quality of life of indigenous peoples, instructing them to improve housing construction techniques and preparing them for jobs in the rural and industrial environment.¹⁷⁷ The mandate of the SPI also included the legalization of the effective possession of the land that the indigenous peoples inhabited on the basis of land tenure as a foundational precondition to their tranquillity and future development in all territories necessary for their way of life, including extractive industries, hunting, fishing, agriculture and stock breeding.¹⁷⁸

The legacy of the SPI can be described as an integrationist project with tiny hints of pluralism. The somewhat humanitarian and diversity-prone approach instilled by the SPI founders in the encounters between indigenous and non-indigenous peoples was nearly forgotten in its last years of operation. These ideals were neglected and furthered by the patronizing ways of

¹⁷² Hemming, *Die if You Must*, *supra* note 75 at 2 observes that the creation of the SPI was the achievement of a small group of liberal activists, inspired and led by the then Lieutenant-Colonel Cândido Mariano da Silva Rondon who was the first head of the SPI and drafted most of its Statute and regulations. Marshal General Rondon is one of the most iconic names in Brazilian history in the early 20th Century. Although an integration idealist limited by his time, Rondon is known as a trailblazer in the respect for indigenous cultures and political organization. He was in charge of the military operation that spread the telegraphic lines throughout Brazilian territory. The telegraphic lines operation was the first contact many indigenous peoples in the Centre-West and Northern part of the country had with the dominant society and Rondon's role as the operation's commander was crucial to minimize the conflict that this encounters naturally generated.

¹⁷³ *Ibid.* at 1-2. It should also be noted that the SPI Statute foresaw incentives for the high ranking members of the staff that became fluent in an indigenous language or dialect, see *Decreto n. 8.072*, *supra* note 165 at art. 18.

¹⁷⁴ Hemming, *Die if You Must*, *supra* note 75 at 1.

¹⁷⁵ *Decreto n. 8.072*, 20 June 1910, *supra* note 165 at art. 2, III. The English translations of the original source were taken, where available, from Hemming, *Die if you Must*, *supra* note 75 at 1-23.

¹⁷⁶ *Decreto n. 8.072*, *supra* note 165 at art. 2, IV & Hemming, *Die if You Must*, *supra* note 75 at 1.

¹⁷⁷ *Decreto n. 8.072*, *supra* note 165 at art. 2, XI.

¹⁷⁸ *Ibid.* at art. 2.

operation of FUNAI, created in 1967 to replace the SPI. Merely twenty years after its creation, FUNAI was as corrupt and discredited as its predecessor in its last days.¹⁷⁹

The transition period following the dissolution of the SPI, rather than maintaining the small pluralist advances it made, retained some of the most integrationist objectives and working methods. One of the most entrenched canons in federal legislation regarding indigenous peoples to this date was institutionalized during the mandate of the SPI and refers to the legalization of indigenous lands' tenure. The method proposed the retention of the land's property by the federal government and merely the possession and usufruct of the respective lands would be enjoyed by the indigenous peoples who had, in most cases immemorially, occupied those lands. This practice has remained the same since then and has entered the post-1980s legislation without much opposition, as analysed below.

Other integrationist patterns that emerged during this timeframe also remain virtually untouched. The mandate of the SPI also included the establishment of schools and training facilities to integrate indigenous peoples in the agricultural workforce of the dominant society¹⁸⁰ without foreseeing any respect to their socio-ethnic and cultural differences and without attributing any value to their traditional knowledge and methods in agriculture, stock breeding and extractivism of natural resources. In addition, there was also a supposedly well-intentioned measure that forbade SPI agents to coerce indigenous adults and children to be educated through the methods of the dominant society and encouraged agents to 'gently convince' indigenous peoples of the need of education¹⁸¹ without any acknowledgement of worth for the indigenous methods of teaching and learning.

These examples describe aspects of the understanding of rights and also the agency of indigenous peoples that took a definite place in the dominant society's mindset from then onwards as the appropriate conduct towards distinct societies subjected to internal

¹⁷⁹ Marés, *Renacer*, *supra* note 6 at 112-113.

¹⁸⁰ *Decreto n. 8.072*, *supra* note 165 at art. 15.

¹⁸¹ *Ibid.* at art. 15.

colonization. Early SPI representatives although often respectful of diversity, had little or no doubt from the outset that indigenous legal and political systems had to subsume or ought to be encroached by the dominant society under the pretext of the backwardness of the indigenous systems and ways of life. The patronizing and self-referent attitude that forms and maintains the *circular argument* is founded upon the premise that indigenous peoples should be assisted. In many instances, indigenous peoples were and still are perceived as fragile peoples of the forests who are helpless in the face of industrialized enterprises, having none or very little agency to fend for themselves in the modern world.

This perceived lack of autonomous agency has been created and instrumentalized by the government bodies entrusted with indigenous affairs and perpetuated in the imaginaries of the dominant society as a whole. Time and time again it has served as an excuse at the executive, legislative and judicial levels to deny indigenous peoples self-determination and other pluralist rights under the premise that they do not hold the necessary agency to fully enjoy such rights. This logical fallacy can only be described as a *circular argument*. The official State powers have created the indigenous peoples' 'lack of autonomous agency' – either by enforcing segregation, assimilation and integration policies that destroyed or weakened indigenous structures; and/or by systematically portraying indigenous traditions, legal and political systems and ways of life through 'abyssal thinking' lenses,¹⁸² not comparable in value and effectiveness to the structures and methods used by the dominant society (see annex 1, figs.1-2).

The argument can be qualified as circular because the reasons that justify the denial have been caused precisely by the same authority that denies the rights and the abuse suffered during centuries of unequal relations and unfair encroachment of socio-ethnic, cultural, legal and political structures took its toll on the continuity and functioning ability of indigenous structures, and, to some extent, other socio-ethnic distinct peoples' traditional structures. One portion of the so-called lack of agency is restored merely by surpassing the 'abyssal thinking' paradigm and truly recognizing and acknowledging the equal worth of indigenous socio-ethnic, legal and political structures. Acknowledging the equal worth of structures on both sides of the

¹⁸² See generally Santos, "Beyond Abyssal Thinking", *supra* note13.

line is, for instance, the approach proposed in Taylor's 'politics of recognition' on the basis of the premise that "nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being".¹⁸³ Another portion, however, is truly a lack of agency caused by the forced dependency that became institutionalized with the SPI's mandate and peaked during the 1960s and 1970s under FUNAI's auspices.

Agency is understood here as a fundamental aspect of equal relations amongst the dominant society and other socio-ethnically distinct peoples. The term of reference is extremely valuable because being recognized as an "autonomous agent has normative significance".¹⁸⁴ Autonomous agents, therefore, by principle, are "entitled to respect; their actions and choices should be protected from interference and intervention having the ability to participate in political processes and decisions".¹⁸⁵ Moreover, autonomous agents' decisions and views "should be taken seriously in political processes, such as in collective decision making about principles of justice".¹⁸⁶ Pre-1988 legislation and policy in Brazil have clearly and very often considered indigenous peoples agency as void or considered them as possessing very little autonomous agency and this approach is still occasionally reproduced. The formation and perpetuation of the *circular argument* through the perceived 'lack of agency' argument is clearly illustrated by the legislation and policy described in the following paragraphs.

Established in 1967, FUNAI's mandate, methods of action and political role¹⁸⁷ are irresistibly associated with the integrationist values proposed throughout the *Estatuto do Índio* enacted in

¹⁸³ Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25 at 25.

¹⁸⁴ Holroyd, *supra* note 163 at 322.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ *Lei n. 5.371*, 5 December 1967, consolidated text altered by *Decreto-Lei n. 423*, 21 January 1969, complemented by *Estatuto do Índio*, *supra* note 48; *Decreto n. 1.775*, 8 January 1996 and *Decreto n. 7.056*, 28 December 2009. It should be noted that most of the legislation concerning the SPI, enacted in the 1910s remained in force until it was dismantled in the 1960s. During this period, no core policy or legislation regarding indigenous peoples was created until the approval of FUNAI's internal statutes and the enactment of the *Estatuto do Índio* in 1973.

1973 and still in force.¹⁸⁸ During the late 1960s, 1970s and the early 1980s the mission and political role of FUNAI was to establish the guidelines and ensure the enforcement of the country's *indigenist policy* based on: respect towards indigenous peoples and their 'tribal' institutions and communities; guarantee of the permanent possession of lands they inhabit and exclusive enjoyment of natural resources and utilities that exist on them; preservation of the physical and cultural equilibrium of the indigenous peoples in their contacts with the national society; and finally, the incentive to 'spontaneous acculturation' in a way that indigenous peoples' socio-economic evolution should be fulfilled without violent change.¹⁸⁹ FUNAI was also charged with the promotion of elementary education for indigenous peoples towards their progressive integration into the national society.¹⁹⁰

From the late 1960s to the 1980s, FUNAI's political role and mandate, reinforced by its methods of action and the *indigenist policy* it established plunged the patterns of interrelations between indigenous and non-indigenous peoples in Brazil to its lowest point in terms of respect and diversity. It was the institutionalized height of the integrationist model. The political scenario in the country at that moment in time is extremely relevant to contextualize the integrationist model in force, perhaps more so than in any other time in Brazilian history. A *coup* on 1 April 1964 established a military dictatorship regime that would last until 1985 and naturally influenced the interrelations as well as all legislation and policy concerning indigenous peoples. Most legislation and policy concerning other socio-ethnic distinct peoples enacted in the second half of the twentieth century is post-1988. Consequently, from a socio-legal standpoint, the impact of the authoritarian regime is more easily identified towards indigenous peoples rather than *quilombolas* and other traditional peoples.

¹⁸⁸ *Estatuto do Índio*, *supra* note 48. The *Estatuto* has been complemented by post-1980s legislation and should be interpreted in accordance to the 1988 constitutional principles. See Hemming, *Die if You Must*, *supra* note 75 at 321-351 & Survival International, *Desinherited*, *supra* note 31 at 19.

¹⁸⁹ *Lei n. 5.371*, *supra* note 187 at art. 1, I, a, b, c, d. The English translations of the original source are taken from Hemming, *Die if you Must*, *supra* note 75 at 321.

¹⁹⁰ *Lei n. 5.371*, *supra* note 187 at art. 1, V. Within the integrationist paradigm, this education-related policy sought to prepare indigenous peoples for their inevitable encroachment by the dominant society rather than differentiated education as a measure of respect to diversity. According to the paradigm, once 'integrated', indigenous peoples would no longer exist as such and special programs would no longer be needed as they would be an indiscernible part of the dominant society.

In the early 1960s the SPI was plagued by corruption scandals. The military regime, in one of the first demonstrations that corruption and abuse of power would not be tolerated by the governing authorities, commissioned a parliamentary report on the SPI abuses, known as the *Figueiredo Report*, followed by a judicial inquiry in the wake of the report's release. The report was presented through an emotionally loaded speech by the *rapporteur* in 1971. Findings ranged from enormous financial losses to gruelling evidence of torture and attempted genocide perpetrated against indigenous peoples by SPI agents working on the orders of local settlers that had interest in indigenous lands.¹⁹¹

International media reported on the history based on Figueiredo's speech and caused a global outcry in the early 1970s. The dictatorial regime was unprepared for the international attention the case received and it is speculated that for this reason the report was never made public, few people outside the government ever saw it and it was burned alongside all of its records in a mysterious fire in government offices several years later.¹⁹² The military dictators' attempt to merely cleanse the public service attracted considerable international attention, backfiring towards the semi-secretive regime whose goals were to keep its internal affairs under tight control and without outside intervention, namely in the Amazon and border areas. It is under these circumstances that the FUNAI was created and its mandate established.

The dictatorial regime had a unique project for the country that reinforced the unity of the Nation-State. Public policies were ethnic and social blind and a heavy propaganda regime constantly instilled and reinforced the 'good Brazilian citizen' identity that did not encompass multiple or plural identities in order to forcefully legitimize the State and consequently, the

¹⁹¹ Hemming, *Die if You Must*, *supra* note 75 at 225-230 and Survival International, *Desinherited*, *supra* note 31 at 15-17, highlighting that the 5,000 page *Figueiredo Report* documented mass murder, torture and bacteriological warfare, slavery, sexual abuse, theft and neglect mostly during the 1960-1967 period and concluded that 80 tribes had disappeared completely as a consequence of those practices at that time period. The report and the findings of the judicial inquiry launched in the wake of the report led to 134 government officials being charged with over 900 crimes but no convictions followed.

¹⁹² Survival International, *Desinherited*, *supra* note 31 at 17.

Armed Forces dictatorially imposed political power. The promotion of diversity or of foreign or globalized influences were qualified as subversive, and therefore, severely punished.¹⁹³

As a federal organ created and operated within the political conjuncture in force in the 1970s, FUNAI's mandate was shaped and enforced based on a full integrationist project. Terms that previously dominated legislation and policy such as 'dominant society' or 'civilized society' were replaced by 'national society'.¹⁹⁴ The legal canon that established the rights of possession and usufruct of the land by indigenous peoples rather than property rights, which started under the mandate of the SPI, was maintained and reinforced by the dictatorial regime's strategy of extreme policing of border and remote regions, where many indigenous lands are located.¹⁹⁵

The legislation establishing FUNAI also foresaw that the organ's assets were those from the recently dismantled SPI as well as all the assets and profit derived from the *Parque Nacional do Xingu*, the first, and at that moment in time the only indigenous land demarcated and homologated by the federal government. The creation of the *Parque Nacional do Xingu* in 1961 was emblematic. Xingu was established before the *coup*, FUNAI and the enactment of the integrationist *Estatuto do Índio*. It is a symbolic project that represents the recognition of indigenous lands' rights – although under the guise of a natural resources national park - and the long overdue demarcation of land for the protection of the indigenous peoples who inhabited that particular area.¹⁹⁶ Nevertheless, the project was, and still remains controversial in

¹⁹³ The dictatorship period propaganda did not revolve around the persons of the dictators but rather the Brazilian identity as a people, Brazil's plentiful and unique natural resources and the economic growth attributed to the regime's good and visionary administration. The most widespread and memorable propaganda item are probably the bumper stickers that translate into: 'Brazil: Love It or Leave It'. It is widely known that the regime relied heavily on the national soccer team's performance to instil morale and promote this unifying Brazilian identity, for example, by subsidizing television sales during the transmissions of the 1970s World Cup that Brazil eventually won.

¹⁹⁴ *Lei n. 5.371*, *supra* note 187 at art. 1, I, c.

¹⁹⁵ At that moment, FUNAI's mandate entailed not only the guarantee of permanent possession of the lands inhabited by indigenous peoples but also the management of any type of property not related to land and exclusive policing power in 'areas reserved to indigenous peoples protection'. See *ibid.* at art. 1, II and VII respectively.

¹⁹⁶ *Decreto n. 50.455*, 14 April 1961; the area of the *Parque Indígena do Xingu* is located in the northern part of the state of Mato Grosso in Eastern Brazil. Property of the lands was transferred to the federal government in 1961 but in the 9 years of negotiations before the approval of the decree the state of Mato Grosso continuously attempted to undermine it selling part of the lands to speculators. Xingu has increased geographically and population-wise since its creation. The territorial extension of the park is 2,8 million hectares, roughly the size of

many aspects. The establishment of an enormous contiguous area of indigenous land implied pressure for the relocation of indigenous groups that occupied lands outside of the Xingu perimeter to be transferred to areas inside the park, a measure strongly supported by politicians and farmers in the area. Some of the transfers were forced and implied prior ‘pacification’ of the groups.¹⁹⁷ During the 1960s and 1970s, FUNAI’s administrators promoted an almost idyllic isolationist policy towards the indigenous peoples who inhabited Xingu controlling external access to the land and promoting the homogenization of the different cultures by creating economic dependency amongst the different indigenous groups inside the park and encouraging the reconciliation of historical rivalries amongst groups that were deemed to live together.¹⁹⁸

The Xingu project defined another pattern in the legal and political relations between the federal government, society and indigenous peoples. The objectives that justified the creation of the *Parque Nacional do Xingu*, renamed *Parque Indígena do Xingu* in 1978,¹⁹⁹ were not exclusively related to indigenous land rights or the protection of their socio-ethnic identity. They were also linked to environmental protection. The *double attribution* granted to Xingu as an indigenous and a natural reserve etched the forest-dweller persona of indigenous peoples into the dominant society’s imaginaries - including judges, legislators and public policy makers.

Wales, and has a perimeter of 920km divided in 49 villages. The 4700 indigenous population encompasses 14 ethnic groups each speaking its own language or dialect. See e.g. Hemming, *Die If You Must*, supra note 75 at 133-174 and Instituto Socioambiental, online: < <http://piib.socioambiental.org/pt/povo/tingu/1538>>.

¹⁹⁷ Menezes, *supra* note 21 at 286-292.

¹⁹⁸ The Xingu project was initiated by the Vilas-Boas brothers who were self-proclaimed indigenists. Orlando and Claudio Villas-Boas were then employed by FUNAI to manage the area on the federal government’s behalf. Geographer Maria Lucia Pires Menezes, an expert in the Xingu area, refers to the period of 1961-1978 as the “Villas Boas dynasty” highlighting their nearly segregationist approach encounters between indigenous and non-indigenous peoples. See *ibid.* at 291-292. In 2007, *Projeto de Lei da Câmara dos Deputados n. 45/07*, 5 July 2007 was proposed – it is a bill seeking to change the current name of the *Parque Indígena do Xingu* to *Parque Indígena do Xingu Orlando Villas Boas*. Further analysis on chapter 3 exposes the political background and potential implications of the name change in light of the *circular argument* critique.

¹⁹⁹ *Decreto n. 82.263*, 13 September 1978, online: Câmara dos Deputados <www.camara.gov.br>. The *Parque Nacional Indígena do Tucumã* in the Northern part of the country and created in 1968 was renamed by the same decree to *Parque Indígena do Tucumã*. The name change, symbolic in both cases, demonstrates a willingness of recognition of the territories as indigenous lands but maintain the connotation of enclosed federal reservations that should contain the indigenous communities.

Several indigenous communities entitled to lands demarcated after the establishment of Xingu and even after the enactment of the post-1980s pluralist legislation suffer from the ‘stigma’ of being defined as forest-dwellers whose means of economic (re)production are frozen in time or imply a non commercial extractivist approach to their environment. Naturally, indigenous lands are better preserved in natural terms and are ‘biodiversely’ richer than those that have been exhaustively exploited by settlers with little concern for sustainable development. A significant amount of indigenous lands overlaps with areas of natural protection and the generalization of this *double attribution* status may hinder sustainable exploitation of natural resources by indigenous peoples.²⁰⁰ This scenario reinforces the dominant society’s categorization of indigenous lifestyles and means of production as frozen in time and may perpetuate stereotypes of forced dependency and lack of autonomous agency.

The value of this quasi-isolationist approach towards indigenous peoples was heavily promoted in the 1970s through documentaries, State-sponsored anthropological and natural expeditions to the Xingu area and reinforcement of the essential role of the Armed Forces in maintaining the stock of supplies in these semi-isolated areas.²⁰¹ It should be acknowledged that in the case of Xingu, this quasi-isolationist approach should get part of the credit for ensuring the indigenous population survival and growth in the face of diseases and economic exploitation. However, it also brought forth the idealized dichotomy of choice for *isolation in a primitive and non-civilized lifestyle* or the *complete integration into the civilized society* that became a near-dogma still guiding relations between indigenous and non indigenous peoples as well as the drafting and enforcement of legislation and policy, thus, perpetuating the *circular argument*.²⁰²

²⁰⁰ See generally Almeida, *Terras*, *supra* note 22 at 151-153. The *Terra Indígena Raposa Serra do Sol* also has partial *double attribution* and in some areas a *triple attribution* where indigenous, environmentally protected and border area lands overlap. The *double* and *triple attribution* of lands as well as the forest-dweller imagery bring forth key factors in the outcomes of the case, both to the advantage but also disadvantage of indigenous peoples as analysed below.

²⁰¹ Hemming, *Die If You Must*, *supra* note 75 at 172.

²⁰² This dichotomy of choice for ‘isolation in a primitive and non-civilized lifestyle’ or ‘complete integration into the civilized society’ reverberates within present policies about the ‘isolated groups’ – full communities or small groups of indigenous peoples who live in isolation from the dominant society or who have never had direct encounters with government agents or non-indigenous communities. The UN recent *Report on the Situation of Indigenous Peoples in Brazil* highlights that FUNAI has spearheaded the government’s policy of guaranteeing their right to remain isolated and the integrity of their territories, Anaya, *Brazil Report*, *supra* note 3 at § 10. Further discussion of this status of relative isolation as well as a critique of this quasi- segregationist policy is developed below.

The SPI was and FUNAI remains the operational framework in which the State enforces policies related to indigenous peoples. They are both agencies with direct competence delegated by the executive power and highlight the intricate competence of the executive power to regulate, administer and dispose of the lands and resources that are deemed federal property. Despite the existence of regulatory bodies within the legislative and judicial powers, the executive enforced its open integrationist policies from the 1960s to the 1980s through FUNAI and continues to exercise a monopoly on the management of indigenous peoples' issues without many checks and balances mechanisms in force. Naturally, this has created a grey area in which the regulation and monitoring of the due enforcement of laws and policies are exercised by the same structure of authority. Despite deep changes in power structures following the (re)democratization of the State in the late 1980s, this questionable integrationist-centred paradigm has significantly affected the few pluralist initiatives proposed in the 1990s and 2000s.

It is also interesting to observe that through times, the federal government authority under which the SPI and then FUNAI operate have shifted. The SPI was first placed under the Ministry of Agriculture, Industry and Commerce²⁰³ and managed by a branch of the Armed Forces.²⁰⁴ FUNAI was established under the Ministry of Interior Affairs²⁰⁵ and transferred to the authority of the Ministry of Justice in 1992²⁰⁶ where it remains to the present date.²⁰⁷

From 1967 to 1987, the role of FUNAI was to implement the integrationist project. The redemocratization of the State, consolidated in 1988, and the partial enactment of a pluralist legal framework have altered FUNAI's framework to some extent. Nevertheless, the retention of its pre-1980s hierarchical structure and integrationist working methods paradoxically place FUNAI as one of the leading agents in the perpetuation of the *circular argument*. This scenario is

²⁰³ *Decreto n. 8.072*, *supra* note 165 at art. 1.

²⁰⁴ Hemming, *Die If You Must*, *supra* note 75 at 207.

²⁰⁵ *Lei n. 5.371*, *supra* note 187 at art. 4, § 2.

²⁰⁶ *Decreto n. 564*, 8 June 1992 at art. 1 and *Decreto n. 761*, 19 February 1993 at art. 2, V.

²⁰⁷ The Ministry of Foreign Affairs intervenes alongside the Ministry of Justice whenever negotiations or other affairs relating to the international dimension of indigenous peoples issues are concerned. See *e.g.* Cordeiro, *supra* note 21.

reinforced by the lack of overarching pluralist legislation regarding the government's support structure to indigenous peoples and the ongoing perpetuation of the *circular argument* by the legislative and judiciary as FUNAI presently detains the paramount executory power at operational level in public policies that entail indigenous peoples rights.

The United Nations *Report on the Situation of Indigenous Peoples in Brazil* devotes an entire paragraph to the operational setbacks exposed above. The Special Rapporteur raises the issue of FUNAI's role by first praising the "exemplary work in several areas, including the development of a methodology for identifying and demarcating indigenous lands" and for its contribution to the advancement of "social welfare benefits for indigenous communities".²⁰⁸ These compliments, however, are followed by a poignant and lengthy critique underscoring that "its history is that of an agency dominated by non-indigenous bureaucrats and social scientists who shared a highly paternalistic posture towards indigenous peoples and a model of development that does not keep with contemporary standards of indigenous self-determination". Although acknowledging that the agency's "leadership is conscious of the need to abandon the paternalistic postures of the past", the Special Rapporteur observed that "in many ways the history of paternalism continues to shape FUNAI's operations". Moreover, the Report reinforces this subjective critique drawing attention to objective factors, mentioning that "FUNAI has also been hampered by a significant shortage of resources and qualified staff to carry out its myriad responsibilities".²⁰⁹

²⁰⁸ Anaya, *Brazil Report*, *supra* note 3 at § 17.

²⁰⁹ *Ibid.* at § 17. An educational and awareness website maintained by the Instituto Socioambiental, one of the leading indigenous peoples rights' advocate NGOs in Brazil, contains a section that provides information on the role of the State towards the implementation of indigenous rights. Following the description of FUNAI, the website displays a table entitled "gallery of the permanent crisis" where the history of FUNAI is taught through the terms of its presidents. Political appointments, personal agendas, financial corruption and lack of continuity from one administration to the next, as well as systemic troubles and underfunding of the agency have resulted in a parade of thirty-two presidents in the 42 years, online: <<http://piib.socioambiental.org/pt/c/politicas-indigenistas/o-estado/galeria-da-crise-permanente>>. This demonstrates deep instabilities, taking into consideration that the president's office tenure does not have a temporal limit.

1.4 Constitutional Recognition of Diversity & Worthiness: the Pluralist Model

A pluralist and multi-ethnic (r)evolution swept constitutional law in Latin America throughout the 1990s. Some of these relevant constitutional changes are described by Yrigoyén Fajardo as the recognition of the pluricultural and multi-ethnic character of the State that by consequence brought forth the recognition of an ample range of rights to indigenous peoples, officially recognizing their languages and consuetudinary law.²¹⁰ On the path of this pluralistic constitutional approach,²¹¹ ten Latin American countries ratified the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, sponsored by the International Labour Organization and known as ILO 169²¹² between 1990 and 2000.²¹³ Brazil ratified the Convention in 2002²¹⁴ and was incorporated in the Brazilian legal system in 2004.²¹⁵

The historic timeline of segregation, assimilation, integration and pluralism models of legislation and policy enforcement is similar and consistent in most Latin American countries. Most of them also share the same difficulties in the implementation of the pluralist model as a consequence of the integrationist model legacy in government structures, legislation and public opinion. This shared regional context helps situate the Brazilian analysis in its time, geographical and ideological surroundings but also demonstrates core similarities and relevant differentiations in similar scenarios, thus, enabling patterns to be avoided and best practices to be shared.

The adoption of the pluralist model in Brazil was accompanied and motivated by the overarching process of (re)democratization of the country initiated in 1985. The promulgation

²¹⁰ Yrigoyén Fajardo, *Pantas*, *supra* note 10 at 50.

²¹¹ *Ibid.*

²¹² *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, C169, ILO GC, 76th Sess., 27 June 1989, 1650 U.N.T.S. 28383 [ILO 169].

²¹³ Mexico, 1990; Bolivia, Colombia, 1991; Paraguay, Costa Rica, 1993; Peru, 1994; Honduras, 1995; Guatemala, 1996; Ecuador, 1998; Argentina, 2000, online: ILOLEX <www.ilo.org/ilolex>.

²¹⁴ Ratification date 27 July 2002, online: ILOLEX <www.ilo.org/ilolex>.

²¹⁵ *Decreto n. 5.051*, 19 April 2004 and as a decree that incorporates international human rights law it holds a special semi-constitutional status. Brazil had previously ratified and incorporated through the *Decreto n. 58.284*, 14 July 1966, the *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, C107, ILO GC, 40th Sess., 5 June 1957, 328 U.N.T.S. 4738, also known as ILO 107 and replaced by ILO 169.

of the ‘Citizen Constitution’²¹⁶ in 1988 represents the rupture with the military dictatorial period in which the country had been immersed since 1964. Several principles, rights and guarantees that had been publicly voiced but not constitutionally recognized were lively exposed within the Constitutional Assembly debates especially because the constitution-building project was geared towards the achievement of values of democratic citizenship amongst the population.²¹⁷

Brazilian constitutionalists usually agree that the 1988 Constitution “institutionalizes the instauration of a democratic political regime”, introducing “an unquestionable advancement in the legislative consolidation of fundamental rights and guarantees and the protection of the most vulnerable sectors of the Brazilian society”.²¹⁸ On this path, human rights gained extraordinary relevance in the constitutional order and the 1988 Constitution represents the “most outreaching and detailed document about human rights ever adopted in Brazil”.²¹⁹

Such democratic and human rights geared approach to State governance naturally included vulnerable groups. The outcome is a drastic but extremely positive shift in the guiding legal principles regarding indigenous peoples in Brazil. The position is metaphorically illustrated as a watershed for indigenous affairs.²²⁰ The promulgation of the 1988 Constitution undoubtedly marks the theoretical transition of Brazil from the integrationist to the pluralist model, although a complete evolution towards the pluralist model in practice has not yet happened – but is certainly long overdue.

²¹⁶ *Constituição Cidadã* is the title of the speech given by Ulysses Guimarães, the chairperson of the *Assembléia Nacional Constituinte* on 27 July 1988 just before the second voting round for the approval of the Constitution, at last promulgated on 5 October 1988, online: <www.camara.gov.br>. The expression became an extremely popular motto that embodies democratic change and effective safeguard of rights in the civil, political, social, economic and cultural spheres. Throughout the years it became the Constitution’s nickname and the term was the official slogan for the Constitution’s 20th anniversary celebrations in 2008.

²¹⁷ Piovesan, *Direito Constitucional*, *supra* note 41 at 50.

²¹⁸ *Ibid.* [translated by author].

²¹⁹ *Ibid.* [translated by author].

²²⁰ Ramos, *supra* note 41 at 264-265. Ramos suggests a metaphor stating that the order of things can be divided into B.C. or before the 1988 Constitution and A.C. or after the 1988 Constitution.

Yrigoyén Fajardo's proposed pluralist perspective presupposes a model of justice in which the State legal system should demonstrate respect towards the multi-ethnic, pluricultural and multilingual composition of the population and ensures that cultural values are taken into consideration. Moreover, the pluralist model should entail the recognition of indigenous law, through these system's norms, principles, institutions, procedures and authorities that regulate coexistence and conflict resolution, as long as they do not violate human rights, and, the recognition and expansion of alternative mechanisms of dispute/conflict resolution.²²¹

Naturally, a significant premise of the pluralist perspective is that there are no pure chthonic traditions²²² in the world today due to western traditions' expansions. It is understood that the information base of chthonic peoples have expanded,²²³ thus, incorporating elements of other traditions in a faster and more intense pace than it happened before indigenous peoples were internally colonized. Furthermore, the compliance of chthonic traditions with human rights standards has been debated extensively and the theme harbours many viewpoints. It could be argued that in this regard, however, the pluralist model approach coincides with Glenn's proposition that "contemporary state structures in the west are dominated by notions of rights embedded in primary constitutional documents", highlighting also that human rights-based fundamental concepts of legal thinking have become objects of international declarations and considering that "chthonic peoples dwell in territories of established states, their enjoyment of rights follows as a logical consequence of the existence of state structures which surround them".²²⁴

Despite the constitutional affirmation that Brazil is "fraternal, pluralist and free of prejudice"²²⁵ and the statement of the need to reduce inequality and promote social justice "regardless of origin, race, gender, colour, age or other forms of discrimination",²²⁶ the innovative

²²¹ Yrigoyén Fajardo, *Pautas*, *supra* note 10 at 51.

²²² The word chthonic is used here interchangeably with the word indigenous as proposed in Glenn, *supra* note 44 at 58-92.

²²³ *Ibid.* at 80.

²²⁴ *Ibid.* at 87.

²²⁵ *Constituição*, 1988, *supra* note 23 at preamble [translated by author].

²²⁶ *Ibid.* at art, 3, I, III, IV [translated by author].

democratizing perspectives brought by the 1988 Constitution should be observed with caution. The 1988 Constitution is indeed a watershed and it is pluralist in nature, especially if compared to the legislation that preceded it, but the recognition, or rather, the mere acknowledgement of diversity and pluralism fall short of the standards proposed by Yrigoyén Fajardo or those established by other constitutional orders in Latin America.²²⁷

Latin America witnessed a wave of renewed constitutionalism during the 1980s and 1990s, mostly for political reasons. These new constitutions, as is the case of Brazil, declared the States' redemocratization and established their internal and external political agendas from that moment forward. Several constitutions in South America opened a pluralist path without precedent that improves the status of indigenous peoples as distinct peoples in the State order, and often also acknowledge the socio-ethnic distinctiveness of maroon peoples, such as Colombia²²⁸, Paraguay,²²⁹ Peru,²³⁰ and, Venezuela.²³¹ Bolivia and Ecuador's constitutions enacted in 1994 and 1998, respectively, were recently replaced by new constitutional texts in 2009²³² and 2008²³³. In both cases due to political context-related reasons, the new texts are extremely keen towards the full establishment of the pluralist model.

All constitutions have their shortcomings but in Brazil, the pluralist path could be considered relatively small when compared to other States that share the same pluri-ethnic composition and historical "political subordination, economic exploitation and cultural devaluation"²³⁴ of

²²⁷ Standards and criteria of diversity recognition as well as indigenous rights clauses also fall short of the international human rights law in force at the time period of the Constitution's enactment.

²²⁸ *Constitución Política de la República de Colombia*, 6 July 1991, art. 7, online: <pdba.georgetown.edu>.

²²⁹ *Constitución de la República del Paraguay*, 20 June 1992, arts. 62-63, online: <pdba.georgetown.edu>.

²³⁰ *Constitución Política del Perú*, 31 December 1993, art. 2, IXX, online: <http://pdba.georgetown.edu>.

²³¹ *Constitución de la República Bolivariana de Venezuela*, 30 Dec 1999, art. 2, <pdba.georgetown.edu>.

²³² *Constitución del Estado Plurinacional de Bolivia*, 7 February 2009, online: <pdba.georgetown.edu>. In relation to other Latin American constitutions, the Bolivian text is the one that most clearly enounces its adhesion to the pluralist project. Obviously, it should be analysed in the political context surrounding its promulgation. A left-wing populist government led by a president who is an indigenous person himself has definitely corroborated to the significant innovations it bears in terms of pluralist and indigenous rights. The Constitution was recently approved by a popular referendum with a margin of 61% of votes and directly acknowledges internal self-determination for indigenous peoples (art. 2) and recognizes political, legal, economic, cultural and linguistic pluralism (art. 1) and introduces the official name change of the country itself to Plurinational State of Bolivia.

²³³ *Constitución de la República de Ecuador*, 28 September 2008, art. 1, online: <pdba.georgetown.edu>.

²³⁴ Yrigoyén Fajardo, "Special Jurisdiction", *supra* note 43 at 32.

indigenous peoples. Constitutional innovations in the Andean countries are highlighted by Yrigoyen Fajardo as the main tool towards the recognition of the pluricultural and multi-ethnic character of the State; linguistic and legal plurality as well as specific indigenous rights.²³⁵

The construction of diversity in the Brazilian Constitution is in the *other*, in some of the State nationals and not intrinsically within the State nation-building process. It is similar to its Latin American counterparts as it *recognizes* rather than *creates* cultural diversity²³⁶ but the 1988 Brazilian Constitution does not recognize cultural and ethnic diversity in an integral form or without any restrictions as that would entail providing the status that the national Brazilian culture enjoys to other differentiated cultures within the Brazilian cultural context.²³⁷ It intentionally states the recognition of diversity and grants some rights to socio-ethnic distinct groups but the national culture and the Portuguese language are hegemonically maintained as such.²³⁸

Critiques towards the constitutional text's lack of compromise with a wide pluralist model that truly reflects the multi-ethnic and pluricultural composition of the Brazilian population mention that it consolidated a socio-political agenda that was in existence for quite some time. This socio-political agenda was founded in a model of anthropically-imposed transformation of nature that altered the socio-ethnically distinct cultures' food extraction and supply methods, consequently, altering and incapacitating lifestyles, thus altering peoples and their customs. 'The historical view that indigenous peoples' natural nudity should be labelled as shame, their religions labelled as creeds, their languages classified as dialects and their legal systems valued as mere custom'²³⁹ was repeated and consolidated by the 1988 Constitution.

²³⁵ *Ibid.* at 34.

²³⁶ The textual recognition rather than creation of rights by constitutional orders as a pluralist initiative is observed by Yrigoyén Fajardo, *ibid.* at 34.

²³⁷ Marés, *Renacer*, *supra* note 6 at 158.

²³⁸ *Ibid.*

²³⁹ *Ibid.* at 33.

The 1988 Constitution does not mention multi-ethnicity or pluriculturalism, symbolic elements of extreme relevance for a definitive rupture with the integrationist model. There is no mention of legal or political pluralism and the current interpretation of the constitutional order does not leave much room for such modalities of pluralism as it intentionally acknowledges merely the “social organization, customs, languages, creeds and traditions”²⁴⁰ rather than referring more directly to a pluralist legal and political system or to self-government initiatives or indigenous jurisdictions.

Indigenous peoples’ rights as well as rights related to their lands and the exploitation of those lands’ resources are featured throughout the constitutional text. A full constitutional chapter containing arts. 231 and 232 specifically addresses indigenous rights. The integrationist legacy and the relatively weak constitutional compromise with pluralism, however, can be observed at the chapter’s doorstep – it is entitled “of the Indians”. While endorsing some new ideals of recognition of diversity, the 1988 Constitution also demonstrates, at several stances such as this one, that it contributes to the perpetuation of obsolete legal ideals and vocabulary that do not match the current comparative and international recognition of indigenous rights.²⁴¹

The social organization, customs, languages, creeds and traditions are recognized in art. 231²⁴² but no further constitutional provisions refer to the enforcement of these rights. For the first time in Brazilian constitutional history, the original rights of indigenous peoples to the lands they traditionally occupy are recognized – a precision of extreme relevance when ensuring the fulfilment of indigenous land claims before administrative and judicial instances. Art. 231 delegates primary and exclusive competence to the federal government for the demarcation and protection of indigenous lands and the safeguard of all indigenous patrimony.²⁴³

²⁴⁰ *Constituição*, 1988, *supra* note 23 at art. 231.

²⁴¹ A more detailed analysis in this regard is proposed in chapter 4.

²⁴² *Constituição*, 1988, *supra* note 23 at art. 231.

²⁴³ A jurisprudential trend has recently detailed the criteria of recognition of indigenous lands to those traditionally occupied by indigenous peoples in 1988. The inclusion of this criterion by the judiciary is controversial but defended, for instance, in the *Raposa Serra do Sol* case. Evidently, this unjustifiable time limit requirement has burdened peoples whose claims include lands from which they have been forcefully displaced from or those

The *caput* of art. 231 is complemented by seven paragraphs that regulate the possession and management of indigenous lands. It should be noted that Brazilian legislation has implied since early times, with constitutional endorsement, that the federal government retains the legal property of indigenous lands and only the possession and usufruct of the lands are transferred to the indigenous peoples. This legal formula is built upon the theoretical differentiations between property and possession and uses previously existing complex juridical institutes of Brazilian law to attain the creation of a special situation for indigenous peoples and their territories, granting those lands the simultaneous status of public lands that are of the property of the State and are under a regime of semi-private collective possession. The legal conceptualization of indigenous land, reinforced and consolidated in 1988 is constructed upon the real occupation of the land on the basis of its formal legal attribution which is the mere possession of the land.²⁴⁴

The first paragraph of art. 231 states the cumulative criteria defining the ‘traditionally occupied lands’ formula. Lands should be permanently inhabited by the indigenous peoples; used for their productive activities; indispensable to the preservation of natural resources that are necessary to their well-being as well as their physical and cultural reproduction according to their uses, customs and traditions.²⁴⁵ The second paragraph states that the ‘traditionally occupied lands’ are assigned for permanent possession of the indigenous peoples who also detain the rights to exclusive usufruct of the resources found in these lands and the lands’ rivers and lakes.²⁴⁶ The lands are inalienable, unavailable, and rights over them are imprescriptible.²⁴⁷ The removal of indigenous peoples from their lands is forbidden,²⁴⁸ except

peoples who managed to return, after 1988, to traditional lands they had left, forcefully or voluntarily, before the enactment of the Constitution.

²⁴⁴ The Constitution enumerates the sources of property of the federal government, including the lands traditionally occupied by indigenous peoples; *Constituição*, 1988, *supra* note 23 at art. 20, XI.

²⁴⁵ *Ibid.* at art. 231, §1.

²⁴⁶ *Ibid.* at art. 231, §2.

²⁴⁷ *Ibid.* at art. 231, §4.

²⁴⁸ The constitutional text does not clarify if the removal is forbidden only from lands which have been already demarcated and homologated by the federal government or if the guarantee extends to lands pending demarcation and/or homologation.

upon authorization of the *Congresso Nacional*²⁴⁹ in the event of a catastrophe or epidemic that could endanger the population or on the interest of the country's 'sovereignty'. The immediate return of indigenous peoples removed from their lands on the basis of these conditions is guaranteed once the risks cease to exist.²⁵⁰

The exploitation of mineral and hydric resources, including energetic potential, on indigenous lands can only be undertaken upon authorization of the *Congresso Nacional* and the consultation of the affected indigenous communities is required,²⁵¹ although loosely interpreted and hardly enforced. Rules regarding the exploitation of natural resources on traditionally occupied lands are complemented by general constitutional provisions regulating the exploitation of natural resources,²⁵² with exceptions, as seen below.²⁵³ Furthermore, the constitutional text states that specific conditions shall be established by infraconstitutional complementary legislation for the exploitation of resources on indigenous and/or lands in border areas.²⁵⁴

This overzealous approach to natural resources and their exploitation can be clearly related to the richness and abundance of highly profitable resources throughout the Brazilian territory and especially within indigenous lands. The sixth paragraph of art. 231 declares null and void, and not producing any legal effects, the acts deriving from the occupation, control or possession of indigenous lands as they are described in the *caput*, including the exploitation of the natural resources in the lands, including its rivers and lakes, except when public interest is

²⁴⁹ The legislative power in Brazil is exercised by the *Congresso Nacional*, a bicameral entity formed by the *Câmara dos Deputados* – the House of Representatives – and the *Senado Federal* – the Senate; *Constituição*, 1988, *supra* note 23 at art. 44.

²⁵⁰ *Ibid.* at art. 231, §5.

²⁵¹ *Ibid.* at art. 231, §3. The same provision is repeated within the clauses that define the competence of the *Congresso Nacional* at art. 49, XVI.

²⁵² *Ibid.* at art. 176, §1 (any exploitation activity requires authorization from the federal government and must be in accordance with national interests and be undertaken by Brazilian citizens only or by companies formed under Brazilian legislation, established and managed in Brazil).

²⁵³ *Ibid.* At art. 231, §7.

²⁵⁴ *Ibid.* at art. 176, §1.

at stake. The definition of public interest in these circumstances shall be defined by complementary legislation to be enacted by the federal government.²⁵⁵

The seventh paragraph of art. 231 excludes the application in indigenous lands of a general constitutional provision on the exploitation of natural resources. Art. 174 of the 1988 Constitution regulates *garimpo* or *garimpagem*, the small-scale prospection of precious minerals, promoting incentives for the work of garimpeiros organized into cooperatives.²⁵⁶ While the enforcement of art. 174 ultimately benefits indigenous peoples as it represents a contribution to solve the persistent problem of indigenous lands invasion for illegal mining, it also prevents indigenous peoples from organizing viable local level enterprises for the small-scale exploitation of mineral resources in their own lands where *garimpo* or *garimpagem* is forbidden. Parallels to this scenario are drawn in the UN *Report on the Situation of Indigenous Peoples in Brazil*. The Special Rapporteur observes that “many indigenous individuals have been criminally prosecuted for the exploitation of resources on their own land in the Government’s efforts to regulate the extraction and marketing of minerals”,²⁵⁷ concluding that the exploitation and sale of natural resources has given indigenous peoples “a chance for economic opportunity on the one hand, but also brought on problematic interaction with outsiders that has led to indebtedness by indigenous individuals and the weakening of indigenous cultural bonds”.²⁵⁸

The much shorter art. 232 regulates the legitimate right of indigenous persons, their communities and organizations to defend their rights and interests before courts. Moreover, it establishes the mandatory intervention of the Office of the Federal Prosecutor in all stages of legal procedures relating to indigenous peoples’ rights.²⁵⁹

²⁵⁵ *Ibid.* at art. 231, §6. The provision foresees, however, a right to compensation for enterprises undertaken in good faith.

²⁵⁶ *Garimpagem* can be done individually or in small groups in mines, riverbeds and other similar environments. *The Oxford English Dictionary Online*, September 2009, *s.v.* garimpeiro defines the term as a Brazilian expression for the prospector of gold, silver, diamonds, etc., formerly, one that worked illegally. A *garimpeiro* usually works as a freelancer but the activity has been increasingly regulated and institutionalized in cooperative-style work organizations in the past twenty years.

²⁵⁷ Anaya, *Brazil Report*, *supra* note 3 at § 52.

²⁵⁸ *Ibid.*

²⁵⁹ *Constituição*, 1988, *supra* note 23 at art. 232.

Other provisions, located elsewhere in the constitutional text also refer to indigenous peoples' rights. The Constitution explicitly defines the competence between federal and state-level authorities over indigenous peoples' issues, somehow clarifying a pre-existent grey area pinpointed as the cause of undue delays in the consolidation of indigenous rights. The federal government has exclusive legislative competence over indigenous rights;²⁶⁰ the Federal Justice System, and not the federated states judiciary, has exclusive competence to hear disputes over indigenous peoples rights' issues;²⁶¹ and, it is part of the mandate of the Office of the Federal Prosecutor to defend rights and interests of the indigenous populations before the judiciary system.²⁶²

This brief analysis of some of the constitutional provisions is an illustrative example of the prolixity of the 1988 Brazilian Constitution.²⁶³ This characteristic is shared by many, if not all, constitutional texts that preceded it but in this case, the detailed text also represents an agenda of renewal of democratic values for the Brazilian society. The (re)democratization of the State is the epic story of the 1988 Constitution, in reference to Cover's proposal that "for every constitution there is an epic, for each decalogue a scripture".²⁶⁴ The Constitution establishes a democratic State based on the Rule of Law, a mantra that is tirelessly repeated in many forms throughout the constitutional text.²⁶⁵ All competences are strictly defined; all powers diligently shared and mechanisms to monitor them are constitutionally established; fundamental rights are exhaustively enumerated; all geared to avoid the illegitimate advances of legally constituted authorities such as those in power in the previous twentyyears.

²⁶⁰ *Ibid.* at art. 22, XIV.

²⁶¹ *Ibid.* at art. 109, XI.

²⁶² *Ibid.* at art. 129, V.

²⁶³ The 1988 Constitution is composed by two-hundred and fifty articles, ninety-four transitional articles, and has been subjected to fifty-eight amendments, in a rate of at least two amendments per year in its first twenty-two years of existence. The first amendment was approved on 31 March 1992 and the last on 4 February 2010.

²⁶⁴ Robert M. Cover, "Nomos and Narrative" (1983-1984) 97 Harv. L. Rev. 4 at 4.

²⁶⁵ Piovesan, *Direito Constitucional*, *supra* note 41 at 52.

Consequently, within this context and from the constitutional drafters' viewpoint, the democratic nature of the State and its people is more important than recognizing and guaranteeing its multi-ethnicity or pluriculturality. Democratization, however, meant inclusion and protection of vulnerable peoples and it is through this pathway that the rights of indigenous and other socio-ethnically distinct peoples are measured in the Constitution, following Macklem's advice that in order to evaluate, and consequently, determine the conditions of a just constitutional order, the methodology applied must be attentive to history and context.²⁶⁶ The dictatorial context of repression that preceded the drafting and negotiations process that led to the enactment of the 1988 Constitution arguably explains the timid participation of the civil society representing vulnerable groups. Popular participation was limited and hardly incorporated into the drafting process and only lobby groups managed, through political connections, to influence the outcome of parts of the text.²⁶⁷

The indigenous rights chapter, for instance, was included by a process of indirect pressure for the democratization of national relations at all levels. It was inserted in the Social Order title, which is very distant and detached both ideologically and in terms of textual geography from the sections regulating the fundamental principles of the State as well as the fundamental rights and guarantees sections.²⁶⁸

Moreover, a *Temporary Constitutional Provisions Act* (ADCT for its name in Portuguese) was promulgated simultaneously to the Constitution and has been amended several times although not at the same rate as the Constitution itself. The ADCT has 95 articles; it is appended to the constitutional text and has constitutional status. The relevance of the ADCT in this context is that art. 68 determines that "the definitive property of the lands is guaranteed to the remnants

²⁶⁶ Macklem, *Indigenous Difference*, *supra* note 56 at 10.

²⁶⁷ Paulo Bonavides & Paes de Andrade, *História Constitucional do Brasil* (Porto: Universidade Portucalense Infante D. Henrique, 1988) at 476. Some of the lobby groups cited by Bonavides & Andrade are the Catholic Church, Protestant Church, State Governors, multinational corporations, the feminist and the public servants lobbies.

²⁶⁸ All residents are entitled to the fundamental rights and guarantees enumerated by the Constitution – however, the entitlement is based on individual claims only and an equal citizenship standpoint that every citizen is passively entitled to the same rights and responsibilities. See generally, Will Kymlicka and Wayne Norman, "Return of the Citizen: A Survey of Recent Work on Citizenship Theory" (1994) 104 *Ethics* 352 at 354 [Kymlicka & Norman, "Return of the Citizen"].

of quilombos that occupy them” and delegates to the State the task of issuing land title to the respective *quilombola* communities.²⁶⁹ Moreover, art. 54 of the ADCT also confers constitutional status to certain rights granted to the *seringueiros*, known as rubber-tappers,²⁷⁰ who during the 2000s would be recognized as one of the many other socio-ethnically distinct peoples besides indigenous and *quilombolas* in Brazil.

The choice to grant land rights to *quilombola* peoples at the *Temporary Constitutional Provisions Act* rather than the main constitutional body remains a matter of debate. It is argued that an underlying premise of art. 68 is that although some lobby existed for the inclusion in the Constitution of *quilombola* land rights – usually in connection to indigenous peoples’ land rights – the actual demographics and land tenure scenario of the *quilombolas* was not fully known in the 1980s. This perspective is reinforced by word choice – remnants of quilombos – which critics perceive as a language that implies a decreasing population whose decaying socio-cultural identity is only residually linked to slave trade resistance.²⁷¹ This plausible critique to the text, especially when accompanied by the underlying premises and vocabulary applied to post-1988 legislation regarding the *quilombola* peoples suggests a nuanced extension of the integrationist paradigm to these socio-ethnically distinct peoples.

Furthermore, the main constitution text, in the article regarding the recognition and preservation of heritage sites, confers protection to “all documents and sites bearing historical reminiscence of pre-existent quilombos”.²⁷² The reference to the historical existence of quilombos in the constitutional body and the recognition of rights to their remnant communities in the ADCT could be argued to confirm an attempt, perhaps misinformed, to relate the *quilombola* peoples to a transitory land rights issue without any acknowledgement of their differentiated socio-ethnically status and the recognition of rights this status would imply.

²⁶⁹ *Constituição*, 1988, *supra* note 23 at ADCT, art. 68.

²⁷⁰ The article grants compensation and pension rights exclusively to the underprivileged rubber-tappers or their descendants who contributed to the World War II efforts. Although very limited in scope, the direct recognition of rubber-tappers demonstrates the 1988 Constitution pluralist potential towards the recognition of rights of socio-ethnically distinct peoples.

²⁷¹ See e.g. *Comunidades Quilombolas no Brasil*, *supra* note 34 (the term does not refer to archaeological residues of temporal occupation or biological proof; moreover, it does not refer to isolated groups or a strictly homogenous population).

²⁷² *Constituição*, 1988, *supra* note 23 at art. 216, §5.

The *quilombola* peoples, nevertheless, are socio-culturally strong and aware of their distinctiveness. They are more numerous than the indigenous population²⁷³ and, at present, are equally or more organized in terms of civil society initiatives. The *residual status* attributed by the 1988 Constitution was perhaps inappropriate then but has become even more out of place now considering that the constitutional recognition itself and the few attempts of implementation of the pluralist model through policy and legislation have strengthened the communities and enabled them to flourish.

Similarly to the policy and legislation regarding indigenous peoples' rights, the post-1988 *quilombola* peoples' policy and legislation, which sometimes coincides with the indigenous peoples' rights legislation and is also analysed below, falls short of the pluralist model but made a positive impact in the organization and self-identification of the *quilombolas*. It could be argued that the perception of the *quilombolas* by the dominant society differs from their perception of indigenous peoples. Although also usually related to forest-dwellers peoples who practice outdated rural enterprises, the *quilombolas* are strongly supported by the Afro-Brazilian civil society. The pre-existing placement of quilombos in the social imaginaries of the dominant society as closer to their civilization ideals when compared to indigenous peoples also corroborates this perspective. The historical land tenure patterns exposed above may also explain the choice to grant the possession and usufruct of the lands they traditionally occupy to indigenous peoples but property rights to lands traditionally occupied by *quilombolas*.

Other rights benefiting indigenous peoples and often other socio-ethnically distinct peoples are stated in the constitutional text within sections that address specific issues as education, culture and health. Art. 210 of the 1988 Constitution establishes that the federal government shall determine a basic curriculum for elementary education that includes national as well as regional cultural and artistic values.²⁷⁴ Moreover, it determines that elementary education shall be taught

²⁷³ See text accompanying notes 33-34.

²⁷⁴ *Constituição*, 1988, *supra* note 23 at art. 210.

in Portuguese safeguarding, however, the right of indigenous communities to complementarily use their own languages and their culturally-specific learning methods.²⁷⁵

In terms of cultural rights, art. 215 of the Constitution broadly enounces that the State shall protect popular culture manifestations, the indigenous and afro-Brazilian cultures and cultures from other groups that form part of the ‘national civilizational process’.²⁷⁶ Art. 216 protects assets constitutionally defined as part of the ‘Brazilian cultural heritage’. The assets are material or immaterial in nature, taken individually or as a whole and bear reference to the identity, action and memory of the distinct groups that form Brazilian society, including but not limited to: forms of expression; ways to create, to make, to do, and to live; scientific and technological creations; works, objects, documents, buildings and other spaces intended for artistic and cultural expressions; and, urban complexes and other sites of historical, natural, artistic, archaeological, paleontological, ecological and scientific value.²⁷⁷

There are no specific provisions that define legislative competence or constitutional guidelines regarding the health of indigenous or other socio-ethnic distinct peoples. The regulation of health-related rights is generally undertaken by the federal government,²⁷⁸ moreover, as mentioned above; federal authorities have exclusive competence to legislate over indigenous peoples’ rights.²⁷⁹ Therefore, it is evident within the constitutional system that complementary infraconstitutional legislation regarding indigenous health should be enacted by federal authorities. Indeed, indigenous health has been the most prolific field in terms of legislation enacted post-1988. Fulfilling these rights, on the other hand, has proven to be a much more difficult task ultimately related to the weak pluralist compromise offered by the Constitution and the subtleties regarding the legislative implementation of constitutional guidelines. In fact, multiple changes in authority structures, non-coordinated policies, lack of socio-ethnic awareness in training programmes for legal professionals and policy-makers as well as poor

²⁷⁵ *Ibid.* at art. 210 §2.

²⁷⁶ *Ibid.* at art. 215 §1.

²⁷⁷ *Ibid.* at art. 216. The paragraphs that accompany the article define several administrative procedures for the safeguard of the enumerated assets.

²⁷⁸ *Ibid.* at arts. 196-200.

²⁷⁹ *Ibid.* at art. 22, XIV.

management and corruption are part and parcel of the substantive and procedural subtleties that hinder the recognition and enforcement of indigenous and other socio-ethnic distinct peoples' rights in Brazil as a whole.

The core legislation regarding indigenous rights has not significantly changed since the 1988 Constitution. Moreover, the constitutional innovations hardly match the interpretation of provisions by legislators, public policy makers and courts, which is often related to the vision adopted before 1988 despite an apparent multicultural overarching discourse. Federal legislation and policy enacted since the promulgation of the Constitution shyly endorse the ideals of recognition, plurality and diversity but also contribute in the perpetuation of obsolete and integrationist vocabulary and ideals that do not correspond to the international recognition of indigenous rights or the pluralist aspirations expressed in the renewed nation-building project enounced in 1988.

Before proceeding to an analysis of the challenges towards a broader interpretation of existing rights, an overview of the modes of enforceability of constitutional principles within the legal system proves to be necessary and is complemented with a brief review of the current mechanisms available focusing on their positive aspects and their shortcoming towards a self-determining fulfilment of the pluralist model.

CHAPTER 2

Contexts: Limited Fulfilment of the Pluralist Model

*“En esta orilla del mundo lo que no es presa es baldío, creo que he visto una luz al otro lado del río”.*²⁸⁰

An analytical method proposed by constitutional ethnography theorists is that rather than presenting a survey of the constitutional designs available and the effectiveness of the institutions proposed, the key point of focus should be the logics of contexts that particularly highlight complex political, legal, historical, social, economic and cultural interrelationships.²⁸¹ This method of analysis, according to Scheppele, could effectively increase the understanding of how constitutional systems operate in and within their own historical depth and cultural context by the identification of the governance mechanisms and the “strategies through which governance is attempted, experienced, resisted and revised”.²⁸²

The unique socio-political and historical contexts in which the Brazilian Constitution was promulgated in 1988 are entrenched in its existence and role as the country’s programmatic Decalogue.²⁸³ The redistribution of power both within the reshuffled government structures and within society as a whole is equally entrenched in the constitutional scenario. The 1988 Constitution set in motion the reconfiguration of a democratically and socially aware “symbolic cartography of the law”, and created “several social spaces which, though autonomous, interrelate in different ways”.²⁸⁴

Santos’ legal cartographies metaphor can be extended to the inner workings of the 1988 Constitution considering that “each social space and across spaces different kinds of juridical capital circulate”, moreover, “each kind of juridical capital prompts a specific kind of actions

²⁸⁰ Jorge Drexler, *Al Otro Lado del Río*, CD Eco2, 2005. “In this margin of the world what is not prey is wasteland, I believe to have seen a light on the other side of the river” [translated by author].

²⁸¹ Scheppele, *supra* note 20 at 390.

²⁸² *Ibid.* at 390-391.

²⁸³ The comparison between constitutions and decalogues is taken from Cover, *supra*, note 264.

²⁸⁴ Boaventura de Sousa Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law” (1987) 14:3 J. L. & Soc’y 279 at 286. [Santos, “Map of Misreading”]. The metaphorical concepts are taken from Santos’ work. The parallels with the 1988 Brazilian Constitution are my own.

and symbolic universes”.²⁸⁵ The constitutional and consequently the infraconstitutional context analysis proposed in this chapter seeks to factor in all stakeholders, or the different kinds of juridical capital, involved in the process of the effective and truly pluralist recognition of rights of indigenous and other distinct peoples in Brazil. The current legal order and the specificities of the enforcement of the rights of indigenous and other socio-ethnically distinct peoples clearly spans through the three overarching themes of Santos’ legal cartography: *scale*, *projection* and *symbolization*. They represent determining factors of the utmost practical relevance in establishing and perpetuating different nuances of the *circular argument*.

The analysis of *scale* on the structure and use of law, for instance, demonstrates that the Constitution is based on the assumption that law operates on a single scale, in other words, the scale of the State. Legal pluralist local legalities and the global legal order represented by international law are not a direct part of the system.²⁸⁶ Despite its pluralist discourse, the single scale pattern in which the 1988 Constitution was built and continues to exist cannot efficiently contain the multi-overlapping scale scenario that the recognition and consolidation of the rights of indigenous and other socio-ethnically distinct peoples requires.

Projection, by its turn, illustrates the procedure by which “the legal order defines the limits of its operation and organises the legal space inside them”. Santos also affirms that “different types of projections create different legal objects upon the same social objects”. The relevance of this parallel to the Brazilian context is that each of these legal objects created by the type of projection chosen for the constitutional context “favours a specific formulation of interests and a specific concept of disputes and of modes of settling them”.²⁸⁷ While the Constitution rhetorically recognizes socio-ethnically distinct uses, customs and traditionally occupied lands, it also subtly determines norms and procedures for any type of legal, jurisprudential or administrative debates in relation to the recognition of these rights. These norms and procedures are self-referent to the dominant society but are presented in pluralist and reconciliatory terms. The choice of *projection* in the 1988 Brazilian Constitution; and the formulation of interests and dispute-settling mechanisms chosen by consequence, underscores

²⁸⁵ *Ibid.* at 286.

²⁸⁶ *Ibid.* at 287.

²⁸⁷ *Ibid.* at 291.

the setting for the perpetuation of the *circular argument* through the interpretation of the Constitution or the tools created by infraconstitutional legislation and policy to implement it.

Symbolization, according to Santos “operates on the basis of and conditioned by scale and projection”. In this regard, two categories of legal symbolization are proposed: one has externalized descriptions and unmistakable meanings; while the other describes multilayered experiences with several possible meanings.²⁸⁸ The 1988 Constitution sought to democratize power relations in the country after several years of autocratic rule acknowledging vulnerabilities and shortcomings – nevertheless, the *symbolization* chosen was that of externalized descriptions ‘of the other’ from the mainstream society’s perspective transforming it into the dominant meaning that should underlie the encounters between the State and the majority of society on one side and indigenous and other socio-ethnic distinct peoples on the other side.

Another correlation between the Brazilian Constitution and symbolism, although from a different conceptual perspective, is equally relevant to the analysis undertaken here. Neves proposes a theory of *symbolic constitutionalization* according to which constitutional law would contain enforceable social values but also two other provision types. First, what he calls ‘alibi-legislation’: an attempt to give solutions to specific social problems in order to “convince the public of the legislator’s good intentions”.²⁸⁹ The other type would be the ‘compromise formula’ through which constitutional law would serve the purpose of “postponing the solution of social conflicts through dilatory compromises”.²⁹⁰ Therefore, constitutional agreement would not be founded in the contents of the normative document but on the transference of solutions to conflicts to an undetermined future.²⁹¹ Neves maintains that nearly all programmatic provisions of the 1988 Brazilian Constitution fit in either of these two categories.²⁹² This perspective is very clear in the specific case of norms that refer to the rights of indigenous and other socio-ethnic distinct peoples where the abstract, self-referent and uncompromising terms chosen exude their ‘compromise formula’ and ‘alibi-legislation’ nature.

²⁸⁸ *Ibid.* at 295.

²⁸⁹ Neves, *supra* note 56 at 39 [translated by author].

²⁹⁰ *Ibid.* at 41 [translated by author].

²⁹¹ *Ibid.*

²⁹² *Ibid.* at 177-189.

The State-centred and patronizing enforceability of indigenous and other socio-ethnic distinct peoples' rights' context that exists in Brazil becomes clearer if the Constitution is analysed from this perspective despite the pluralist speech it contains. It is evident that at the time of the Constitution's promulgation, the State understood the provisions that guarantees indigenous and other peoples' rights to be a dilatory compromise and that the corresponding solutions would emerge in due time. However, new problems always emerge and take the centre of the stage and the solutions relating to the recognition and enforcement of indigenous and other socio-ethnic distinct peoples' rights have been systematically and constantly postponed. Besides the blunt disrespect for indigenous and other peoples and their rights, the core of the matter resides in the fact that the dilatory compromise was never a true compromise agreed between the State and the peoples concerned. It was a unilateral decision presented to indigenous and other peoples and as a promptly enforceable solution – a self-referent patronizing act that in itself demonstrates and perpetuates the *circular argument*.

2.1 The Constitutional Programmatic Framework

The theoretical framework of the 1988 Constitution is commonly identified with the Lassallean approach.²⁹³ The Constitution's role is considered to be that of declaring the State's ethical and political values and establish the socio-political goals to be reached with its enactment and beyond, within the redemocratization paradigm.²⁹⁴ The declaration of the ethical and political values of the State and the enunciation of its socio-political goals implies a systematization of the 1988 Constitution into three types of norms. According to Barroso, there are a) norms that concede legal power; b) norms that concede rights and c) norms that merely indicate goals. These norms are typified, respectively as: a) norms of organization; b) norms that define rights; and c) programmatic norms.²⁹⁵ The norms' typification in the constitutional context determines their applicability and relation with infraconstitutional legislation.

²⁹³ Silva, *supra* note 23 at 39-70 and Paulo Bonavides, *Curso de Direito Constitucional*, 6th ed. (São Paulo: Malheiros, 1996) at 63-64 [Bonavides, *Curso*]. This characterization of the constitutional project in both cases is taken in from the seminal work of Ferdinand Lassalle, *Qu'est-ce qu'une Constitution?* (Paris: Editions Sulliver, 1999) at 19-61.

²⁹⁴ Piovesan, *Direito Constitucional*, *supra* note 41 at 56.

²⁹⁵ Luis Roberto Barroso, *O Direito Constitucional e a Efetividade de suas Normas: Limites e Possibilidades da Constituição Brasileira*, 2d ed. (Rio de Janeiro: Renovar, 1993) at 87-88.

Moreover, constitutional norms are also categorized according to their applicability and authors generally agree on three categories that encompass the efficacy and applicability of constitutional norms: a) full efficacy and immediate applicability; b) contained efficacy and immediate applicability with possible restrictions; and, c) limited or reduced efficacy.²⁹⁶ Furthermore, the implementation of constitutional law is even more nuanced because the three efficacy/applicability types of norms can occur within the three overarching types of norms: organization, norms that define rights and programmatic. Norms with restrictions to immediate applicability and norms with limited or reduced efficacy depend on infraconstitutional legislation enactment for the rights they grant to fully operate their effects.²⁹⁷

Provisions relating to indigenous and other socio-ethnically distinct peoples' rights can be classified under all three categories. Most of them, nevertheless, are norms of contained, limited or reduced efficacy, thus, requiring infraconstitutional provisions that define the boundaries, specify and provide tools for the compliance of constitutional rights and guarantees. Examples of norms of organization with immediate applicability are those that establish exclusive competence of federal authorities to enact indigenous peoples rights' laws. Other norms, such as those in the indigenous rights' chapter or those guaranteeing specific social and cultural rights to indigenous peoples are harder to categorize. They occupy a grey area because they are, simultaneously, norms that define rights and programmatic norms. This multiple identity brings consequences for the enactment, enforcement and judicial challenges of constitutionally recognized indigenous peoples' rights.²⁹⁸

On the one hand, norms that define rights create subjective rights to satisfy interests established as relevant by the constitutional order. These norms are always bilateral, simultaneously addressing two stakeholders: one party that is entitled to a claim and demands actions from the other party to fulfil it. On the other hand, although always limited or

²⁹⁶ *Ibid.* at 85.

²⁹⁷ *Ibid.*

²⁹⁸ Pathways for judicially challenging the constitutionality of legislation and administrative acts over indigenous and other socio-ethnic distinct peoples' rights in the Brazilian legal system are presented within the context of existing case law analysed in chapter 3, see *infra*, text accompanying note 536.

restricted in terms of efficacy and applicability, programmatic norms are relevant because they determine the axiological framework of the State and establish the guidelines upon which the legislative system shall adapt to the new constitutional order. Programmatic norms immediately revoke all normative acts enacted previously to the promulgation of the Constitution that collide with its value-based framework. Moreover, programmatic norms also establish the ground principles upon which the unconstitutionality of infraconstitutional norms can be raised before courts. Finally, all normative acts such as laws and decrees that do not expressly collide with the Constitution, and therefore, are not immediately revoked, shall be interpreted in accordance with the principles established by the programmatic norms.

In terms of indigenous rights, their dual nature as norms that define rights but also as programmatic norms is of relevance because pre-existing legislation not revoked in 1988 must be applied and interpreted according to the renewed pluralist framework. As mentioned above, the 1988 pluralist model falls short of comparative and international standards, in the Brazilian context, however, it is more inclusive than the pre-1988 integrationist approach. Nevertheless, the pluralist interpretation of pre- and post-1988 legislation is flawed and incomplete and arguably represents one of the largest contributors for the perpetuation of the *circular argument*.

The infraconstitutional legislative apparatus, by its turn, has several types of norms. Art. 59 of the Constitution defines that there are different types of law depending on their objective, source and approval methods. The types are legislative decrees; constitutional amendments; temporary measures; resolutions; and complementary, ordinary and delegated laws. The specific relevance of these normative distinctions here is the one between the nature, source and approval methods of complementary and ordinary laws. Complementary norms regulate and consolidate constitutional norms of limited, reduced or contained efficacy and may refer only to issues pertaining to constitutional law. Ordinary laws may refer to any subject matter.

²⁹⁹ No hierarchy exists between complementary and ordinary norms once they are enacted and the main procedural difference between them is the quorum needed for their approval in each

²⁹⁹ If ordinary norms clash with principles established by complementary legislation, the procedure to follow is to determine the constitutionality of the ordinary norm rather than to revoke it on the basis of the complementary norm as the principles outlined in it are ultimately constitutional.

of the houses of the *Congresso Nacional* - ordinary norms require a simple majority while complementary legislation requires an absolute majority.³⁰⁰

In terms of indigenous peoples' rights, the reception of previously enacted legislation took place as a temporary measure until new legislation that fully complies with the new Constitution was enacted, upon the condition that pre-1988 legislation should be interpreted in light of the constitutional principles promulgated in 1988. That is basically the underlying reason for the reception of the *Estatuto do Índio*,³⁰¹ enacted in 1973, temporarily recognized as the core complementary norm that guarantees the efficacy and applicability of constitutional provisions on indigenous peoples' rights.

The main problem lies in the fact that no core complementary legislation has been enacted since 1988 and the pre-1988 *Estatuto do Índio*, purely integrationist in nature, is still the official vector of consolidation of indigenous peoples' rights in Brazil. The *Estatuto do Índio* carries the outdated integrationist model ideals as well as some of the repressive nature of the autocratic regime in force at the time of its enactment. As it must be interpreted in light of constitutional principles and, for this same reason, its provisions are stretched unlimitedly by authorities in the legislative, executive and judicial powers and yet other provisions remain simply unused – delaying both the consolidation of the rights and guarantees granted to indigenous peoples as well as their active role and autonomous agency in the enforcement of these rights. When contextualizing the current status of indigenous peoples' rights' legislation in Brazil, the UN Special Rapporteur observes that the *Estatuto do Índio* was progressive at the time of its adoption but “has become widely criticized for being out of step with contemporary constitutional and international standards as it encourages indigenous peoples to ‘evolve’ and become more ‘civilized’”.³⁰²

³⁰⁰ *Constituição*, 1988, *supra* note 23 at art. 59.

³⁰¹ *Estatuto do Índio*, *supra* note 48.

³⁰² Anaya, *Brazil Report*, *supra* note 3 at §14.

2.2 Post-1988 Legislation: Non-Cohesive Efforts Towards Pluralism

The recognition of indigenous peoples' rights' granted by the Constitution, although unprecedented, innovative, and clearly stated, requires practical guidelines and a strong legal and jurisprudential foundation for a new constitutional paradigm to be built and aptly enforced. Sparse legislation has been enacted since 1988, some drafted before the promulgation of the Constitution, thus maintaining old approaches and vocabulary. Other legislation, especially in the domains of education and health, were enacted in a timid attempt to comply with the constitutional provisions but do not open much space for pluralism as if waiting for more instructions to be given by the upcoming core legislative piece that will replace the *Estatuto do Índio*.

The UN Special Rapporteur, following his analysis of the *Estatuto do Índio*, transcribed above, mentions that “since 1991 there have been debates in the Congress to replace the law with a new one, but those debates are ongoing”.³⁰³ The Rapporteur's brief and politically correct account surely does not mirror the long and unconcluded process towards the enactment of post-1988 core legislation regarding indigenous peoples' rights. The *Estatuto das Sociedades Indígenas* bill was originally proposed by legislative power representatives in 1991 aiming to replace the outdated *Estatuto do Índio*.³⁰⁴ It was followed by the presentation of two bills with the same objective. Still in 1991, *Projeto de Lei n. 2.160 /91* was proposed by the Executive under the title *Estatuto do Índio*,³⁰⁵ and in 1992, *Projeto de Lei n. 2.619/92* was proposed by another group of legislative representatives and named *Estatuto dos Povos Indígenas*.³⁰⁶ In 1994 a special commission was formed to update and consolidate all three propositions under *Projeto de Lei n. 2.057/91* and renamed *Estatuto do Índio*.³⁰⁷ In 2000, on the basis of the debates surrounding the approval of the bill, a renewed version was presented by the special commission still bearing the *Estatuto do Índio* designation.³⁰⁸ In 2001 the latest version of the bill

³⁰³ *Ibid.*

³⁰⁴ *Projeto de Lei n. 2.057/91*, *supra* note 48. All references to *Projeto de Lei n. 2.057/91*, hereinafter, with the exception of *infra* note 687, refer to the text consolidated in 2001, *infra* note 309.

³⁰⁵ *Projeto de Lei n. 2.160/91*, 15 June 1999 and appended to *Projeto de Lei n. 2.057/91* 15 April 1992.

³⁰⁶ *Projeto de Lei n. 2.619/92*, 19 March 1992 and appended to *Projeto de Lei n. 2.057/91* 9 April 1992.

³⁰⁷ *Substitutivo da Comissão Especial para o Projeto de Lei n. 2.057/91*, 29 June 1994.

³⁰⁸ *Proposta Substitutiva ao Projeto de Lei n. 2.057/91*, 2 December 2000.

was presented, entitled *Estatuto das Sociedades Indígenas* and is pending approval.³⁰⁹ The bill contains a much more updated and diverse approach to indigenous issues than the *Estatuto do Índio* in force. The scope of the new legislation is undoubtedly broader and more detailed,³¹⁰ but it still falls short of the international standards observed in the early 2000s. Participation of indigenous peoples in the drafting and debates of any of the bills was virtually nonexistent and repeated discussions over the ‘concession’ of certain provisions, namely those regarding land rights, exploitation of natural resources, self-government and military operations in indigenous lands permeate the approval of the bill³¹¹ as well as many other pieces of ordinary legislation that refer to indigenous rights, as analysed in detail below.

In 2006, in parallel to the House of Representatives’ debates of *Projeto de Lei n. 2.057/91*, the executive power decreed the creation of the *Comissão Nacional de Política Indigenista*,³¹² the CNPI. The Commission functions within the institutional structure of the Justice Ministry and operates alongside FUNAI.³¹³ The appointment of the commissioners was delayed by a year, and in 2007 the CNPI, which is an advisory body gathering representatives from several government institutions and indigenous representatives, became operational. The role of the Commission is to propose guidelines regarding indigenist policy and its mandate differs significantly from the initial proposition presented by indigenous organizations for the creation of the CNPI as a deliberative, rather than an advisory body of indigenous and government leaders for the improvement, implementation and evaluation of the implementation of indigenous peoples’ rights.³¹⁴

³⁰⁹ *Projeto de Lei n. 2.057/91*, *supra* note 48.

³¹⁰ The 1973 *Estatuto do Índio* has sixty-eight articles while the *Estatuto das Sociedades Indígenas*’ 2001 revision has one-hundred-twenty-six articles and is broader in content and scope.

³¹¹ Plenary debates of the bill stalemated after the last revised proposal in May 2001. Several attempts were made to redirect the bill for debates or to define it as a matter requiring urgent approval in 2003 and 2005. The most recent development in the process occurred on 20 August 2009 through the requirement by a representative from Roraima, a federated state with one of the largest indigenous populations in the country for the bill to be reinserted in the Congress’ agenda. It should be noted that besides the large indigenous population that inhabit the federated state, the *Terra Indígena Raposa Serra do Sol* is fully located in Roraima where indigenous lands represents 7.7% of the state’s territory.

³¹² *Decreto de 22 de Março de 2006*, 22 March 2006.

³¹³ “Criada a comissão que irá organizar a política indigenista”, *Instituto Socioambiental* (23 March 2006), online: <<http://www.socioambiental.org/nsa/detalhe?id=2213>>.

³¹⁴ “Comissão Nacional de Política Indigenista é instalada”, *Instituto Socioambiental* (20 April 2007), online: <<http://www.socioambiental.org/nsa/detalhe?id=2447>>. General information about the CNPI, its mandate, members and agenda is not readily available online and no reference to it can be found in the Ministry of Justice’s

The CNPI was precisely the main stakeholder in the latest development regarding the enactment of post-1988 core complementary legislation. The Minister of Justice met with the House of Representatives' president on 5 August 2009 and presented, on behalf of the CNPI, a draft proposal entitled *Estatuto dos Povos Indígenas*.³¹⁵ The CNPI suggests that this new draft, elaborated in consultation with indigenous organizations and other indigenous *fora* should replace *Projeto de Lei n. 2.057/91* and that its examination, debate and approval by the House should be expedited.³¹⁶ It should be noted that, albeit limitations defined by the institutionalized presence of the *circular argument*, this renewed draft presents certain advancements, which sometimes surpass the pluralist project established in 1988 and often takes close aim towards the fulfilment of the international legal standards presently in force in terms of indigenous peoples' rights. A critique of the bill in its several versions including the CNPI's proposal will follow in the next chapter.

The dominant mark of the *Estatuto do Índio* and most legislation enacted both before and after the 1988 Constitution is a bureaucratic attachment to old values of insufferable patronizing³¹⁷ public policy making. The sad reality is that the legislation proposed and/or pending approval still contains, to lesser extent, a frozen identity and an old-fashioned anthropologically loaded perspective towards the regulation of the indigenous peoples' constitutional rights. This context basically makes most, if not all, indigenous rights legislation currently in force or

website even three years after its creation and two years after it became effectively operational. Most of the information is only available through NGO-sponsored online news outlets, such as the Instituto Socioambiental bulletins.

³¹⁵ Ministério da Justiça, *Estatuto dos Povos Indígenas proposto pela CNPI*, 5 June 2009, online: <<http://www.mj.gov.br/EstatutodosPovosIndigenasPropostaCNPIversaoFINAL.pdf>>.

³¹⁶ The presentation of the CNPI draft was publicized in real time at the Ministry of Justice's website, highlighting opinions from the Minister about the relevance of the subject as well as the pledge by the President of the House for the document to be discussed by the plenary before the end of the year. "Tarso entrega nova proposta de Estatuto dos Povos Indígenas à Câmara", *Ministério da Justiça* (5 August 2009), online: <<http://www.mj.gov.br>>. Two months later, the Minister of Justice, the president of FUNAI and the Ministry of Justice's Secretary of Legal Affairs published a joint opinion piece in one of the newspapers of largest circulation in the country directly referring to the present legislation as 'exclusionist, paternalist and obsolete' and calling upon the *Congresso Nacional* to appreciate the relevance of the approval without undue delay of the *Estatuto dos Povos Indígenas*; Tarso Genro *et al.*, "Da Avenida Paulista aos ianomâmis" *O Globo* (23 September 2009) Opinião 7.

³¹⁷ The concept is taken from Taylor, *supra* note 183 at 69. The act of declaring another culture's creations to be of equal worth to one's own can usually be understood as a genuine expression of respect. Nevertheless, to declare oneself the supporter of another culture even when one considers that 'their creations are not all that impressive' is to act in an unsufferable patronizing way.

pending approval, to be *weakly pluralist and slightly integrationist*. The actual ability of indigenous persons and indigenous peoples to seek access to justice regarding any matter and to claim social, economic and cultural conditions to exercise the somewhat innovative rights granted by the constitution is very limited.

The context of systemic clashes and mismatched efforts is worsened when the discussion of the hierarchical status of human rights treaties within the legislative system in Brazil comes into play. Piovesan expresses that the 1988 Constitution breaks with the axiological systematicity of the previous constitutional orders by proposing the respect for human rights standards as the central paradigm for the enforcement and interpretation of constitutional law. Moreover, Piovesan adds that the compromise with international standards is not limited to the engagement of Brazil in the process of creation of international human rights norms but also requires the full integration of those norms within the Brazilian legal system.³¹⁸ As seen above, the Constitution gives extraordinary emphasis to fundamental rights and it is considered the most advanced, outreaching and detailed document in this regard in Brazilian legal history. It unprecedentedly establishes the prevalence of human rights as the guiding principle in international relations in an effort to improve the image of Brazil as a State that respects and guarantees human rights.³¹⁹ Moreover, the principle of human dignity has been established as the parameter for the interpretation of the entire legal system after the promulgation of the 1988 Constitution.³²⁰

The Constitution has a one-article chapter on the ‘individual and collective rights and duties’. The lengthy art. 5 enumerates seventy-eight human rights provisions and has four paragraphs. Paragraphs one and two were part of the text promulgated in 1988, three and four were included by an amendment in 2004. These paragraphs are of extreme relevance to the enforceability and monitoring of human rights standards in Brazil and the first three³²¹ are instrumental for the analysis of international law and jurisprudence, taking into account that

³¹⁸ Piovesan, *Direito Constitucional*, *supra* note 41 at 61.

³¹⁹ Flavia Piovesan, “A Constituição Brasileira de 1988 e os Tratados Internacionais de Proteção dos Direitos Humanos” (2008) 2:1 EOS Revista Jurídica da Faculdade de Direito Dom Bosco 20 at 25 [Piovesan, “Tratados”].

³²⁰ *Constituição*, 1988, *supra* note 23 at art. 1, III; Piovesan, “Tratados”, *supra* note 319 at 25.

³²¹ The fourth paragraph enforces the International Criminal Court’s jurisdiction regarding Brazil.

the reinterpretation proposed here as one of the pathways to break the *circular argument* presupposes compliance with general and specific international human rights standards regarding indigenous and other socio-ethnically distinct peoples akin to them.

The first paragraph of art. 5 states that “all provisions that define fundamental rights and guarantees are immediately applicable”,³²² thus, not requiring complementary legislation. Such provision is expected within the context of human rights legislation, its enforceability, however, may not be as clear as the textual statement. The second paragraph, determines that the rights expressed in the constitutional text do not exclude rights and guarantees derived from constitutional principles or expressed in international treaties that Brazil is a part of.³²³ The second paragraph’s most common interpretation is that the Constitution encompasses rights expressly included in the text but also those that implicitly flow from the Constitution’s axiological framework and international treaties Brazil has committed to.³²⁴

The controversy and academic debates regarding this provision are three-fold. First, the nature and scope of the provision seems to indicate that the Constitution adopts a hybrid model for the reception of international legislation within its framework. A teleological interpretation through the formal requirements of the legal system places international human rights legislation at par with the highest ranking norms in the internal legal system. In other words, because of their *jus cogens* nature in international law, the international human rights norms retain constitutional status in Brazil. Meanwhile, international law norms not related to human rights would fall under the historically adopted dualist method of incorporation of

³²² *Constituição*, 1988, *supra* note 23 at art. 5, §1.

³²³ *Constituição*, 1988, *supra* note 23 at art. 5, §2. This constitutional provision was drafted by Antonio Augusto Cançado Trindade who is one of the most respected and prolific authors in the fields of Public International Law and International Human Rights Law in Brazil and internationally. He has served as judge of the Inter-American Court of Human Rights from 1994 to 2008 and was elected for the International Court of Justice for the 2009-2018 term. See Piovesan, *Direito Constitucional*, *supra* note 41 at 74. Cançado Trindade has affirmed that it is encouraging to see international law achievements with regards to human protection being incorporated within the constitutional order through art. 5, §2. See Antônio Augusto Cançado Trindade, *A proteção internacional dos direitos humanos: fundamentos jurídicos e instrumentos básicos* (São Paulo: Saraiva, 1991) at 631.

³²⁴ Piovesan, “Tratados”, *supra* note 319 at 25. See also Piovesan, *Direito Constitucional*, *supra* note 41 at 78 and Silva, *supra* note 23 at 197.

international law through infraconstitutional legislation.³²⁵ In spite of its cohesiveness, this understanding is far from consensual. There is disagreement within the courts and precedents established by the *Supremo Tribunal Federal* are very wide in range – the Court has reinforced the parity of international human rights law with the Constitution in some instances³²⁶ but it has also extended the dualist approach to international human rights law, or simply avoided the discussion of the matter.³²⁷

The *Emenda Constitucional n. 45* was approved in 2004 and added two paragraphs to art. 5.³²⁸ The aim of paragraph three was to dissipate the controversy generated by the second paragraph by defining the status of international human rights treaties. It states that international human rights treaties and conventions approved in each house of the *Congresso Nacional* in two rounds by two-thirds of the votes of the members of each house acquires status equivalent to constitutional amendments.³²⁹ Nevertheless, instead of clarifying the debate, the new paragraph has stirred even more controversy and enlarged the mismatched possibilities of interpretation. While some approaches maintain that only the treaties approved by the qualified quorum defined in 2004 would have constitutional status, others defend that the amendment only reinforces the higher status of international human rights law in the legal system in comparison to international law in general.

One of the solutions proposed to solve the controversy determines that treaties approved with qualified quorum after 2004 would be both materially and formally constitutional while treaties incorporated before 2004 or that have only been ratified, but not incorporated, are materially constitutional as a consequence of the pre-2004 interpretation and reinforced by the ideals

³²⁵ See e.g. Piovesan, *Direito Constitucional*, *supra* note 41 81. Piovesan deduces the dualist framework for the international norms not pertaining to human rights by citing art. 102, III, b of the Constitution that foresees the competence of the *Supremo Tribunal Federal* to decide about the unconstitutionality of international treaties incorporated to the system through federal legislation.

³²⁶ STF, HC 87.585, Rel. Min. Marco Aurélio, Plenário, 3 December 2008, DJE, 26 June 2009. The Court expanded the guarantees granted by the Constitution through the complementary application of the *American Convention on Human Rights* ratified by Brazil on 9 July 1992.

³²⁷ As observed in the *Terra Indígena Raposa Serra do Sol* analysed in detail below, and, for example, in STF, ADI-1.480-MC, Rel. Min. Celso de Mello, Plenário, 4 September 1997, DJ, 18 May 1997.

³²⁸ *Emenda Constitucional n. 45*, 8 December 2004.

³²⁹ *Constituição*, 1988, *supra* note 23 at art. 5, §3.

conveyed in the 2004 amendment.³³⁰ This understanding is strengthened by the fact that prior to the amendment, the 1988 Constitution did not require the qualified quorum or multiple voting rounds for the incorporation of human rights treaties. A differentiation between the human rights treaties incorporated into the system before and after the date of the amendment in 2004 would not be justifiable and could create an undue hierarchy between human rights treaties.³³¹ This understanding is complemented by an emblematic vote at the *Supremo Tribunal Federal* in 2006 stating that the 2004 constitutional reform reinforces the special character of the human rights treaties in relation to other international law treaties that gives them a privileged place within the internal legal order. The decision also encourages the Court to critically revisit its institutional understanding of the role and scope of international human rights law in the internal legal order.³³²

This privileged place for international human rights treaties in the constitutional and ultimately the entire legal system is not consensual between theorists, courts and even amongst the *Supremo Tribunal Federal* bench— as observed, for example, in the *Terra Indígena Raposa Serra do Sol* case analysed in detail below. Some votes express a strong interpretation of the dualist approach to international law and even downplay the importance of international human rights declarations,³³³ therefore, marching on the opposite direction of global norms that guarantee indigenous rights, perpetuating the integrationist model practices and ultimately perpetuating the *circular argument*.

The role granted to the human dignity principle and the predominant role given to human rights as the guiding principle within the country's international relations framework by the

³³⁰ Piovesan, “Tratados”, *supra* note 319 at 27-29.

³³¹ *Ibid.* at 27; observing that despite the inexistence of the qualified quorum rule before 2004 most human rights treaties approved until then exceeded the three-fifths of favourable votes in each House of the *Congresso Nacional*.

³³² STF, RE 466.343, voto do Min. Gilmar Mendes, Plenário, 22 November 2006, DJ, 29 November 2006. Similarly to the case HC 87.585, *supra* note 326, RE 466.343 refers to art. 7(7) of the *American Convention on Human Rights* establishing – in opposition to internal legislation in force – that ‘no one shall be detained for debt’. It should be noted, however, that only one treaty has been approved under the conditions imposed by art. 5, §3 since the amendment – the *Convention on the Rights of Persons with Disabilities* and its *Optional Protocol* ratified by Brazil in 30 March 2007 and incorporated in the legal system through the qualified quorum through *Decreto n. 6.949*, 25 August 2009.

³³³ See e.g. PET 3388, Peluso, *supra* note 167.

1988 Constitution could be interpreted as enabling the inclusion of international human rights law that specifically addresses indigenous peoples' issues,³³⁴ thus complementing the context of interpretation and enforcement of the Constitution. This potential constitutionalization of international norms referring to indigenous peoples' human rights is particularly relevant when determining the recognition and enforcement of such norms by the legislative and judiciary in their respective decision-making processes. This includes, for instance, an enhanced role for the *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, or ILO 169,³³⁵ ratified and incorporated in the Brazilian legal system and the *jus cogens* status of several other provisions directly enouncing indigenous and other socio-ethnically distinct peoples' rights or those that although not referring to them directly, positively affect the reinterpretation of rights granted by the 1988 Constitution.

The ILO 169 Convention was incorporated into the Brazilian legal system in 2004, prior to the adoption of the amendment to art. 5 and its scope and role in the legal system are controversial. While academics usually agree with its human rights nature,³³⁶ courts often disconsider its existence and potential application. The position of the *Supremo Tribunal Federal* is a clear illustration of the common judicial understanding – the *Terra Indígena Raposa Serra do Sol* decision highlights and often endorses grave breaches to the duty to consult – an indigenous peoples' right loosely affirmed in the Constitution but strongly and clearly affirmed in ILO 169. The court overlooked it as both a material and procedural issue that could affect the outcome of the decision. Only the dissenting vote evoked the duty to consult the indigenous peoples affected by the land demarcation as a procedural obstacle that would render void the demarcation and homologation of the land.³³⁷

³³⁴ Specific international law norms that advance the core human rights of peoples are also understood to form part of the International Human Rights Law system. In the case of indigenous peoples' rights, see especially Anaya, *Indigenous Peoples*, *supra* note 57.

³³⁵ In 2007 the *Supremo Tribunal Federal* acknowledged that ILO Conventions incorporated in the system have a complementary role in the interpretation of the constitutional text, citing ILO Convention 126 in this particular case: STF, ADI-1.675-MC, Rel. Min. Sepúlveda Pertence, Plenário, 24 September 1997, DJ, 29 September 2003.

³³⁶ Instituto Socioambiental, *A Convenção da OIT no Brasil*, online: <www.socioambiental.org>.

³³⁷ Supremo Tribunal Federal, PET 3388, Min. Farias Mello, Voto Vista Escrito, 18 March 2009 at §61-64 [PET 3388, Farias Mello]. This issue will be analysed in detail in the next chapter.

The UN *Report on the Situation of Indigenous Peoples in Brazil* straightforwardly expresses that “Brazil’s progressive constitutional provisions on indigenous peoples should be interpreted to conform to relevant international standards”.³³⁸ Naturally, the Special Rapporteur highlights the need for a cohesive enforcement of the ILO 169 and the *United Nations Declaration on the Rights of Indigenous Peoples* by courts, legislators and policy-makers. The Special Rapporteur’s critique reinforces the lack of enforceability of the duty to consult and land rights, demonstrating that ILO 169 is not thoroughly respected even after its incorporation into the national legal system.

The UN Report states that the current situation of indigenous peoples is not in sync with constitutional and international standards, considering that they lack adequate participation in decisions that affect their lives and communities, and that they do not adequately control their territories, even after the official land demarcation.³³⁹ The Special Rapporteur pinpoints the lack of effective consultation mechanisms regarding development projects,³⁴⁰ noting that the absence of adequate consultation mechanisms reflects a broader problem: the need for fully harmonizing government policies, laws and development initiatives with those that ensure self-determination and related rights to indigenous peoples.³⁴¹

In his short observation mission to Brazil,³⁴² the UN Special Rapporteur has aptly perceived and reported some of the biggest obstacles towards the fulfilment of the pluralist model in Brazil and the consequent need for the creation and enforcement of legislation and public policy that restore the principle of human dignity within indigenous communities. The Special Rapporteur recommends coordinated measures from all government agencies to secure rights and safety of indigenous individuals and communities³⁴³ and the enactment of new legislation and reform of existing laws in consultation with indigenous peoples as necessary to implement

³³⁸ Anaya, *Brazil Report*, *supra* note 3 at §40.

³³⁹ *Ibid.* at §24.

³⁴⁰ *Ibid.*

³⁴¹ *Ibid.* at §55.

³⁴² *Ibid.* at §1; the first paragraph of the report informs that it is based on information gathered by the Special Rapporteur during a visit to Brazil from 18-25 August 2008 and on subsequent research and exchanges of information.

³⁴³ *Ibid.* at §90.

ILO 169 and to harmonize Brazil's laws and policies with the principles and objectives of the *United Nations Declaration on the Rights of Indigenous Peoples*.³⁴⁴

As pointed out with precision by the Special Rapporteur, the lack of cohesiveness in enforcing indigenous peoples' rights in Brazil is two-fold: first, the legal system lacks a unified approach to indigenous peoples' rights, consequently, the existing efforts to implement them at infraconstitutional level are also extremely uncoordinated; in addition, the pluralist framework of the 1988 Constitution does not seem to have much impact over the legislative and public policy drafting processes.

An indigenous rights agenda is non-existent at the *Congresso Nacional*.³⁴⁵ Favourable legislation is usually advanced by members of parliament from regions with a sizable indigenous population or where those population's activities may have greater impact on non-indigenous or shared communities. Representatives who defend the interests of other socio-ethnically distinct peoples, normally connected to small-scale natural extractivist practices, also perceive the indigenous cause as worth pursuing. Most post-1988 legislation regarding indigenous peoples, however, were enacted either as a result of pre-1988 reform processes³⁴⁶ that materialized after 1988 or as an 'action-reaction' enactment.

Such 'action-reaction' policies are enacted to address claims by indigenous-advocacy organizations; environmental concerns expressed by indigenous peoples and others; public opinion outcries driven by the media about several issues; or under political pressure to respond to land demarcation related violence. Other legislative provisions and public policies

³⁴⁴ *Ibid.* at §93.

³⁴⁵ There is, on the opposite direction, a wave of anti-indigenous rights bills advanced in most part by the ruralist lobby to restrict existing and future land rights. The UN Special Rapporteur has included in his report, *ibid* at §30 that 'several bills have been introduced in the National Congress to reverse or limit the protections for indigenous rights already established'. See e.g. "Propostas em tramitação no Congresso ameaçam direitos indígenas e meio ambiente", *Instituto Socioambiental* (30 March 2005), online: <<http://www.socioambiental.org/nsa>>; "Bancadas que mandam no Congresso", *Gazeta do Povo* (20 September 2009), online: <<http://portal.rpc.com.br/gazetadopovo/vidapublica>>.

³⁴⁶ See e.g. the enactment of the new Civil Code in 2002 that eliminates discriminatory restrictions on the exercise of civil rights by indigenous peoples, analysed in more detail below.

may benefit indigenous peoples but are not exclusively directed to them. Socio-cultural rights and agro-extractivism regulations are usually geared towards other socio-ethnically distinct groups but may include indigenous peoples.³⁴⁷ Another type of ‘combo policies’ in which indigenous peoples are included are the affirmative action initiatives proposed to address claims of the Afro-Brazilian lobby that may also include indigenous peoples as another disadvantaged social group. All those measures have advanced the indigenous cause to a certain extent but have also raised controversial issues regarding the social, legal and political status of indigenous peoples within the State affecting the *circular argument* pattern.

The following sections contain a brief review of the relevant legislation and policy in force enacted both as a result of bills proposed before 1988 but also ‘action-reaction’ enactments. All policy and legislation geared specifically towards *quilombola* peoples were enacted post-1988 and refer to a smaller spectrum of rights, most notably, land rights and are presented below alongside indigenous peoples’ rights legislation.

2.2.1 Agency Stereotypes in Civil and Criminal Law

Pre-existing reform processes include, for example, the new Civil Code enacted in 2002, which came to replace the Civil Code in force since 1916.³⁴⁸ The 1916 regime included indigenous peoples among those who were relatively incapable of practicing legal acts.³⁴⁹ Relatively incapable individuals are not able to exercise certain legal acts or are limited in the way of exercising civil rights. Moreover, according to the 1916 Code, the State retained the guardianship of indigenous peoples and the terms of this guardianship were determined by specific legislation. A provision on this regard first appeared in 1928 as a part of *Decreto n. 5.484* – the SPI statutes, considered the predecessor of the *Estatuto do Índio*. It foresaw a

³⁴⁷ Legislation and policy regarding other distinct or traditional peoples’ socio-cultural rights and agro-extractivism regulations that protect their unique socio-ethnic lifestyles – including the *Política Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais* will be analysed in chapter 4 as they represent a diverse and more promising reality towards the enforcement of the pluralist model.

³⁴⁸ *Código Civil, Lei n. 10.406*, 10 January 2002, in force since 11 January 2003, revoked the *Código Civil, Lei n. 3.071*, 1 January 1916 [*Código Civil*, 2002].

³⁴⁹ *Lei n. 3.071*, *supra* note 348 at art. 6 determined as relatively incapable of certain acts or ways of exercise certain acts those between 16 and 21 years-old; prodigal persons characterized by reckless behaviour, wasteful of one’s property or means; and the *sibícolas* (forest-dwellers).

guardianship regime similar to that granted to orphaned minors; the assignment of guardians was undertaken on a case by case basis by SPI inspectors mainly for the representation of indigenous peoples before courts and other public authorities.³⁵⁰

The provisions contained in the *Estatuto do Índio*, enacted in 1973, replace the 1928 decree and the guardianship regime is maintained. Moreover, it determines that when indigenous peoples have integrated to the dominant society and become adapted to it they attain full capacity to exercise individual civil rights³⁵¹ - a strong demonstration of the integrationist paradigm. The guardianship regime was exercised by FUNAI and foresaw the possibility of a case by case judicial analysis of the integration stages of indigenous persons in order to grant them full capacity to exercise civil rights,³⁵² in opposition to the 1928 blanket integration provision.

The 2002 Civil Code, by its turn, excludes the *silvícolas* or ‘forest-dwellers’ from its exhaustive list of those who are relatively incapable of exercising certain acts or are limited in the way of exercising them. Although excluding indigenous peoples from the list, a paragraph was added to this same article mentioning that the ‘civil capacity of the indians’ shall be defined by special legislation.³⁵³ The UN Special Rapporteur has praised the new Civil Code for advancing the rights of indigenous peoples by eliminating discriminatory restrictions to the exercise of civil rights. The Report also mentions that “previous to the enactment of this new code, indigenous peoples were categorized as ‘relatively incapable’ and effectively treated as ‘minors’, with FUNAI in a guardianship (*tutela*) position”.³⁵⁴

³⁵⁰ *Decreto n. 5.484*, *supra* note 165 at arts. 1, 5, 6 and 7.

³⁵¹ *Lei n. 3.071*, *supra* note 348 at art. 6, § único.

³⁵² *Estatuto do Índio*, *supra* note 48 at art. 9.

³⁵³ *Código Civil*, 2002, *supra* note 348 at art. 4. The vocabulary used represents an advancement as the new Code replaces the word *silvícolas* used in 1916 for indians (*índios*). The 2002 choice of words is consistent with the Constitution lexicon although the word ‘indian’ is currently and often considered derogatory by sectors of the civil society, including some indigenous organizations – and international inter-governmental organizations that promote the enforcement of indigenous peoples’ rights.

³⁵⁴ Anaya, *Brazil Report*, *supra* note 3 at §15.

Indeed, this is a great achievement, however the decision of the Special Rapporteur to praise the removal of indigenous peoples from the list of those relatively incapable as an entirely positive achievement is somewhat rushed. The Rapporteur's mere announcement that indigenous peoples can now fully enjoy civil and political rights because the legal limitations have been lifted lacks a relevant analytical element. The fact that a paragraph following the article that lists those who are relatively incapable affirms that the capacity of indigenous peoples will be regulated by specific law does not directly determine that indigenous peoples now enjoy full capacity to exercise civil and political rights. As a consequence, the enforcement of the 2002 Civil Code encounters the same obstacle as many 1988 constitutional provisions: the lack of core post-1988 legislation regarding indigenous peoples' rights.

Art. 232 of the Constitution states the right of indigenous persons and of indigenous communities and organizations to defend their rights and interests before courts, therefore, indirectly implying capacity to exercise civil and political rights. The fact that the Constitution is not explicit in determining that only those individuals who have been declared capable are entitled to defend their rights before courts suggests a pluralistic approach towards the recognition of full capacity of indigenous peoples equivalent to any other citizen not listed as absolutely or relatively incapable of civil and political acts. This constitutional insight is argued to have motivated the Civil Code changes but this theoretical pathway is rarely explored, moreover, in practical terms, the civil capacity of indigenous peoples is deeply connected with and much dependant upon the provisions of the *Estatuto do Índio*.

The *Estatuto do Índio* text furthers the relative capacity understanding by maintaining that civil and political rights can only be exercised by indigenous peoples if special conditions defined in the statute and related legislation are met.³⁵⁵ FUNAI retains 'guardianship of those individuals not fully integrated to the dominant society' and this integration is determined by FUNAI

³⁵⁵ *Estatuto do Índio*, *supra* note 48 at art. 5, § único.

itself.³⁵⁶ This provision entails, for instance, that, all indigenous individuals require the approval of FUNAI to apply for a *carteira de trabalho*³⁵⁷ or a passport.³⁵⁸

These provisions are still applied as such by FUNAI and the courts, subliminally claiming that on the absence of specific legislation, the provisions in force should be followed under the pretext that by not interfering the State would not be providing sufficient protection to vulnerable persons and communities. The lack of a blanket definition of capacity to exercise civil and political rights by either the Constitution or the Civil Code causes this truly integrationist and paternalist provision of the *Estatuto do Índio* to remain valid – indigenous individuals must plead before a federal court to have the guardianship status lifted and their full civil capacity declared.³⁵⁹

This legal requisite is widely overlooked and many restrictions to the practice of civil acts are paternalistically imposed by FUNAI in what could almost be perceived as an attempt to

³⁵⁶ *Ibid.* at art. 7. Marés, *Renacer*, *supra* note 6 at 103 observes that this provision was a retrocession in terms of indigenous rights even at the time of its enactment, speculating that it was included precisely because with the progressive civil emancipation, they would lose their indigenous identity and the possession of their lands would be returned to the State.

³⁵⁷ The *carteira de trabalho* in Brazil is equivalent to the North American social insurance number. Considering of the difficulties they face within these circumstances, many indigenous peoples apply for the documentation as non-indigenous, causing further problems for them. For instance, military service is compulsory in Brazil and all men over 18 years old must prove that they have enlisted or that they have been officially dismissed of military service to be issued a *carteira de trabalho*. Military service is not compulsory to indigenous peoples but many enlist, unaware of the exemption or in order to expedite the issuance of their *carteira de trabalho* enabling them to enter the formal labour market. See Roberta Melega, “Uma crônica da relação índios e militares na Cabeça do Cachorro”, 2001, online: < <http://www.socioambiental.org/esp/indiosemilitares.htm> >.

³⁵⁸ Marés, *Renacer*, *supra* note 6 at 105 recounts that in 1980 the indigenous leader Mario Juruna was invited to speak at a human rights event abroad but the Minister of the Interior, then FUNAI’s umbrella governmental body, did not authorize the issuance of his passport thus impeding him to leave the country, a decision later overturned by the *Supremo Tribunal Federal*. Afterwards Juruna became the first indigenous person to be elected to the *Congresso Nacional*. Although this particular story represents a blatant abuse of power that was politically motivated and happened while the dictatorial regime was in force, the provision, still in force, is timelessly discriminatory.

³⁵⁹ *Estatuto do Índio*, *supra* note 48 at art. 9; granted that the indigenous person speaks Portuguese fluently; is licensed for the exercise of a professional activity in the dominant society; and, demonstrates reasonable knowledge of the dominant society’s uses and customs. The article also determines that the person must be at least 21 years old which adds another layer of confusion to the equation considering the 2002 Civil Code reduced the age for full capacity in relation to the 1916 Code from 21 to 18 years old. The potential conflict of interpretation regarding age, however, is arguably the least debatable of the set. The integrationist requirements of a professional license within the dominant society surely clashes with the pluralist 1988 Constitution recognition of indigenous peoples’ uses, customs and traditions, and consequently, their work methods and organization.

control every interrelation and encounter between indigenous and non-indigenous peoples in Brazil. Similarly, many acts legitimately practiced by indigenous peoples are annulled by courts on the grounds that they did not possess the civil capacity to do so. Conversely, the legality of illegitimate acts that harm indigenous peoples who do not fully understand the circumstances and responsibilities entailed in certain legal scenarios is upheld on the grounds that civil capacity provisions are not clear and leave ample room for interpretation – often on the interest of those with most influence over the courts’ interpretation of matters.

The unclear status before the law also spreads to the realm of the Criminal Code.³⁶⁰ Matters that intersect indigenous peoples and criminal law have historically been divided in two categories: crimes committed by indigenous peoples and crimes committed against them. The Criminal Code in force was enacted in 1940 and its general part was thoroughly reformed in 1984. Many amendments were introduced afterwards but the gray-area specific provision regarding indigenous peoples has not been altered or clarified since the Code’s enactment.

The core indigenous peoples’ specific legislation in force in 1940, when the Criminal Code was enacted, was the 1928 decree³⁶¹ that determined that those who were not in contact with the dominant society for less than five years were compared to minors and were not criminally liable for the actions while indigenous persons who had more than five years of integration within the dominant society were liable but the sentence would be mitigated by half. The 1940 Code did not discipline criminal liability of indigenous peoples³⁶² but the exposition of motives declares that the definition of criminal liability, or lack thereof, should be understood to include indigenous individuals not integrated into the dominant society because of their ‘incomplete development’.³⁶³ Due to the lack of specific provisions in the Criminal Code, the 1928 decree remained the framework of reference until the late 1960s. Moreover, according to

³⁶⁰ Issues of civil and criminal liability have been current discussion topics amongst academics in Brazil. See *e.g.* Marés, *Renascer*, *supra* note 6 and Cordeiro, *supra* note 21. The approach taken here does not aim to contribute to the debate but rather highlight the main issues concerning the overlap of integrationist and pluralist models and how they perpetuate the *circular argument*.

³⁶¹ *Decreto n. 5.484*, *supra* note 165 at arts. 28-32.

³⁶² *Código Penal, Decreto-Lei n. 2.848*, 7 December 1940, as amended by *Lei n. 7.209*, 11 July 1984 at art. 26 [*Código Penal*].

³⁶³ Marés, *Renascer*, *supra* note 6 at 109-110.

the 1928 regime, the imprisonment of indigenous convicts or other sentences were not administered by the judiciary power but by the SPI that created special incarceration facilities of indigenous peoples in which much abuse was reported.³⁶⁴ The indigenous prisons were closed with the demise of the SPI and the punitive competence was returned to the judiciary power rather than transferred to FUNAI.

In 1973, the *Estatuto do Índio* clarified some aspects of criminal liability of indigenous peoples and the respective sentencing criteria. Although the understanding of the Criminal Code remains in force, the statute proposes a blanket sentence attenuation clause for crimes committed by indigenous peoples and recommends that courts verify the person's degree of integration into the dominant society and the person's degree of understanding of the criminality of the action.³⁶⁵ Despite being enacted on the height of the integrationist paradigm and directly referring to it, this provision could be considered somewhat pluralist. First of all, because it does not deny liability of indigenous peoples for criminal acts, consequently not portraying them with underdeveloped comprehension abilities and second, because it seeks to avoid the degradation of the indigenous culture within the national penitentiary system.³⁶⁶

The article following this somewhat pluralist provision, however, is painted with all integrationist colours and states that the application of penal or disciplinary sanctions by 'tribal groups' according to their own institutions will be tolerated whilst directed to the members of the 'tribe' and if the sanctions do not entail degrading or cruel punishments, forbidding the death penalty in any circumstance. Although the article upholds certain human rights standards and could facilitate the establishment of indigenous jurisdictions, the choice of words leaves little room for an impartial and legal pluralist approach.

³⁶⁴ See *supra* note 191 regarding the demise of the SPI and the Figueiredo Report.

³⁶⁵ *Estatuto do Índio*, *supra* note 48 at art. 56; suggesting, moreover, that whenever possible the reclusion or detention sentences be completed in special regimes of incarceration in geographical proximity to a FUNAI support agency.

³⁶⁶ See especially "Índios nunca foram inimputáveis" diz advogado indígena" *G1* (21 May 2008), online: Globo <<http://g1.globo.com/Noticias/Brasil>>.

Considering the lack of core legislation regarding indigenous peoples' rights and the omission of the Criminal Code, these two articles contained in the *Estatuto do Índio* remain the only and very grey frame of reference for the application of criminal law in relation to indigenous peoples in Brazil. Marés de Souza pinpoints with precision the implications of the integrationist legislation in force and the lack of a pluralist compromise in its application by noting that the dominant integrationist ideology to which the State and legal system have remained affiliated to renders it difficult for courts, legislators, policy makers and some academics to understand why indigenous peoples should be entitled to a differentiated treatment merely because they are indigenous peoples. In the dominant view, the only justification for the mitigation of sentences rely on the incomplete understanding of the delictual character of the act resulting from lack of comprehension of social rules caused by, in an extremely racist view, ethical and mental inferiority. The dominant ideology does not accept that indigenous peoples belong to a society that is culturally and organizationally distinct and this is what justifies differentiated criteria for criminal liability and sentencing.³⁶⁷

Portrayals of ethical inferiority and an incoherent application of the liability criteria, or lack thereof, by courts have deeply impacted the image of indigenous peoples as inept for interaction within the dominant society and also as those who hide behind their special liability status to commit crimes against non-indigenous peoples. The State, through its executive,

³⁶⁷ Marés, *Renascença*, *supra* note 6 at 116-117. Yrigoyén Fajardo, *Pautas*, *supra* note 10 at 44 complements this position by stating that State sponsored justice systems do not respect and may even criminalize cultural difference. Moreover, she highlights a discriminatory and racist attitude in many justice operators' behaviour. An example is the decision STF, HC 85.198, Rel. Min. Eros Grau, Primeira Turma, 17 November 2005, DJ, 9 December 2005. The Office of the Public Prosecutor impetrated a demand of *habeas corpus* on behalf of an indigenous person requesting anthropological and psychological tests to evaluate his degree of integration into the dominant society to determine criminal liability, also requesting the application of special sentencing conditions in light of art. 56 of the *Estatuto do Índio*. The Court decided, in accordance with pluralist principles, that the person was fully liable for the criminal conduct due to participation in the dominant society's educational system, fluency in Portuguese and the level of leadership exercised in the criminal enterprise. The STF also maintained the mitigation of the sentence because of the indigenous status of the defendant. On a negative note, aspects of this decision were cited in the proposition of a bill before the Senate two years later. *Projeto de Lei do Senado n. 216/08*, 29 May 2008 aims to clarify the indigenous peoples criminal liability criteria. The discriminatory language and reasoning used, however, resemble legislation enacted thirty years previously. It foresees that 'isolated indians' are not criminally liable and those 'pursuing integration' or 'fully integrated' should be considered criminally liable. The bill's exposition of motives blatantly misuses the arguments of the STF decision and seeks to 'clarify the issue and avoid future reoccurrence'. While the STF decision rightly analysed the issues of special sentencing conditions and *mens rea* separately, the bill's exposition of motives does not differentiate between the two – exactly and precisely as exposed by Marés de Souza and Yrigoyén Fajardo – considering the proponents of the bill defend that if integrated, the indigenous person is criminally liable and if criminally liable, for this same reason not entitled to special sentencing conditions.

legislative and judicial branches, as well as the media, are accountable for the perpetuation of this image even within the post-1988 pluralist model. The unclear interpretations given to their legal status in the civil and criminal law realms always cohesive with the integrationist paradigm have heavily contributed to the formation and perpetuation of the *circular argument*. Taking this context into account it is clear that a legislative and academic vacuum exist regarding a diverse, creative and pluralist paradigm to be developed as an interdisciplinary effort with the full participation of indigenous peoples themselves.

The second category of intersection between indigenous peoples and criminal law refers to the crimes committed against indigenous peoples and culture. Art. 58 of the *Estatuto do Índio* states that to ridicule, vilify or disturb in any way the practice of ceremonies, rites, uses, customs or cultural indigenous traditions is a crime.³⁶⁸ It also typifies as a crime to feature persons or communities in tourism advertisements or any exhibition with lucrative purposes.³⁶⁹ It also defines as a crime to encourage, by any means, the acquisition, use and dissemination of alcoholic beverages to ‘tribal groups’ or individuals that are not integrated in the national society.³⁷⁰ Moreover, the sentence for such crimes shall be aggravated by one-third if the perpetrator is an employee of the indigenous protection agency.³⁷¹

The protection of indigenous peoples as socio-ethnically distinct individuals and communities is indeed very welcome and the criminalization of certain acts against them demonstrates the seriousness of the issue. However, it is relevant to note that the typification of crimes and the hierarchical gravity of the offences listed in art. 58 follow a threshold pattern that is paternalistic and most definitely culturally self-referent to the dominant society. The disposition and the punishment imposed, rather than referring to the gravity of the indigenous peoples’ fundamental rights’ violation refers to the level of interaction and disturbance to the dominant society.

³⁶⁸ *Estatuto do Índio*, *supra* note 48 at 58, I; the sentence is one to three months of detention.

³⁶⁹ *Ibid.* at 58, II; the sentence is two to six months of detention.

³⁷⁰ *Ibid.* at 58, III; the sentence is six months to two years of detention.

³⁷¹ *Ibid.* at art. 58, § único and art. 59 respectively.

The priority list established in art. 58 also highlights the *circular argument* logical fallacy. The right of indigenous peoples to be free from ridicule, vilification or disturbance in the practice of their ceremonies, rites, uses, customs and cultural traditions are at the smaller end of the spectrum of protection with the lower sentence among the crimes typified. Conversely, the sale and dissemination of alcoholic beverages to individuals not integrated to the dominant society imply an overarching lack of agency or discerning attitude with the highest sentence imposed to those members of the dominant society who ‘take advantage of indigenous peoples’ in this regard. The actual existence and enforcement of a general prohibition of alcohol beverage sales to indigenous individuals throughout the country determines a paternalistic approach that does not address the problem directly. On the contrary, the general prohibition causes the exploitation of indigenous peoples by third parties who create black markets that lead persons and communities to financial ruin and substance abuse, all overlooked by State authorities. Government officials, by their turn, justify their conduct by enforcing the legislation within the legal market and blaming indigenous peoples’ naïveté and lack of autonomous agency for falling prey of schemes and substance abuse thus justifying the retention of the current regime that comes at the cost of perpetuating the *circular argument*.

Moreover, an added layer of paternalistic and self-referent behaviour by the State can be added to the equation. The higher interest addressed on the typification of the conduct is the size of the problem created to the State by the wrongful conduct described. While substance abuse may generate a larger and costly problem, the State might gain with the promotion of ‘exotic’ tourism and does not have much to loose if the traditional practices of socio-ethnically distinct communities of some citizens are ridiculed or disturbed. This approach matches the role of the State in Brazil in the 1970s. Although such position would not be considered politically correct nowadays, the legislation is still in force, and much like other provisions – as seen above – has not been applied with clear standards. As an example, in the stance of alcohol sales, the concept of indigenous persons ‘not fully integrated to the national or dominant society’ is

applied as a blanket designation to all indigenous peoples who do not interact with the mainstream society workforce.³⁷²

Other types of legislation have been enacted post-1988, laws specifically addressing indigenous peoples' education, cultural heritage, health, land demarcation and interactions with military forces in their lands. Some, as mentioned above, were approved after 1988 but had been in the works before the enactment of the new constitutional paradigm. In great part, nevertheless, those were 'action-reaction' enactments addressing indigenous peoples' claims; public opinion outcries of all sorts driven by the media; the military lobby regarding border areas or political pressure in response to violence related to land demarcation.

2.2.2 Education, Cultural Heritage and Health Policies

Post-1988 infraconstitutional legislation and policy directly addressing indigenous peoples' rights was initiated by a series of short executive power decrees in 1991.³⁷³ In great part, *Decretos n. 22, 23, 24, 25, 26* and *27* detailed rights already recognized in the Constitution, attributed competences to federal, federated states or local authorities and proposed regulations about land demarcations, health, environmental protection on indigenous lands, promotion of economic sustainable programs and education. One of the decrees also established a commission to propose reformulations to the existing legislation. With the exception of *Decreto n. 26* addressing 'indigenous education', all 1991 presidential decrees were revoked in 1994 by *Decreto n. 1.141*,³⁷⁴ enacted within the following governmental administration.³⁷⁵ The 1994 legislation was then partially revoked and amended by legislation

³⁷² Indigenous peoples that integrate the Armed Forces, for example, are deemed to have agency to consume alcoholic beverages while their neighbours, relatives, etc. who live in the same communities and have the same forms of contact and interaction with the dominant society but exercise traditional occupations within the communities are not authorized to purchase or consume alcohol. See, e.g. Melega, *supra* note 357.

³⁷³ *Decretos n. 22, 23, 24, 25, 26*, 4 February 1991 and *Decreto n. 27*, *supra* note 48.

³⁷⁴ *Decreto n. 1.141*, 19 May 1994.

³⁷⁵ The mandate of the 32nd president of Brazil, Fernando Affonso Collor de Mello started in 1990 and was cut short in 1992 by his resignation following corruption charges. The investigation against the president was not halted by his resignation and he was formally impeached on the same year. Collor de Mello's vice-president, Itamar Franco, became the 33rd president from 1992-1994. Collor de Mello had been the first president to be elected by direct democratic elections following the military dictatorship. After Collor de Mello's resignation, all stances of government, namely those directly proposed or managed by the executive power underwent a

enacted in 1995, 1999 and 2001.³⁷⁶ Moreover, provisions of the *Estatuto do Índio* that are still in force also discipline social, cultural and economic rights.

According to the 1991 *Decreto n. 26*, all actions referring to indigenous education at all levels and modalities are coordinated by the Ministry of Education and those actions shall be developed by education governmental authorities of the federated States and municipalities.³⁷⁷ The short decree solely established the coordination of indigenous education initiatives' competences and only five years later the issue of indigenous education was addressed again.

Curricular and school administration guidelines are established by federal authorities through the Ministry of Education. The latest general reform was sanctioned by *Lei n. 9.394* in 1996 and states as a general principle at any level the pluralism of ideas and pedagogical conceptions. Arts. 78 and 79 of *Lei n. 9394* address indigenous education in a remarkably pluralist context; encouraging collaboration among federal agencies in charge of education, culture and support to indigenous peoples for the development of integrated learning and research programs, bilingual and intercultural education that shall factor in both indigenous and non-indigenous as well as inter-indigenous groups contributions. It boldly states that differentiated education for indigenous peoples has the objective of offering them the restoration of historical collective memories; the reaffirmation of their ethnic identities; and the valorization of their languages and sciences while guaranteeing their access to information, technical and scientific knowledge of the 'national as well as other indigenous or non-indigenous societies'.³⁷⁸ Art. 79 commits the federal government to support technically and financially the intercultural indigenous education systems through the development of integrated teaching and research programs. The

bouleversement process. It is difficult to establish a direct parallel between this transitional moment in Brazilian politics and the indigenous rights infraconstitutional framework change. However, the political stalemate caused by these events from 1991 to 1995, when the administration of the 34th president, Fernando Henrique Cardoso, started readdressing rights of indigenous and other vulnerable groups, certainly aggravated the already difficult situation caused by several years of integrationist policies. Most of the legislation in force has been enacted during Cardoso's two terms from 1995-2002 or during the two terms of the 35th president, Luiz Inacio Lula da Silva which began in 2003 and end in 2010.

³⁷⁶ The different decrees enacted during this period are analysed in the following paragraphs according to their relevance to each topic proposed.

³⁷⁷ *Decreto n. 26*, *supra* note 377 at arts. 1 & 2 – the only two articles that form the text of the decree.

³⁷⁸ *Lei n. 9.394*, 20 December 1996 at art. 78.

article also determines that indigenous communities should be heard in the planning stages of the programs and the goals should be to strengthen the socio-cultural practices and languages of each community; it also states that specialized personnel should be offered training programs; the systematic elaboration and publication of specific and differentiated didactic material should be encouraged and, *curricula* and programs should be designed including cultural contents corresponding to each community.³⁷⁹

In 1999, the *Conselho Nacional de Educação*, a branch of the Ministry of Education, finally issued a resolution specifying the guidelines for indigenous education provided by *Lei n. 9.394*.³⁸⁰ Instead of establishing practical measures to implement the general guidelines, the resolution merely states the objectives of the 1996 legislation in more detail, also stating responsibilities of the federal and federated state governments in meeting those objectives. According to progress reports issued by the Ministry of Education, the federal government has been able to identify deficiencies and provide training programs to initiate or to improve the implementation of the guidelines regarding indigenous education throughout the country.³⁸¹

Indigenous education initiatives, however, currently rely entirely on public funding due to the lack of political will and consequent measures of the executive branch to delegate and monitor the establishment and management of schools in partnerships between the communities and the private or the third sector – unlike the mainstream society educational initiatives that are more likely to secure funding or be owned by entities of the private sector and merely regulated and monitored by the executive branch of government. The deficient and underfunded state of public education in Brazil in general is common knowledge. The unique characteristics underlying indigenous education, which usually require additional funding and political will, contribute to locating public indigenous education at an even more deplorable state than the public education in general. The UN *Report on the Situation of Indigenous Peoples in Brazil* has a sub-section on education within the section ‘Indigenous Development and Related Human Rights Concerns’; it reports that schools have a rundown infrastructure; lack

³⁷⁹ *Ibid.* at art. 79.

³⁸⁰ *Resolução do Conselho Nacional de Educação n. 3*, 10 November 1999.

³⁸¹ Ministério da Educação, *Educação Escolar Indígena*, s/d, online: <<http://portal.mec.gov.br/secad>>.

of supplies; and a shortage of teachers despite increases in government funding. Citing data from 2005, the Report informs that 34.2 indigenous schools did not have their own buildings and instead functioned out of community centres or churches, and almost half of the school buildings did not have electricity or running water. Inadequate teacher qualifications are also touched upon as the Report highlights that only 11% of teachers in indigenous schools have completed a teaching certification degree and 10% of teachers have not completed primary education. The Rapporteur mentions hearing repeated complaints by indigenous leaders that they face obstacles to play a meaningful role in the administration of schools in their communities.³⁸²

An evident manifestation of the legislation as paternalistic, culturally self-referent and incoherent with the pluralistic proposal of constitutional rights and the international legislation ratified by Brazil is the lack of consultation with and participation of indigenous peoples in the definition of objectives and strategies of implementation of indigenous education. In practice, the UN Report informs that according to the federal government 95% of the nearly 10,000 educators employed in indigenous schools are indigenous; the chair of the Indigenous Education Steering Committee of the Ministry of Education is indigenous and in 2004 the government created the National Commission on Indigenous Education.³⁸³ Those efforts address the *circular argument* aspect of the critique to a certain extent. The same UN Report, however, demonstrates that the bureaucratic efforts have yet to bear fruit in practice. In addition to the appalling infrastructure of the indigenous schools, the Rapporteur recalls receiving several reports of inadequate incorporation of indigenous languages and cultural perspectives into educational curriculum and texts.³⁸⁴

³⁸² Anaya, *Brazil Report*, *supra* note 3 at §69.

³⁸³ Anaya, *Brazil Report*, *supra* note 3 at §66-67. The Report also refers to federal government affirmative actions programs such as *Diversidade na Universidade* and *Universidade para Todos* as tools to increase the enrolment of indigenous peoples and other minorities at higher education institutions. These programs address in most part the Afro-Brazilian community and do not require unique socio-ethnic settings or accommodation; consequently, they are not directly addressed here.

³⁸⁴ *Ibid.* at §68. See also, “Índios criam novo modelo de educação” *Jornal Nacional* (25 September 2009) online: <<http://jornalnacional.globo.com>>. The largest media group in Brazil recently produced a short documentary about a local indigenous education initiative in the *Cabeça do Cachorro* region that is located in the State of Amazonas bordering Colombia. The documentary demonstrates the excellent results of a school that is locally managed by a Tuyuka indigenous community in contrast with schools located in communities that do not have the conditions or proactivity of the leaders of this specific community. This initiative illustrates how a project

On the same path of the indigenous education legislation, FUNAI has enacted an ordinance in 2000, in the realm of cultural rights, creating the Indigenous Cultural Heritage Registry; defined as complementary to art. 231 of the Constitution that recognizes indigenous peoples' social organization, customs, languages, creeds and traditions and art. 215, §1 that asserts the duty of the State to protect manifestations of indigenous culture.³⁸⁵ Inclusions in the Registry can be requested by 'indigenous societies and their communities, indigenous organizations, civil society organizations, scientific organizations, the Office of the Federal Prosecutor, FUNAI or an indigenous person if the product is an individual production.'³⁸⁶ The nature and vocabulary of the ordinance are surprisingly pluralistic although the scope is too general and has proven hard to enforce due to lack of political interest and funding.

The Constitution does not contain provisions directly related to indigenous health. Legislation and public policy have, however, addressed the issue of access to health to indigenous peoples presupposing a differentiated socio-ethnic approach arguably following international legislation guidelines ratified by Brazil at the different stages of indigenous health policy development.³⁸⁷ Indigenous health legislation and policy enacted post-1988 are diffuse and somewhat uncoordinated. Unlike other sectors of the Brazilian population, even vulnerable ones, indigenous peoples must rely heavily on health services sponsored by the State for socio-economic reasons and notably because of the territorial isolation of most indigenous lands.³⁸⁸

developed and managed locally can be extremely successful. The presentation and vocabulary chosen by the dominant society production company, however, are deplorably self-referent and paternalistic, overshadowing this promising practice.

³⁸⁵ *Portaria n. 693*, 19 July 2000.

³⁸⁶ *Ibid.* at art. 3. It should be noted that this legislation was enacted before the political shift towards the adoption of the 'indigenous peoples' terminology when the legislation proposed to replace the *Estatuto do Índio* still expressed the 'indigenous society' and 'indigenous community' wording.

³⁸⁷ Most notably ILO 107, *supra* note 215 and ILO 169, *supra* note 212.

³⁸⁸ Access to health services in Brazil are available through the public and private sectors, regulated by the Ministry of Health. Both public and private systems operate in a very different manner than those available in North America – costs are regulated by federal authorities and the access to healthcare professionals is not as heavily directed by the State as is the case in Canada. There are affordable private health plans in Brazil and the shortage of healthcare professionals is not an overarching problem, existing only in remote or underpopulated areas. The public system, as is the case with any public service in any developing country, is underfunded and does not fully meet the demand but the existence of an affordable private system greatly alleviates the public system's demand. The isolation and socio-economic situation of many indigenous communities result in

Indigenous health is regulated by laws, several executive power decrees, National Health Council resolutions and various ordinances from the National Health Foundation – the organ that ultimately coordinates the delivery of health services at local level. The nationwide public health system, *Sistema Unico de Saúde* contains an indigenous health subsystem with specific rules for differentiated and adapted care that respect regional diversity.³⁸⁹ In 1986, therefore, before the enactment of the 1988 Constitution, the I *Conferência Nacional de Proteção à Saúde do Índio* - promoted by the federal government - affirmed the urgent need to implement a system that guaranteed indigenous peoples' universal and integral access to health noting the importance of respecting ethnic and socio-cultural traits and therapeutic practices of each group. It reinforced the relevance of the participation of indigenous peoples in the definition of indigenous health policies and proposed the creation of *Distritos Sanitários Especiais Indígenas*.³⁹⁰ The special districts became a reality only in 1999.

The competence for developing and delivering healthcare to indigenous peoples was fully directed to the Ministry of Health in 1991. In 1994, after many legislation and policy reforms, the Ministry of Health was mandated with preventive medicine duties while FUNAI had the *de facto* competence for all other healthcare related measures.³⁹¹ Indigenous healthcare reached appalling levels in the following years and in 1999, the Ministry of Health's competence for all types of healthcare was restored and would be provided by the *Fundação Nacional de Saúde*³⁹² - FUNASA. The administration of FUNASA, however, decided to share the foundation's tasks, and, ultimately, the Health Ministry's mandate to provide healthcare to indigenous peoples by delegating the provision of services to local contractors such as non-governmental and religious organizations and municipalities.

dependence solely from the public health system that is not common place for other citizens, even those in less privileged settings.

³⁸⁹ *Lei n. 9.836*, 23 September 1999; the federal government is responsible for funding all indigenous health initiatives with the possibility of complementation of resources provided by federated states, municipalities or non-governmental organizations.

³⁹⁰ Instituto Socioambiental, *A saga das reformas da saúde indígena*, online: <socioambiental.org>.

³⁹¹ *Decreto n. 23*, *supra* note 373 and *Decreto n. 1.141*, *supra* note 374 respectively.

³⁹² *Decreto n. 3.156*, 27 August 1999.

Widespread corruption and undue bureaucracy plagued the actions of FUNASA and its partner organizations. The effects of this poorly managed enterprise nationwide resulted in epidemics of previously controlled diseases, malnutrition and a descent of indigenous health indicators to levels seen only in the 1800s and early 1900s. In 2004 the Ministry of Health cancelled part of those contracts and those that remained valid did not produce many positive results leading to reshuffles in the institutional structure and redistribution of competences several times since then.³⁹³

In 2002, the *Política Nacional de Atenção dos Povos Indígenas* was approved by the Ministry of Health followed by the creation of the *Programa de Promoção de Alimentação Saudável em Comunidades Indígenas*. In 2004 a consultative committee composed by government and indigenous representatives was created to evaluate and propose improvements to the national indigenous health policy.³⁹⁴ Besides direct provision of healthcare, the national policy also includes guidelines for human resources training for action in intercultural contexts, monitoring of indigenous health initiatives, articulation of the indigenous traditional health systems, promotion of the adequate use of medication and promotion of ethics in health research and actions involving indigenous communities.³⁹⁵ The policy highlights that indigenous peoples cannot be the passive receivers of care or be considered dispossessed of knowledge regarding healthcare and biomedicine; encouraging those working within the indigenous health framework at all levels to recognize cultural and social diversity, demonstrate respect and consideration to traditional health systems towards the promotion, education and execution of health-related initiatives in each local context.³⁹⁶

³⁹³ “Especial sobre saúde indígena”, *Instituto Socioambiental* (23 June 2006), online: <www.socioambiental.org> and “Índios vivem em condições precárias no AM”, (21 September 2009), online: <www.jornalnacional.globo.com> informing that agreements were signed between the Ministry of Health, the Armed Forces and FUNAI to improve healthcare accessibility in remote areas.

³⁹⁴ *Portaria do Ministério da Saúde n. 254*, 31 January 2002; *Portaria do Ministério da Saúde n. 2.405*, 27 December 2002; and *Portaria da Fundação Nacional de Saúde n. 64*, 20 January 2004. Complemented by *Portaria do Ministério da Saúde n. 2.656*, 17 October 2007 that regulates funding distribution to local governmental partners.

³⁹⁵ Fundação Nacional de Saúde, *Política Nacional de Atenção à Saúde dos Povos Indígenas*, 2d ed. (Brasília: Ministério da Saúde, 2002) at 13 [FUNASA, *Política Nacional*].

³⁹⁶ *Ibid.* at 17.

The same 2002 document that publicizes the policy also recounts the reasons for restructuration, presenting a grim scenario of the conditions of indigenous health in Brazil at that moment.³⁹⁷ The UN Report also devotes a subsection to health within the 'Indigenous Development and Related Human Rights Concerns' section and the facts and figures from 2008 presented there demonstrate very little change when compared with the situation reported in 2002. The main causes of illness and ultimately of death of indigenous peoples are malnutrition, dengue, malaria, hepatitis, tuberculosis and parasites. Poor overall health conditions are often tied to precarious land tenure situations and consequent inadequate access to food and sanitation. The Special Rapporteur also credits the remoteness of some indigenous communities as a clear barrier in the access to health services and the nutritional monitoring system. On the positive side, the Special Rapporteur commends the establishment of indigenous health clinics located in urban centres near indigenous-populated areas.³⁹⁸

The UN Report denounces financial limitations and severe management problems as the cause for healthcare delivery shortcomings highlighting that indigenous peoples have pressed for deeper reforms including a special secretariat within the Ministry of Health to replace FUNASA and measures to increase indigenous participation in all levels of health services, including the training of indigenous health providers.³⁹⁹ Several obstacles hinder the accessibility of indigenous peoples to healthcare services, most related to the *circular argument* towards the combined use of traditional and dominant society health practices, lack of service available in indigenous languages, causing miscommunications, and lack of trust in non-indigenous professionals; or due to the geographical remoteness of indigenous lands. The distance of traditional lands from urban centres and from the dominant society's points of

³⁹⁷ *Ibid.* at 9-12.

³⁹⁸ Anaya, *Brazil Report*, *supra* note 3 at §62-64.

³⁹⁹ *Ibid.* at §65;§86 the Special Rapporteur recommends that the Ministry of Health, in consultation with FUNAI and indigenous peoples, should continue efforts to improve the delivery of health services to indigenous peoples, especially in remote areas, with attention to the special health needs of indigenous women and children. Every effort should be employed to enhance indigenous peoples' participation in the development of health policy with a view to better incorporate traditional indigenous health practices. All medical professionals should be provided with comprehensive medical training that includes indigenous languages and traditional healthcare methods.

reference cannot be interpreted, as it is usually implied by public opinion,⁴⁰⁰ as a choice to forfeit the right to basic sanitation and access to appropriate healthcare.

2.2.3 Land Tenure and Land Use Rights

Land tenure claims of territories traditionally occupied by indigenous and *quilombola* peoples or the right to territorial accommodation of groups that no longer inhabit their traditional lands represent a key legislative and jurisprudential element after 1988. As seen above, the Constitution ensures the recognition of original rights of possession of the lands indigenous peoples traditionally occupy⁴⁰¹ and guarantees property of their lands to the remnants of quilombos.⁴⁰²

Following the same pattern of other legislative measures regarding indigenous and other socio-ethnically distinct peoples, the legislation and policy enacted so far to regulate the demarcation of indigenous and *quilombola* lands is controversial and lacks cohesiveness. Legislation and policy regarding land demarcation and tenure have been constantly challenged through other legislative measures, in courts and have been subjected to constant changes, amendments and reforms – a scenario that is not very conducive to the respect and effective fulfilment of land rights and other land-tenure related rights. The demarcation and homologation of indigenous and *quilombola* lands are based on distinct socio-historical premises and are quite different from a procedural perspective from each other; therefore, a summary and critique of each is separately presented below, followed by an analysis of their impact in the formation and perpetuation of the *circular argument*.

⁴⁰⁰ “Índios vivem em condições precárias no AM”, *supra* note 393.

⁴⁰¹ The legal conceptualization of indigenous land that was sedimented in the 1988 Constitution is that the federal government retains formal property of the lands while the usufruct and possession rights are transferred to indigenous peoples. The ‘traditionally occupied lands’ formula is formed through cumulative criteria defined in art. 231: lands should be permanently inhabited by indigenous peoples; used for their productive activities; indispensable to the preservation of natural resources that are necessary to the well-being of indigenous peoples as well as their physical and cultural reproduction according to their uses, customs and traditions. The lands are inalienable, unavailable, and the rights over them imprescriptible. *Constituição*, 1988, *supra* note 23 at art. 231.

⁴⁰² *Ibid.* at ADCT, art.68.

With regards to indigenous peoples, the procedure established in 1973 by the *Estatuto do Índio* remains the main framework of reference.⁴⁰³ Following the promulgation of the Constitution, *Decreto 22*⁴⁰⁴ of 1991 disciplined land demarcation but was replaced in 1996 by the more extensive and detailed *Decreto n. 1.775* that complements the provisions of the *Estatuto do Índio* and describes the administrative procedure for the demarcation of indigenous lands.⁴⁰⁵ The procedure can be briefly summarized in seven steps. It is relevant to note that *Decreto n. 1.775* guarantees that the indigenous peoples concerned in each land demarcation shall participate through their own representative institutions in all stages/steps of the process.⁴⁰⁶

The seven steps can be summarized as the following: first, FUNAI identifies lands that have been traditionally occupied by indigenous peoples through the request of indigenous communities or the agency's own observations. After identifying a specific area, FUNAI requests an initial anthropological study from a recognized professional in the field. This anthropological study will serve as the basis for the work of an interdisciplinary technical group, also appointed by FUNAI and preferably formed by members of its own staff that shall undertake complementary ethno-historical, sociological, legal, cartographic and environmental studies as well as determine the extension of the land in physical terms. The second step is the presentation of a circumstantiated report to FUNAI and upon approval, this report is published in the official annals of the federal government, the federated state(s) in which the land is located and at the seat of the municipalities concerned, if any. The third step is characterized by a three month period for contestation by any interested stakeholders, including private citizens, private entities and the federated states and municipalities. If approved, the process is forwarded to the Ministry of Justice. If contested, FUNAI has two months to elaborate opinions about each contested item and forward those accompanied by the report and the contestations to the Ministry of Justice.

⁴⁰³ *Estatuto do Índio*, *supra* note 48 at art. 19.

⁴⁰⁴ *Decreto n. 22*, *supra* note 373.

⁴⁰⁵ *Decreto n. 1.775*, *supra* note 48. *Decreto n. 94.946*, *supra* note 48 and *Decreto n. 1.141*, *supra* note 374 also include provisions regarding indigenous lands but unrelated to their demarcation process, see, e.g., arts. 9-10. The exploitation of natural resources on indigenous lands is regulated in general terms by the *Estatuto do Índio*, *supra* note 48 and *Decreto n. 88.985*, 10 November 1983.

⁴⁰⁶ *Decreto n. 1.775*, *supra* note 48 at art. 2, §3.

After receiving the report, the fourth step corresponds to the Ministry of Justice that has thirty days to a) issue an ordinance declaring the geographic limits of the land and requesting its physical demarcation; b) request additional information or the verification of information provided within three months, issuing the ordinance following the presentation of necessary clarifications; or c) deny the identification with an exposition of motives decision on the basis of art. 231 of the Constitution. Following the issuance of the Ministry of Justice ordinance that declares the limits of the area, the fifth step is performed by FUNAI by physically demarcating the land while INCRA, the National Institute of Agrarian Reform prioritizes indemnizations and reallocation of non-indigenous peoples who live or own property in the area. The sixth step is the official homologation of the land by a presidential decree and the seventh and final step, thirty days after the publication of the homologation decree, is the notarial registration of the land as property of the federal government and object of collective possession of the indigenous peoples who inhabit it.⁴⁰⁷

Indeed, the process of land demarcation is, in theory, one of the most pluralist institutions of indigenous rights' safeguard within the national legal system, being considered one of the most advanced of its kind in the world. The UN Report praises Brazil for developing an advanced methodology to demarcate and register indigenous lands with the participation of indigenous

⁴⁰⁷ This summary is loosely based on the Instituto Socioambiental factsheet “Como é feita a demarcação hoje?” *Enciclopédia dos Povos Indígenas do Brasil*, online: <<http://pib.socioambiental.org>>. The Ministry of Justice releases periodical data on electronic format regarding the demarcation of indigenous lands. Until October 2009, 394 *terras indígenas* had been homologated and registered, completing all seven steps of the administrative process. Another 17 had been homologated but not registered; 20 were in the pre-homologation physical demarcation stage; 67 had been declared as such by ordinance of the Ministry of Justice but had not been physically demarcated and 24 had been fully identified but had not yet been declared as indigenous lands. Another 117 lands were in the initial process of identification. These figures represent a total of 643 indigenous lands, 431 of which have been already identified as such and are in the process of official demarcation, online: Ministério da Justiça <www.mj.gov.br>. These 643 lands have a combined extension of 1.103.570 km², the equivalent of 13% of Brazilian territory. The larger concentration of those lands is in the Amazon region – 405 areas, equivalent to 20% of the Brazilian Amazonian territory and 98% of all indigenous lands in the country. The speed in the presidential homologation of indigenous lands is fuelled by partisan and public administration interests and the impact of the ruralist lobby at given times, e.g.: the Sarney administration (1985-1989) homologated 67 lands; the short Collor administration, the first one fully within the 1988 Constitutional regime, homologated 112 lands between 1990-1992; the Itamar Franco government homologated only 16 areas within a similar period of time (1993-1994); the Cardoso administration homologated 146 areas in its eight year term from 1995-2002 including the *Terra Indígena Raposa Serra do Sol*, which was later contested but the entire administrative process was reaffirmed by the *Supremo Tribunal Federal*. The current administration has homologated 74 areas since 2003 it is not anticipated that it will reach the previous administration mark until the end of the eight-year term in 2010.

peoples in which attention is given to historical land use patterns as well as the present and future needs of indigenous people for their physical and cultural survival.⁴⁰⁸

Nevertheless, procedural deadlines established by *Decree n. 1.775* and institutional ordinances that ensure the land demarcation flow within the different government bodies are blatantly overlooked, delaying the process. Worst of all, the participation of indigenous peoples at any stage of the process has been virtually non-existent. The process is often halted several times, and by extensive periods of time, mainly due to competing claims from private stakeholders and their challenges to the demarcation or the compensation offered.

Such claims normally motivate violence in the field and depend on police and judicial intervention to be solved.⁴⁰⁹ Moreover, additional conflict has been caused by illegal occupation or invasion of the lands, even after registration, by non-indigenous persons who either inhabited the area and refused the relocation provided⁴¹⁰ or those who invade the lands with the intention of exploitation of natural resources.⁴¹¹ Naturally, the conflicts are exacerbated by the richness but also the remoteness of the great majority of the indigenous lands. Law enforcement is challenging and also very corrupt. The UN Report highlights that “while State security forces are necessary to ensure that indigenous communities and their

⁴⁰⁸ Anaya, *Brazil Report*, *supra* note 3 at §41.

⁴⁰⁹ See *e.g.* the report entitled “Acampamento Terra Livre: Abril Indígena 2007” developed during an annual State-sponsored gathering of indigenous leaders and organizations on 19 April 2007 and delivered to federal authorities. In this report, indigenous leaders describe and claim action to end violence against indigenous peoples and request unbiased investigations in crimes perpetrated in the context of land demarcation.

⁴¹⁰ See *e.g.* “Arrozeiro destrói tudo antes de sair de reserva em RR” *O Estado de São Paulo* (27 April 2009), online: <www.agenciaestado.com.br> and “Protesto marca saída de agricultores em reserva em RR” *O Estado de São Paulo* (1 May 2009), online: <www.agenciaestado.com.br>.

⁴¹¹ The UN Report describes aspects of this conflict of interests; Anaya, *Brazil Report*, *supra* note 3 at §46 (a recurrent impediment to securing indigenous lands is the presence of non-indigenous occupants. This can especially be seen in areas, such as in Mato Grosso do Sul, the state with the largest indigenous population outside the Amazon region, where there is heavy non-indigenous settlement and land use that has displaced indigenous peoples from their traditional lands. Unlike the Amazon region, where vast expanses of land remain inhabited mostly by indigenous peoples, the rural areas of Mato Grosso do Sul have been mostly parcelled out to non-indigenous farmers, many of them engaged in large-scale agribusiness. This is a result of an aggressive government policy of titling land to private individuals in the last century, well prior to the 1988 Constitution and its recognition of indigenous rights. Indigenous peoples were forced off their land, or left only with small plots within their larger traditional use areas, thereby being deprived of adequate means of subsistence and cultural continuity. Paraná and Santa Catarina are two other states in the Southwestern part of the country in which indigenous peoples have been left only with small patches of land, much of it infertile and providing little in the way of sustainable livelihood).

lands are protected from invasion, there have also been reported abuses by these forces”. The Special Rapporteur recommends the need for a “far more coordinated approach to security with the consultation of indigenous peoples and in conjunction with the work of FUNAI”.⁴¹²

In the instances when indigenous peoples took it upon themselves to defend their territories, it resulted in severe friction with the official law enforcement bodies and created an ongoing media frenzy that labelled indigenous peoples as insurgents in relation to the official legal system and as less committed to Brazil as a nation than the dominant society. This context is also fuelled by the geographic location of many indigenous lands in border areas.⁴¹³ The UN Report notes that “with a few notable exceptions, while the Special Rapporteur was in Brazil the demands being made by indigenous peoples and the gains they have made in the recognition of their rights were treated with suspicion or worse”, also observing that “there seemed to be minimal representation of indigenous peoples or their organizations in the news media, with little opportunity for indigenous peoples to influence the content of material that was published or broadcast about them or on their behalf”.⁴¹⁴

⁴¹² *Ibid.* at §54.

⁴¹³ Media reports have emerged recently regarding the internal police force created by the Tikuna people whose lands are located in the border between Brazil and Colombia. The group could indeed be qualified as paramilitary which may cause dubious interpretations and frictions with official law enforcement, most notably because of the context of paramilitary activities in Colombia. However, it is interesting to note that the force was named *Serviço de Proteção ao Índio* in allusion to the extinct indigenous protection service active in the first half of the 20th Century – a relevant indicator that community memory still recognizes the SPI as more legitimate and indigenous-oriented than more contemporary and less integrationist efforts and institutions. The Tikuna SPI has been undermined by State authorities despite being efficient and is a strong reminder that the incorporation of legal pluralism or merely pluralism within the indigenous and non-indigenous peoples’ relations, despite being a constitutional principle, is far from becoming recognized in practice. The Tikuna SPI ranks are also much more egalitarian than the official State forces where women do not perform active duties in the field, unlike the women who volunteer and participate in equal grounds to men in the community’s police force. “Índios criam polícia na selva amazônica” *Band TV* (27 April 2009) online: <<http://band.com.br/jornalismo>>.

⁴¹⁴ Anaya, *Brazil Report*, *supra* note 3 at §28. The secondary sources review of this thesis included the analysis of close to one hundred written and broadcasted media articles, op-eds, podcasts and newscasts in Brazil regarding the consolidation of indigenous peoples’ rights. In most of them the language, tone and perspective used were plainly self-referent to the dominant society and utterly paternalistic. It could be argued that the lack of presence and participation of indigenous peoples themselves in the media have some relation to their implied lack of agency by those in charge of defining the context and content of written or broadcast media. The news pieces are useful to inform the dominant society’s general public about the indigenous rights cause and their struggles, but as mentioned above, it could potentially contribute to the perpetuation of the *circular argument* within the dominant society’s mindset.

The escalation of these circumstances led to a reaction of those who have some decision-making power with regards to indigenous rights and who act, more often than not, against indigenous interests. Some legislators and judges have risen in defence of third party interests, such as the *Congresso Nacional*'s ruralist lobby or in what is preached as the safeguard of the Rule of Law and the State along with its territory. The UN Report highlights that the growth and fortification of autonomous indigenous organizations over the past decades have enabled indigenous peoples to become greater protagonists in their own struggles at all governmental levels; noting, nevertheless, that while this organizational growth along with certain favourable policies and constitutional protections have generated great advances; they have also attracted controversy and an often antagonistic political environment⁴¹⁵ for the discussion and enforcement of indigenous peoples rights.

The consequences of this belligerent context are summarized with precision by the UN Special Rapporteur who describes that a great challenge to the consolidation of indigenous peoples' rights is the discordant political forces seeking to undermine, halt, or even reserve the progress of the demarcation of indigenous lands. He mentions proposals to amend constitutional provisions regarding indigenous peoples' rights along with proposals in the Senate and the House of Representatives to suspend indigenous land demarcation decrees or to change the procedures to identify and demarcate indigenous lands. The UN Report includes excerpts of the recent *Terra Indígena Raposa Serra do Sol* case jurisprudence as a discordant force that undermines the progress of demarcation of indigenous lands, forbidding the amplification of lands that are already demarcated and could potentially undermine ongoing efforts to secure adequate areas for indigenous communities that were provided with relatively small parcels of land prior to the current demarcation regime⁴¹⁶ or those communities whose demographics have grown exponentially since demarcation processes that date back at least fifteen years. Indeed, it is precisely the magnitude of the widespread conflict that make the land tenure situation a significant factor in the obstacles to the enactment and enforcement of other indigenous rights determined by politicians, the media, and, other stakeholders in the dominant society.

⁴¹⁵ *Ibid.* at §27.

⁴¹⁶ *Ibid.* at §45.

The empowerment of indigenous peoples and their differentiated legal status, land-related or otherwise, granted on the basis of socio-ethnic distinctiveness could break the excuse for the perpetuation of the dominant, abyssal and paternalistic lack-of-agency-excuse *status quo*. Nevertheless, motivated by the wrongful sheer belief in the righteousness of the *circular argument*, the dominant sector of the dominant society intentionally maintains the land debate and consequently, the debates regarding other rights within the spectrum of legislative, executive and judicial powers at a stalemate. Several other legislative proposals are analysed in more detail below and refer to limitations to land and other indigenous rights. Similar obstacles with unique nuances also happen regarding the constitutional safeguard of *quilombola* land rights.⁴¹⁷

As seen above, the Constitution, through art. 68 of the ADCT, guarantees definitive property rights of the lands occupied by remnants of quilombos or *quilombolas*. This was the first time in Brazilian constitutional history that original and traditional land tenure rights on the basis of socio-ethnic distinctiveness were granted to a people other than indigenous peoples.⁴¹⁸ Arts. 215 and 216 of the Constitution are usually connected to the implementation of art. 68 of the ADCT – for the protection they grant, respectively, to the manifestations of Afro-Brazilian culture and material and immaterial assets pertaining to the memory of the different groups that are part of the Brazilian nation-building project.⁴¹⁹

Similarly to the scenario of demarcation of indigenous lands, art. 68 of the ADCT delegates land demarcation to the State, which is also interpreted in this context as a delegation to the executive power. Some quilombo communities already had land titles before 1988, either through regular private property acquisition contracts or donations. Most titles were granted individually but unofficially enjoyed communal usufruct.⁴²⁰ Most communities, however, retain

⁴¹⁷ See *infra* sections 3.1.2 and 3.1.3.

⁴¹⁸ Comissão Pró-Índio de São Paulo, *Quilombos e a Legislação*, online: <www.cpis.org.br/htm/leis> [CPISP, Report]. The report elaborated by Comissão Pró-Índio de São Paulo also highlights that the first land title on the basis of art. 68, ADCT was granted in 1995 and as of September 2009 only 174 of the more than 3000 *quilombola* communities nationwide have been granted their respective land titles. The first post-1988 manifestation of compliance with art. 68 of the ADCT was the creation of the extractivist reserve of *Quilombo Flexal* in 1992. The *extractivist reserve* land tenure modality will be analysed in general terms in section 4.2.2. The specific case of *Flexal*, however, is an exception and shall not be included in this analysis because it is not representative of a regular process of recognition of land title to *quilombola* peoples on the basis of the 1988 constitutional provision.

⁴¹⁹ See e.g. CPISP, Report, *supra* note 418 and Almeida, *Terras*, *supra* note 22 at 57.

⁴²⁰ Almeida, *Terras*, *supra* note 22 at 133-141.

only the possession of traditional lands or the claim to traditional lands they have been forcefully displaced from.

The fundamental legal divide between indigenous and *quilombola* peoples is the constitutional regime chosen to safeguard land claim rights. While an historical formula was maintained for indigenous peoples land tenure – the property of the lands remains with the State and the possession and usufruct are transferred to indigenous peoples; the innovative recognition of land claims to another socio-ethnically distinct people, one that could be considered, to some extent, a by-product of the colonization enterprise rather than an internally colonized one is guaranteed through the identification, demarcation and ultimate registration of the property of the land in question to the *quilombola* community itself.

This innovative property claim introduced by the 1988 constitutional recognition of *quilombola* land rights has advanced the cause of socio-ethnically distinct peoples as it legitimizes collective and indivisible land tenure registration, on behalf of the entire community rather than a group of individuals. Post-1988 legislation also determines the inclusion of a clause defining the lands as inalienable, unavailable and the rights over them as imprescriptible.⁴²¹ Another significant difference among *quilombola* and indigenous lands after registration consists in the fact that quilombo lands are considered collectively owned private property and the transit of outsiders as well as the exploitation of natural resources, for example, are not subject to a special regime and require the observation of ordinary legislation, as any other private stakeholder, unless those are lands characterized by *double attribution*, e.g., simultaneously consisting in *quilombola* and environmentally protected or border areas.

Lands demarcated as traditionally occupied by indigenous or *quilombola* peoples that have been legitimately and previously registered as private stakeholders' property are disappropriated by the State as part of the procedure of implementation of the land rights recognized by the 1988 Constitution. For cases regarding indigenous lands the modality used is indirect disappropriation of lands that become federal property with the indemnization and reallocation of the non-indigenous persons. *Quilombola* lands, however, are first transferred to

⁴²¹ *Decreto n. 4.887*, *supra* note 30 at art. 17. It constitutes the reference framework for *quilombola* land demarcation and registration and is analysed in detail below.

the State by disappropriation justified by public interest and then registered on behalf of the *quilombola* community.

The different models of disappropriation applied bear relevant legal consequences to the peoples concerned. The compensation methods applied in the disappropriation of lands that will be titled to *quilombola* peoples are much more akin to those found in negotiations among private stakeholders in the context of the dominant society – and, this scenario has been argued to reduce conflict over the transitional occupation of the property and the transfer of the title.⁴²² The validity of the claim or even the land right on the basis of socio-ethnic distinctiveness as perceived by the dominant society's stakeholders is remarkably related to its own perception of the (monetary) fairness of the disappropriation transaction. Furthermore, the justification of public interest provided by the executive power is considered to be an indissociable part of the declaratory act; and therefore, not susceptible to examination by the courts.⁴²³ The model of indirect disappropriation does not seem to uphold the same premise considering the void in this regard in theoretical and jurisprudential contexts.⁴²⁴

The first regulatory infraconstitutional initiative post-1988 was an INCRA ordinance issued in 1995 seeking the identification and demarcation of *quilombola* lands already located in federal lands.⁴²⁵ The first core piece of legislation was enacted in the form of a presidential decree in 2001 designating the *Fundação Cultural Palmares* to represent the executive power regarding the obligations decurrent from art. 68 of the ADCT. *Fundação Cultural Palmares*, FCP, is a branch of the Ministry of Culture, established in 1988 to “promote the preservation of cultural, social

⁴²² Daniel Sarmento, “A garantia do direito à posse dos remanescentes de quilombos antes da desapropriação” in Duprat, *Pareceres*, *supra* note 21, 77 at 79-80. A preliminary decision rendered by a Federal Court in the State of Paraná refused the declaration of property claims by private stakeholders until a decision regarding the determination of the traditional occupation of the lands by quilombola peoples and reinforces this trend: Justiça Federal, Mandado de Segurança n. 2008.70.09.002352-4/PR, Indeferimento de Antecipação de Tutela, Ponta Grossa, 10 October 2008.

⁴²³ Luciana Job, “De Quem É Este Quilombo? Era Só o que Me Faltava”, 2006, online: CPISP, Ações Judiciais e Terras de Quilombo <<http://www.cpisp.org.br/acoes/html/artigos.aspx>>.

⁴²⁴ The nature and scope of the PET 3388 that ultimately resulted in the *Terra Indígena Raposa Serra do Sol* judgement by the *Supremo Tribunal Federal* directly refers to this issue. It was proposed by private stakeholders who preyed on the theoretical and jurisprudential void by contesting the demarcation, thus cancelling the effects of the indirect disappropriation. The issue has also been addressed in anti-indigenous land rights bills proposed before the *Congresso Nacional* and analysed in detail in chapter 3.

⁴²⁵ *Portaria do Instituto Nacional de Colonização e Reforma Agrária n. 307*, 22 November 1995.

and economic values decurrent from the Black legacy in the formation of the Brazilian society”.⁴²⁶

Decreto n. 3.912 determines the competence of FCP to “start, follow-up and conclude administrative procedures of identification of the remnant quilombo communities and the lands traditionally occupied by them as well as the recognition, delimitation, demarcation, issuance of title and registration of those lands”, also determining that only lands occupied by quilombos in 1888 that remained occupied by 5 October 1988 could fall within the constitutional protection of art. 68 of the ADCT.⁴²⁷

Advisory Opinions of the Office of the Public Prosecutor were issued following the promulgation of the decree claiming its unconstitutionality. The grounds for the claim are simultaneously procedural and substantial and highlight with precision a nuance of the *circular argument* that has spread from the indigenous to the *quilombola* peoples’ rights perception by the dominant society. Considering that the Constitution did not define any timeframe for the traditional occupation by *quilombola* peoples for lands to be qualified as such, the strongest critique refers to the decree’s imposition of time limitations that restrict the implementation of the constitutional provision and, consequently, limit the achievement of the right constitutionally sanctioned.⁴²⁸

The timeframe argument follows substantial sources of critique. First, it imposes an interpretation that implies a socio-cultural and socio-ethnic identity that is frozen precisely at 1888 - the year when slavery was officially abolished in Brazil. The time limitations imposed recall a well-known hermeneutical tactic in indigenous claims to associate occupation of lands to a pristine moment prior to internal colonization.⁴²⁹ The criteria does not consider forced

⁴²⁶ *Lei n. 7.668*, 22 October 1988 at art. 1.

⁴²⁷ *Decreto n. 3.912*, 10 September 2001 at art. 1; 1888 is the year in which slavery was fully abolished in Brazil and 5 October 1988 is the precise date of promulgation of the Constitution.

⁴²⁸ Marcelo Beckhausen, “A inconstitucionalidade do Decreto 3912, de 10 de setembro de 2001” in Duprat, *Pareceres*, *supra* note 21, 21 at 28.

⁴²⁹ See e.g. John Borrows, “‘Landed’ Citizenship: Narratives of Aboriginal Political Participation” in Alan C. Cairns et al. eds. *Citizenship, Diversity & Pluralism: Canadian and Comparative Perspectives* (Montreal: McGill-Queen’s University Press, 1999) 72 at 77 [Borrows, “Landed Citizenship”]. Borrows proposes the question of what does it mean to be Aboriginal or traditional, arguing that Aboriginal practices and traditions are not ‘frozen’ and identity is constantly undergoing renegotiation as values and identities are constructed and reconstructed through local,

displacement or expansion due to the growth of the population and adaptations to socio-political internal and external changes that occurred in the one hundred years that transpired between the abolition of slavery and the promulgation of the 1988 Constitution. An Advisory Opinion issued by the Office of the Public Prosecutor addressed to the Attorney-General states that the decree created a frigorific approach to the notion of quilombo that does not consider the constitutional evolution of quilombo from a penal to a socio-cultural concept.⁴³⁰

Duprat proposes that the terms of the decree offend the constitutional text in two fronts: first, because the establishment of the 1888 timeframe is in violation of the right to self-identification considering an entity external to the group determines the constitutionally protected existence of the group. Secondly, because of the cultural strictness imposed at *quilombola* peoples that renewed communal structures or ways of life could not be constructed after 8 October 1988, therefore, undermining the dynamics of any real community that is ever changing and transforms itself as its history progresses thus reconstructing its identity (and not losing it).⁴³¹

Indeed, by determining a cut date for the legitimization of the traditional occupation, the decree resembles an ongoing jurisprudential trend that imposes 8 October 1988 as the deadline for actual occupation of indigenous lands on the basis of art. 231.⁴³² The critique holds true for an imposition of such strict timeframe both towards the indigenous and the *quilombola* scenarios. First of all, such criteria clearly exists in a socio-historical vacuum that does not consider territorial and socio-political changes caused by internal colonization and repression to resistance; the development and growth of these societies and the peripheral legal status of these peoples throughout history. Second, this type of criteria does not factor in that such

national and sometimes international experiences not confined to some pristine moment before the arrival of Europeans in the Americas.

⁴³⁰ Parecer n. AGU/MC – I/2006, Gabinete de Segurança Institucional da Presidência da República, Interpretação da questão quilombola na Constituição de 1998 in Duprat, *Pareceres supra* note 21, 41 at 48. It should also be noted that the timeline imposed does not take into account the difficulties to prove occupation of the land considering that prior and sometimes even after 1888, *quilombola* peoples were social and legal outcasts. Furthermore, the 1888 criteria is flawed taking into account the underdeveloped communications network in some of the remote or isolated areas where quilombos were located – it is argued that many quilombo communities did not learn about the abolition of slavery and the consequent automatic prescription of their criminal status as run-away slaves until several years after 1888.

⁴³¹ Deborah Duprat, “Breves considerações sobre o Decreto 3.912/2001” in Duprat, *Pareceres, supra* note 21, 31 at 38 [Duprat, “Decreto 3.912”].

⁴³² See, *supra* note 243.

physical territories are symbolic spaces of identity, of cultural production and reproduction and intrinsic and not external to this same identity – consequently, the constitutional protection granted to these peoples should be interpreted in the sense that their rights on the basis of socio-ethnic distinctiveness, including land rights, cannot be expropriated or limited by other agents – most notably, by the State itself.⁴³³

Two years after the promulgation of the much criticized *Decreto n. 3.912*, it was finally revoked and replaced by *Decreto n. 4.887* in 2003. While the existence of *Decreto n. 3.912* brought about a fruitful debate about the socio-ethnic distinct peoples' rights context in Brazil, it also paralyzed all demarcation and registration of land titles to *quilombolas* by federal authorities.⁴³⁴ *Decreto n. 4.887* came into existence after Brazil's ratification of ILO 169 in 2002 and perhaps as a consequence, it proposes a more adequate construction of *quilombola* land rights in comparison to its predecessor. Art. 2 of the decree defines remnants of quilombo communities as self-identified ethno-racial groups with unique historical trajectories, specific territorial relations, and, presumed Black ancestry related to the resistance of historical oppression.⁴³⁵ Furthermore, the decree defines the lands as those used to guarantee the physical, social, economic and cultural survival of the quilombo communities⁴³⁶ and enables the communities to make their own territorial claim.⁴³⁷

The decree establishes the competence of INCRA to identify, delimitate, demarcate and title *quilombola* lands and specifically foresees the possibility of disappropriation of lands titled to other stakeholders if traditionally occupied by *quilombola* peoples. Moreover, it specifically determines the complementary competence of federated states, the Federal District or municipalities to identify and cede quilombo land title according to the regulations provided in

⁴³³ Duprat, "Decreto 3.912", *supra* note 431 at 34.

⁴³⁴ According to INCRA's *Coordenação Geral de Regularização de Territórios Quilombolas*, from 1995 to 2000, FCP and INCRA finalized 31 administrative procedures with the final transfer of the land title to the quilombo communities that traditionally occupied them. In 6 stances, the land transfer process was granted by a member-State of the federation or by a partnership among the State and the federal government. The member-States that took part in the effort were Pará, Maranhão, Bahia and Rio de Janeiro. From 2001 to 2003, 21 quilombo land titled were issued. In this time period, however, due to the constitutionality debacle of the 2001 federal decree, only member-States contributed to the land identification and transfer of title – in Pará, Maranhão and São Paulo, online: <www.incra.gov.br>.

⁴³⁵ *Decreto n. 4.887*, *supra* note 30 at art. 2.

⁴³⁶ *Ibid.* at art. 2 § 2.

⁴³⁷ *Ibid.* at art. 2 § 3.

the federal decree.⁴³⁸ The extension of the competence to other levels of the federal realm demonstrates a great advancement to the fulfilment of the *quilombola* rights but also unearths an internal discrepancy. The historical and constitutionally entrenched exclusive competence of the federal government to address indigenous rights issues and the particular land ownership regime reiterated in art. 231 of the 1988 Constitution limits the scope in the fulfilment of land claims made by indigenous peoples. This incoherent historical oversight generates an undue burden to indigenous peoples considering *quilombola* land rights enjoy the same constitutional foundation as indigenous land rights claims.

According to the 2003 decree, therefore, the National Institute of Agrarian Reform - INCRA replaces *Fundação Cultural Palmares* – FCP as the executive’s administrative body in charge of commencing the process of *quilombola* land claims. *Decreto n. 4.887*, however, mandates that the FCP shall assist and accompany the work of INCRA and the Ministry of Agrarian Development in all *quilombola* land claims to guarantee the preservation of the cultural identity of the communities and to subsidize necessary technical documentation in the event that identification and recognition of specific quilombo lands are contested by third parties.⁴³⁹ The decree equally mandates the *Secretaria Especial de Políticas de Promoção da Igualdade Racial* to work alongside INCRA and the Ministry of Agrarian Development to guarantee the “ethnic and territorial rights of the remnants of quilombo communities”.⁴⁴⁰

⁴³⁸ *Ibid.* at art. 3.

⁴³⁹ *Ibid.* at art. 5.

⁴⁴⁰ *Ibid.* at art. 4. The Presidency’s Special Secretariat of Policies for the Promotion of Racial Equality was created by a unilateral presidential act in 2003. The Secretariat’s mission is to promote equality and protect rights of individuals as well as racial and ethnic groups that are discriminated against or are affected by other forms of intolerance, with emphasis to the Black population. Its objectives extend to the coordination of public policies towards the promotion of racial equality amongst different government branches; to the promotion of international agreements signed by Brazil that seek promotion of equality and elimination of racial or ethnic discrimination; and, to assist the Foreign Affairs Ministry in the international policy concerning relations with African countries. The framework of reference and mission statement clearly demonstrates that the actions of the Secretariat are geared first and foremost to the Afro-Brazilian population within the mainstream society. It is speculated that the creation of the Secretariat was the fulfilment of a campaign promise that ensured the support of the Black Movement in the 2002 elections. It could also be argued, within the hypothesis proposed in this thesis that the Secretariat is not aptly named and contributes somehow to the perpetuation of the *circular argument*. It claims to address race and ethnicity issues but only the former, racial issues, are truly observed in practice. This also contributes for confusion and an incoherent approach towards specialized policies targeting socio-ethnic distinct peoples that can be of Afro-Brazilian descent or not – the focus on racial equality – understood here as the empowerment of Black persons – grants *quilombola* peoples, the only socio-ethnically distinct peoples with clear Afro-Brazilian roots, with a support and empowerment tool that is not readily available for other socio-ethnic distinct peoples. The involvement of the Secretariat with the *quilombola* peoples’ cause is a political oxymoron – it tacitly excludes the support to other socio-ethnic distinct peoples under the banner of promotion of equality and elimination of discriminatory practices.

Since 2003, the role of FCP extends to the provision of legal assistance to *quilombolas* while the land title is pending to guarantee the retention of the land use and the protection of the territorial integrity of areas delimited as *quilombola* lands. The decree, in anticipation of the difficulties that the enforcement of this mandate would entail, also foresees the possibility of partnerships between the FCP and other public or private organizations aiming a more efficient fulfilment of this provision.⁴⁴¹ The FCP, therefore, accumulates the roles of monitoring of the preservation of quilombo cultural identity, provision of legal assistance after recognition of lands but also of guarantor of the instauration of procedures to register lands as Brazilian Heritage Sites and the protection of those sites in the stance that historical and archaeological evidence of the original quilombos are found during the process of identification of lands traditionally occupied by *quilombola* peoples.⁴⁴² Moreover, the FCP mandate includes the registration of all self-identified existing quilombo communities.⁴⁴³ The enforcement of this task motivated the issuance of a FCP ordinance in 2007 creating a general registry named *Cadastro Geral de Remanescentes das Comunidades de Quilombos da Fundação Cultural Palmares*.⁴⁴⁴

After the identification and demarcation of the lands, INCRA, by its turn, must send the technical report for feedback from several government bodies, for instance: the Historical and National Heritage Institute - IPHAN, the National Environment and Renewable Resources Institute - IBAMA, FUNAI, FCP, and the National Defence Council.⁴⁴⁵ If the lands identified are superimposed to conservation units, national security areas, border areas and/or indigenous lands; the decree adds the need to specific consultations with IBAMA, the National Defence Council and FUNAI with the mediation of INCRA and the FCP in order to guarantee the sustainability of the affected communities and conciliate the interests of the State with it.⁴⁴⁶

⁴⁴¹ *Decreto n. 4.887, supra* note 30 at art. 16.

⁴⁴² *Ibid.* at art. 18.

⁴⁴³ *Ibid.* at art. 3 §4.

⁴⁴⁴ *Portaria FCP n. 98*, 26 November 2007. The ordinance also foresees the assistance of the FCP to the constitution or the improvement of representative organizations of each community.

⁴⁴⁵ *Decreto n. 4.887, supra* note 30 at art. 8.

⁴⁴⁶ *Ibid.* at art. 11.

It is relevant to mention that the decree ensures the “participation of the remnants of quilombo communities in all phases of the administrative procedure, directly or by means of representatives indicated by them”.⁴⁴⁷ *Decreto n. 4.887* also establishes that with regards to agrarian and agricultural policy, quilombo communities shall receive “preferential treatment, technical assistance and special lines of credit geared towards infra-structure and productive activities”.⁴⁴⁸

When compared to the situation of indigenous peoples, quilombo communities land demarcations and enforcement of rights on the basis of socio-ethnic distinctiveness have received a more cohesive intergovernmental approach. The procedures for land recognition of indigenous and quilombo lands are quite similar from a formal standpoint. The regime established by *Decreto n. 4.887*, however, acknowledges several advancements in international and comparative legislation and innovations in Brazilian law. Its creation is much more recent than the core guidelines of the indigenous land title regime, coming into existence almost two decades after the (re)democratization process and bringing forth a much more flexible and inclusive approach for the encounters and interactions of these socio-ethnic distinct peoples in comparison to the indigenous scenario.

The FCP was created fully within the pluralist constitutional paradigm, following through and through the politically correct anti-discrimination viewpoints of the Afro-Brazilian Movement’s lobby. FUNAI and FCP do not have the same mandate in relation to indigenous and quilombo communities respectively. Nevertheless, they possess some analogous core roles despite the much more ample and complex mandate of FCP geared towards the entire Black population not only those with socio-ethnic distinct status. However, in what concerns their support to *quilombola* peoples, FCP operates without a tainted and entrenched history of corruption and integrationist approaches which, in the case of FUNAI, still hinder pluralist efforts to enforce indigenous peoples’ rights. This context, therefore, allows FCP, at least until now, to render a more efficient and self-determining fulfilment of its mandate.

⁴⁴⁷ *Ibid.* at art. 6 [translated by author].

⁴⁴⁸ *Ibid.* at art. 20 [translated by author].

Some provisions of the 2003 decree regarding the demarcation of quilombo lands are also very revealing in terms of the agency debate proposed above. It demonstrates the perception of the *quilombola* peoples as much more akin to the dominant society than the framework proposed and perpetuated within indigenous rights legislation. The underlying attempted protection of indigenous cultures in their original state does not seem to flow to the *quilombola* rights framework in its entirety. It should be noted, however, that the fresh maroon rights scenario proposed in Brazil also has flaws commonly encountered in other socio-ethnic distinct rights frameworks.

Sustainable development initiatives, for instance, are repeatedly connected to agrarian enterprises. Paradoxically, the 2003 decree sediments the criteria of self-identification while simultaneously referring to the *quilombola* peoples as ‘remnants of quilombo communities’. While this designation mirrors the constitutional provision regarding *quilombola* land rights ensuring a causal nexus with the constitutional right, it also subtly freezes the socio-political and cultural existence of the communities as vestiges of a past resistance initiative. This approach could suggest a restrained perspective of the role and dynamic growth and existence of the quilombo communities in the present thus potentializing scenarios of forced dependency and placing obstacles to lasting and self-determining socio-legal decisions within each community’s context.

The replacement of the 2001 decree following heated constitutionality debates, issues raised above as well as questionable measures undertaken to ensure the enforceability of *Decreto n. 4.887* demonstrate that despite counting with an improved framework in comparison to indigenous peoples, *quilombolas* are also very much akin to them regarding challenges faced towards the enforcement of constitutional rights. These challenges include, *e.g.*, the fact that the enforcement of *Decreto n. 4.887* takes place by INCRA’s identification and determination of the land title. The first guidelines issued in this regard were determined through *Instrução Normativa n. 16* in 2004, another four normative instructions have been enacted since to replace it, in order to adapt to best practices in the field and also in the shape of mild responses to

criticism voiced by civil society representatives of the *quilombola* peoples.⁴⁴⁹ *Instrução Normativa n. 49* from 2008 is particularly controversial due to the unjustified and unexpected removal of the criteria of *quilombola* self-identification of their own socio-ethnically distinct status and consequently the removal of the criteria of identification by the community of lands traditionally occupied by them.⁴⁵⁰ The exclusion of the self-identification criteria violates not only the *Decreto n. 4.887*, norm that determines the terms and scope of the instruction but also ILO 169, an integral part of Brazilian legal system.

The context in which *Instrução Normativa n. 49* was issued in 2008 demonstrates a similar if not the very same phenomenon that affects the defence and enforcement of indigenous peoples' rights before judiciary and legislative bodies. As seen above, several bills pending approval at the *Congresso Nacional*, most of which proposed and promoted by the ruralist lobby, seek to halt or extensively limit land rights and other rights decurrent from the socio-ethnic distinct status of indigenous peoples. Effects of these adversarial agendas also affect the *quilombola* cause highlighting a similar but nuanced shade in the perpetuation of the *circular argument*.⁴⁵¹ The promoters of these adversarial agendas associate indigenous and *quilombola* peoples at their convenience and imply characteristics to each or both groups that would justify the

⁴⁴⁹ *Instrução Normativa Incria n. 16*, 24 March 2004; *Instrução Normativa Incria n. 20*, 19 September 2005; *Instrução Normativa Incria n. 49*; 29 September 2008; *Instrução Normativa Incria n. 56*, 7 October 2009; and *Instrução Normativa Incria n. 57*, 20 October 2009.

⁴⁵⁰ See e.g. Ana Carolina da Matta Chasin & Daniela Carolina Perutti, "Os retrocessos trazidos pela Instrução Normativa do Incria n. 49/2008 na garantia dos direitos das Comunidades Quilombolas", online: Comissão Pró-Índio de São Paulo <www.cpis.org.br/artigos>.

⁴⁵¹ Those who orchestrate the opposition to the consolidation of indigenous and *quilombola* peoples' rights, most notably their land rights, usually do so by questioning the executive's competence to issue unilateral decrees that regulate constitutional rights. Therefore, it should be considered the right is not directly targeted but the lack of input from the legislative power – ultimately, nevertheless, the actions of the factions of the legislative power that foment this type of agenda can be considered as disastrous to the enforcement of socio-ethnic distinct peoples' rights as a blatant denial of the rights would have been. These reactions will be analysed in detail in chapter 3. Measures that seek to impose obstacles to *quilombola* rights by questioning the constitutionality of *Decreto n. 4.887* include court cases from 2007 and 2008; the *Ação Direta de Inconstitucionalidade*, STF, ADI-3239-DF, Rel. Min. Cezar Peluso, proposed in 2004 by a right-centre political party and pending decision by the Supreme Court despite advisory opinion of the *Procurador-Geral da República* for the inadmissibility of the demand; see *infra* text accompanying note 535 and a legislative decree bill proposed in 2007, see *infra* text accompanying note 537 that seeks to revoke *Decreto n. 4.887* and regulate identification and concession of land title, which also counts with a dissenting advisory opinion from the Office of the Public Prosecutor that focuses on the right of a community to self-identify itself rather than to have the criteria for its own identity be imposed by decision-makers external to the community.

perpetuation of the *circular argument* and the *status quo*, thus undermining the consolidation of the constitutional rights to the lands they traditionally occupy.⁴⁵²

2.2.4 Multiple Attribution of Traditionally Occupied Lands

A brief overview of the complementary infraconstitutional legislation regarding the relationship between most notably indigenous but also to some extent other socio-ethnic distinct peoples' rights and national security is undertaken here to directly describe aspects of the *circular argument* derived from these encounters as well as to contextualize the relevance of *double* or *triple attribution* of lands in the perpetuation of the *circular argument*. The multiple attribution of lands,⁴⁵³ as described above, is the phenomenon by which the same geographical area is the object of two or three overlapping differentiated legal statuses.

The hypotheses of interest here are those that include the simultaneous occurrence of indigenous or *quilombola* lands' status and other statuses. The most common multiple attribution case is the overlapping status of indigenous or quilombo lands and territories that are the object of specific environmental protection. Another case of *double attribution* of lands is their cumulative status as indigenous or *quilombola* and border areas. *Triple attribution* entails scenarios that overlap indigenous or quilombo lands, environmentally protected areas and border statuses – precisely the case in parts of the *Raposa Serra do Sol* area. Indeed, the multiple attribution of the lands played a decisive role in the reasoning of the court and the formulation of conditions created as a precedent for the future demarcation of other indigenous lands. The terms *double* and *triple attribution* of lands are a jurisprudential creation sedimented by the Supreme Court in the *Terra Indígena Raposa Serra do Sol* case.

⁴⁵² Despite all obstacles to the identification and transfer of title of quilombola lands before and after the 2003 decree, from 2004 to 2009 INCRA has granted land titles to 54 communities – 46 of which in partnership with the federated states of Pará, Maranhão, São Paulo, Bahia, Rio de Janeiro and Mato Grosso do Sul. According to INCRA, there are 948 ongoing administrative procedures filed from 2003 to 2009 at the various stages between the identification and the title transfer of lands. Almost half of the lands are located in the Northeastern Region and almost a third in the Southeastern Region, respective hearts of the sugar and mineral exploitation during the slave trade period. The quilombo presence is widespread in the Brazilian territory. There are even 5 administrative procedures regarding lands in the outskirts of Brasília, within the diminute Federal District territory. Only two States in Brazil, Acre and Roraima, located in the North-Amazon Region do not have any records of quilombo communities and no claims before INCRA or federated state authorities, online: *Coordenação Geral de Regularização de Territórios Quilombolas*, INCRA: <www.incra.gov.br>.

⁴⁵³ See text accompanying note 200.

Some infraconstitutional legislation has been enacted post-1988 addressing the issue of multiple attribution of lands. The *double attribution* regulation on environmental grounds is often coupled with the regulation of sustainable development and natural resources exploitation. Legislation and policy exist on a case by case basis but mostly as principles or guidelines directed at socio-ethnic distinct or traditional peoples in general.⁴⁵⁴ These include indigenous and *quilombola* lands as well as lands that have a special status due to their relation to the promotion of sustainable development and the protection of the socio-environmental, economic and cultural rights of other socio-ethnically distinct peoples whose constitutional right to identity, social and political structures' preservation depends on *sui generis* non-constitutional land tenure arrangements. Although not yet fully operational, these policies are not specifically geared to indigenous peoples and were proposed and exist within a much more self-determining framework.⁴⁵⁵

The *double attribution* that occurs in border areas, however, is strongly and specifically regulated. *Double* or *triple attribution* indigenous lands occur in extensive proportions of the borders with French Guyana, Surinam, Guyana, Venezuela, Colombia, Peru, Bolivia and Paraguay which causes controversy and much debate considering the apparent conflict of constitutional norms that refer to national security, safeguard of territorial integrity and the rights of indigenous peoples regarding their traditionally occupied lands. The analysis that follows covers legislation and policy regarding the encounters between indigenous peoples and military and police personnel in general and also the existing post-1988 guidelines for lands of *double attribution*.

Despite the controversy, guidelines for encounters between indigenous peoples and military and police forces and the regulation of national security-related activities in indigenous lands do not abound in pre-1988 legislation. During the 1970s, when the issue emerged in international law and the *Estatuto do Índio* was enacted, the Armed Forces dictatorship governed the country with an iron fist. The preponderance of military action and national security issues over any civil, political, economic, social and cultural right was a given and not open for

⁴⁵⁴ See e.g. United Nations Conference on Environment and Development, *United Nations Convention on Biological Diversity* 5 June 1992, 1760 U.N.T.S. 142, signed by Brazil on the same date and incorporated into the Brazilian legal system through *Decreto n. 2.519*, 16 March 1998; and *Decreto n. 6.040*, 7 February 2007 establishing the *Política Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais*.

⁴⁵⁵ See chapter 4, section 4.2.2 where the policies are analysed as an important contribution of existing legislation and policy with the potential to break in *circular argument*.

debate. The possibility that Armed Forces or any other law enforcement entity would never have to negotiate its actions or have its area of impact limited by any other institution or right was so entrenched in the legal cosmos at the time that only one article mentions the *Forças Armadas* and the *Polícia Federal* in the *Estatuto do Índio* solely stating their role in the protection of lands occupied by indigenous communities.⁴⁵⁶

After the redemocratization process that culminated with the promulgation of the Constitution, all legislation enacted was overzealous with the protection of civil and political rights and very specific about limitations to the use of power and due process by military or police agents; constitutional provisions strictly define military and police agents' competence and jurisdictional scope.⁴⁵⁷ Although direct limitations have not been imposed with regards to indigenous lands, art. 231 refers to measures in circumstances that would justify the removal of the indigenous peoples from their lands and is usually interpreted as a limit to military and police action in this regard.⁴⁵⁸

Many homologated and registered indigenous lands are located in border areas in the Amazon and Chaco regions and are, consequently, federal lands of *double attribution*. Border areas are constitutionally defined⁴⁵⁹ and obviously monitored by the Armed Forces and the Federal Police. The Constitution, therefore, regulates both indigenous lands and the safeguard of border areas but the interaction of the two, however, is not constitutionally regulated. The Constitution also determines the enactment of complementary legislation to regulate the occupation and use of border areas.

Armed Forces, Federal and federated State Police Forces actions, occupations, intervention or any type of activities on indigenous lands, specially in *double attribution* territories that share indigenous and border land status should, thus, be regulated at federal level and by complementary rather than ordinary legislation considering both elements of the *double attribution* are object of constitutional law regulation. Moreover, the interaction of indigenous

⁴⁵⁶ *Estatuto do Índio*, *supra* note 48 at art. 34.

⁴⁵⁷ *Constituição*, 1988, *supra* note 23 at arts. 136-144. The context described can be identified in the title heading for this set of articles: 'of the Defence of the State and the Democratic Institutions'.

⁴⁵⁸ *Ibid.* at art. 231, §5 (removal of indigenous peoples from their lands in the event of catastrophes or epidemics that represent a risk for the population or on the interest of the country's sovereignty).

⁴⁵⁹ *Ibid.* at art. 20, §2.

peoples and military and police forces is not limited to land rights but also other indigenous rights such as the right to consultation.⁴⁶⁰

Complementary legislation specifically addressing the interaction of indigenous rights; the *double attribution* of indigenous lands in border areas; and, military and police action in indigenous lands has not been enacted so far. The issue has been scarcely addressed in national security and defence complementary legislation but mostly only within ordinary legislation and without the provision of substantial guidelines.⁴⁶¹

The legislation and policy documents that directly regulate and address the action of the Armed Forces and the Federal Police in indigenous lands are *Decreto n. 4.412* from 2002, amended in 2008 by *Decreto n. 6.513*,⁴⁶² both enacted by the executive power, and three Ministry of Defence ordinances from 2003 and 2004 establishing guidelines for relations between the Armed Forces with indigenous peoples.⁴⁶³ Both presidential decrees mirror the interests of the military or ‘national sovereignty’ lobby not stating any mandatory consultation requirements, and foreseeing a facultative consultation of FUNAI about the eventual impact of national defence actions for the local communities in places where military or police outposts are located⁴⁶⁴ without determining liability or possible redress actions.

⁴⁶⁰ The right was incorporated in the Brazilian legal system through ILO169. As seen above, if the perspective that human rights treaties have constitutional status in the Brazilian system is undertaken, the *double attribution* of the lands and rights would be overlapped with the enforcement of ILO169’s provision on the duty to consult: ILO 169, *supra* note 212 at art. 6. Moreover, art. 30 of the *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17 to which Brazil has publicly voted in favour but has yet to be acknowledged and incorporated in the internal legal system, expressly defines that 1. Military activities shall not take place in the territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned; 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

⁴⁶¹ *Lei n. 8.183*, 11 April 1991; establishing the organization and operation guidelines for the *Conselho de Defesa Nacional* as complemented by *Decreto n. 893*, 12 August 1993. The External Relations and National Defence Chamber, created by *Decreto n. 4.801*, 6 August 2003, does not include the representation of indigenous organizations or even FUNAI despite the vast extension of indigenous lands in border areas. *Lei Complementar n. 97*, 9 June 1999 establishes the general norms for the organization of the Armed Forces and briefly touch upon double attribution of lands.

⁴⁶² *Decreto n. 4.412*, 7 October 2002 and *Decreto n. 6.513*, 22 July 2008.

⁴⁶³ *Portaria do Exército Brasileiro n. 20*, 2 April 2003; *Portaria do Ministério da Defesa n. 983*, 17 October 2003; and *Portaria do Ministério da Defesa n. 537*, 7 May 2004.

⁴⁶⁴ *Decreto n. 4.412*, *supra* note 462 at art. 2, § único.

Although extremely self-referent and somewhat paternalistic, the Ministry of Defence ordinances are more pluralistic than the presidential decrees or legislation that address the matter. In 2003, the ordinance issued by the highest command of the Brazilian Army aimed at regulating relations between the Army and indigenous communities. Unlike the decrees that regulate actions in indigenous lands, the 2003 ordinance refers to the relationship with the communities that inhabit the lands. The two other ordinances, issued by the Ministry of Defence enacted later in 2003 and in 2004 retain the content of the first 2003 Army ordinance and extend the guidelines first to the Air Force and then to the Armed Forces as a whole.⁴⁶⁵

Portaria n. 20, the first Army ordinance, states as basic premises that military forces recognize the rights of indigenous peoples and historically maintain an excellent relationship with them⁴⁶⁶ and that maintaining a close relationship with the indigenous communities throughout the national territory is in the Forces' utmost interest, particularly in the Amazon, in order to complement the strategic presence in the region.⁴⁶⁷ With the extension of the scope of *Portaria n. 20* to all Armed Forces by the 2003 and 2004 ordinances, their commitment towards the relationship between the military and indigenous peoples include: studies and necessary measures to minimize the social and environmental impact of military units transferred to or installed within indigenous lands; to include all legislation pertaining to indigenous rights and the relationship between military forces and indigenous communities into the Armed Forces training materials; transfer of knowledge for agents stationed in indigenous lands about the communities' ways of life, customs and traditions; and to encourage military personnel stationed in indigenous lands to develop socio-legal norms and agreements with each specific indigenous community to guide their relations and shared spaces. Moreover, the military units are encouraged to make agreements with FUNAI and FUNASA to support healthcare access projects to the indigenous populations.⁴⁶⁸

⁴⁶⁵ *Portaria do Exército Brasileiro n. 20*, *Portaria do Ministério da Defesa n. 983*; and *Portaria do Ministério da Defesa n. 537*, *supra* note 463.

⁴⁶⁶ The text enumerating the premises cites the testimony of the life and work of Marshal-General Rondon, founder of the SPI, as a focal point of this excellent relationship between military forces and indigenous peoples. See generally, *supra* note 172.

⁴⁶⁷ Another basic premise enounced by the ordinance is that the mutual cooperation between the military forces and indigenous peoples precedes the formation of the Army, citing historical battles in which indigenous peoples joined either Portuguese or Brazilian forces to defend the territory against foreign invasion.

⁴⁶⁸ As mentioned above, most of the healthcare provided to indigenous peoples and the population in general in remote areas such as the Amazon and Chaco are already brought by the military medical corps mobilized in the region. Transportation and storage of vaccines and other medical supplies and the transportation of FUNASA

The ordinances only cover the action of military personnel in the region. Actions of the Federal Police, nevertheless, are only under the general decrees enacted by the executive power that do not address consultation or the relationship between agents and the indigenous community. Naturally, this causes frictions in several areas of the country's territory, most notably in the regions where illicit traffic of weapons, drugs and persons occur. The lack of consultation to indigenous populations affected by military or other large-scale law enforcement operations such as national security and the prevention of illegal trafficking have been at the centre of a debate regarding the constitutionality of the 2002 executive *Decreto n. 4.412*, a position supported by two Advisory Opinions issued by the Office of the Public Prosecutor in that same year.⁴⁶⁹

Moreover, their constitutionality is also questioned on the grounds that decrees issued by the executive power cannot directly regulate norms of constitutional status, especially when complementary legislation regarding the matter has yet to be enacted. The 2008 *Decreto n. 6.513* obviously does not solve the formal critique and rather than addressing the controversial issues of material or substantive nature raised since the enactment of *Decreto n. 4.412* in 2002, reinforces the hierarchical supremacy of the military and police interests over indigenous and other socio-ethnic distinct peoples' rights, in spite of Brazil's recent commitment to the harmonization and safeguard of these rights in the international arena. It seems that the executive power has opted for a double-faced speech: while internally, it succumbs to the national security lobby and the public opinion fears generated by unstable situations in the borders areas with Venezuela, Colombia and Bolivia; it simultaneously promotes an external

healthcare personnel to remote areas is provided almost entirely by the Armed Forces. This interrelation between the Armed Forces and the provision of healthcare attention to indigenous communities in remote areas made the news recently with the unfortunate reporting of the crash of an Air Force plane in the Amazon region transporting both Air Force and FUNASA staff who were involved in a massive vaccination effort in the *Vale do Javari* indigenous land. The accident was widely reported by Brazilian and international media. BBC provided the most complete coverage including information about the indigenous land. It also highlighted the crucial role of the indigenous peoples who found the site of the crash and the cooperation with the search party that located survivors. "Brazil tribe finds crash survivors" *BBC News* (30 October 2009), online: <<http://news.bbc.co.uk/2/hi/americas/8334580.stm>>.

⁴⁶⁹ Raquel Elias Ferreira Dodge, Procuradoria Federal dos Direitos do Cidadão, Parecer sobre o Decreto n. 4.412 endereçado ao Secretário de Estado dos Direitos Humanos do Ministério da Justiça, 18 October 2002; Aurélio Virgílio Veiga Rios, Procuradoria Regional da República, Parecer 'Reflexões sobre a inconstitucionalidade do Decreto n. 4.412', 31 October 2002.

relations policy of empty commitment to compliance with international standards by, for instance, openly adopting the UN *Declaration on the Rights of Indigenous Peoples*.⁴⁷⁰

Security enforcement inside and surrounding indigenous lands is also a considerable problem. *Estatuto do Índio* regulations that are still in force have contributed, as seen above, to some of the violence against and involving indigenous peoples. Crime is widespread in Brazil as a whole and the monitoring of vast and remote areas does not make the task easier even when there is willingness to act. On that regard, the UN Report's conclusions include a call for action for "federal, state and local authorities to take further, coordinated measures to secure the safety of indigenous individuals and communities and the protection of their lands, in consultation with them, especially in areas with elevated incidence of violence", ensuring that "persons who have committed crimes against indigenous individuals are swiftly brought to justice".⁴⁷¹ The Rapporteur recommends that "measures should be taken to ensure that police and military personnel operating in indigenous areas are adequately trained and do not discriminate against indigenous peoples, and that they are disciplined for inappropriate or illegal action against indigenous peoples".⁴⁷²

The recommendations proposed by the Special Rapporteur are brought about in the practical context where despite the existence of guidelines to the military personnel's direct contact with indigenous peoples, they may not be thoroughly observed. The unilateral position proposed by

⁴⁷⁰ *Projeto de Lei do Senado n. 69/04*, 31 March 2004, a bill proposed before the Senate, seeks to fill the formal gap caused by the current regulation of constitutional law by a presidential decree. Its phrasing is very similar to that of *Decreto n. 4.412*, *supra* note 462. Recent developments regarding the bill were an Advisory Opinion by the Senate's Comissão de Constituição, Justiça e Cidadania, 12 May 2009 and a Public Hearing on 11 August 2009. The original text of the bill disciplines the actions of Armed Forces and the Federal Police in border areas and, akin to the legislation currently in force, it does not foresee any type of consultation to the affected indigenous communities. Surprisingly, due to its mandate to verify the constitutionality and fairness of proposed legislation, the Commission does not suggest any changes with regard to consultation but proposes, rather on the opposite direction, that the bill's enforcement territory should be enlarged to all indigenous lands rather than only the ones border areas. The Commission cites the Supreme Court decision on the *Terra Indígena Raposa Serra do Sol* case's excerpts on Armed Forces and Federal Police activities in indigenous lands as the most relevant source in the matter. This part of the decision, as seen below, is in clear violation of ILO169 and the UN *Declaration on the Rights of Indigenous Peoples*. The Senate invited five representatives of entities of relevance to the issue to take part in the Public Hearing: the Ministry of Defence, the *Comissão Nacional de Política Indigenista*; the *Articulação dos Povos Indígenas do Brasil*, an indigenous organization, the Office of the Public Prosecutor and the International Labour Organization. The issues of consultation, cooperation and compliance with ILO169 were raised but dismissed. Sadly, the Public Prosecutor's Office and ILO did not attend and it could be argued that had they been there a stronger case for the consultation and cooperation issues could have been made.

⁴⁷¹ Anaya, *Brazil Report*, *supra* note 3 at §90.

⁴⁷² *Ibid.* at §91.

the executive decrees and the legality questions raised do not do much either to pacify controversies and problematic interactions and demonstrate that although the military dictatorship has ceased to govern the country for more than twenty years, the national security framework created by it is still operational at the high-level decision-making processes.⁴⁷³ Furthermore, this scenario is reinforced by recent and unprecedented border disputes by other countries in the Amazon region and the external pressure by the international community to all States in the region to combat and control illicit weapon, drug and persons trafficking as well as the safeguard of indigenous peoples' land tenure and other rights.

Undoubtedly, the *double attribution* overlap of indigenous and border lands and the necessary encounters between indigenous and national security agents in this and other contexts contributes to the perpetuation the *circular argument*. Instances when this occurs are, *e.g.*, efforts undertaken by influential stakeholders such as the high command of the Armed Forces and the media to portray indigenous peoples' rights as incommensurable with national security measures and the subjective definition by legislators, policy-makers and courts of the civic awareness of communities that inhabit border areas. In the UN Report's section on the *Terra Indígena Raposa Serra do Sol*, the Special Rapporteur notes that "military officials weighed in publicly with pronouncements of concern that a quasi-autonomous indigenous territory running along a lengthy section of Brazil's border with Venezuela and Guyana would have implications for national security, *perpetuating a broader concern about indigenous peoples rights as being a threat to national sovereignty*".⁴⁷⁴ This approach perpetuates integrationist models of interaction that hinder the collaboration between national security agents and indigenous peoples who often possess strategic knowledge of the lands.⁴⁷⁵

⁴⁷³ Discrimination and sexual violence have been reported in the interactions with personnel stationed in remote areas, namely border surveillance units. Consensual relationships occur, usually between lower ranking military personnel and indigenous women, however, the duration of the assignment in a specific unit is often short and children from these unions are left behind, unsupported, disrupting community customs and ways of life and burdening the indigenous women. Military service can be an interesting option to indigenous individuals but the Forces are not fully prepared to accommodate personnel with a diverse socio-ethnic background. The individuals who volunteer usually face discrimination by their peers; their unique and privileged knowledge of the land and the environment is seldom taken into account; and, moreover, they face a harsher reality than that of the individuals in their own communities after being discharged because they do not fully belong to either societal group. See, *e.g.* Melega, *supra* note 357; Ricardo Barreto, "Exército abre diálogo para melhorar relação com os índios nas fronteiras", *Instituto Socioambiental* (12 December 2002).

⁴⁷⁴ Anaya, *Brazil Report*, *supra* note 3 at § 33 [emphasis added].

⁴⁷⁵ There is no reference in any of the Armed Forces ordinances to special rules regarding the contact with *quilombola* or other socio-ethnic distinct peoples. The agency perception of a society more closely related to the dominant one might have played a role in this regard. It is relevant to note that there is no evidence of prejudice

Similarly to the provisions regarding the demarcation of lands, the regime proposed for *quilombola* land rights is more in sync with the possibility of co-existence between defence policies and the traditional occupation of lands. Art. 11 of the *Decreto n. 4.887*, as seen above, foresees the multiple attribution of quilombo lands but does not offer concrete guidelines for action – it suggests the consultation and joint action of IBAMA or the National Defence Council to guarantee the sustainability of the communities and conciliate State interests.⁴⁷⁶ The policy is also clearer regarding the overlap with national security areas and/or border areas, by stating - unlike the multiple attribution regime for indigenous lands - that the scope of national security should be interpreted more broadly and should not be restricted to border areas.

A concrete case of another possibility of overlap has emerged since the promulgation of the Constitution and most notably, the 2003 decree. Ownership and occupation of lands in the region of Alcântara - in the north Atlantic coast of the state of Maranhão in Northeastern Brazil – have been controversial since the late 1970s when the then military regime approved the construction in this location of a satellite launching base as part of the Brazilian Space Program. Between 1986 and 1987, 23 quilombo communities were compulsorily transferred from their traditionally occupied lands,⁴⁷⁷ not protected by constitutional law at that moment in time, for the construction of the Alcântara Launch Centre that has been operational since 1989.⁴⁷⁸ *Quilombolas* and other rural communities have uninterruptedly occupied the area for

against *quilombola* peoples regarding their ‘Brazilianess’ or civil awareness as there is in relation to indigenous peoples even though *quilombolas* are irremediably linked to a heritage of resistance to the State, outlawry behaviour and whose ancestors were forcibly transferred to Brazil from foreign nations in more recent times than the conquest of the Brazilian territory by Europeans and the consequent internal colonization of indigenous peoples.

⁴⁷⁶ *Decreto n. 4.887*, *supra* note 30 at art. 11. The decree suggests the possibility of superimposition of *quilombola* and indigenous lands determining the cooperation between FCP and FUNAI. This scenario does not exist in practice and it could be speculated that although plausible, if the two peoples agree to co-exist, taking into account the historical reports of harmonious co-existence and considering the similarities and overlaps between the rights of indigenous and other socio-ethnic distinct peoples; the complications would lie in the dominant society’s self-referent property regimes infraconstitutionally imposed by which could eventually lead to the indigenous peoples disadvantage.

⁴⁷⁷ Almeida, *Terras* *supra* note 22 at 116-117.

⁴⁷⁸ The Alcântara Launch Centre has been dubbed a nature’s perfect launch pad – the proximity with the Equator assists the impulse of launchers reducing fuel costs. The geographic disposition of the Alcântara peninsula and its low demographic density enables both horizontal and vertical types of orbit launches and has a large surrounding area for sea impact of rockets. The weather conditions are also ideal and it is possible to schedule rocket launches practically all year long. In 2004/05 international treaties have been established with Ukraine for the use of the launch centre and technology development on site, which increases the role and profitability of the centre, thus the pressure for its enlargement and consequent encroachment of the rural communities that surround the launch centre area. A complaint before the Inter-American Commission of Human Rights on behalf of the quilombo

more than 200 years and their subsistence relies on fishing, crafts and small-scale crops. Those transferred pre-1988 were relocated inland, a drastic change that irremediably altered their identity and traditional lifestyle. Furthermore, the promise of schools, health centres, potable water and paved roads was never fulfilled by any government.⁴⁷⁹

Approximately 170 communities inhabited by 15.000 people were not displaced in the 1980s for the construction of the launch centre,⁴⁸⁰ but face challenges that range from the disruption of the sustainability of their socio-ethnically distinct cultural, economic and socio-political structures to the constant threat of displacement from their lands. After 1988, and thus without considering the constitutionally protected status of the lands, the executive power ordered further disappropriations and the removal of residents without property titles within the launch centre's surrounding area, a measure that would potentially displace some of the remaining communities and affect all others. Nevertheless, the post-1988 constitutional protection of the lands prevented actions of immediate displacement and triggered an uneven dialogue of judicial and political proportions that remains unsolved.⁴⁸¹

In 2001, the leadership of the quilombo communities in the region formed an organization to lobby on behalf of the affected communities before government officials at all levels.⁴⁸² As a result of this initiative, an interministerial group was created in 2004 to “articulate, grant viability and assist with the necessary actions for the sustainable development of the municipality of Alcântara”.⁴⁸³ It is relevant to note, nevertheless, that despite being a step

communities of Alcântara, *infra* note 485, accuses the Binational Company Alcântara Cyclone Space jointly owned by Brazil and Ukraine, of illegally using *quilombola* lands and harassing local communities.

⁴⁷⁹ Steve Kingstone, “Brazil spaceport threat to villages” *BBC News* (9 November 2004), online: BBC News South America <<http://news.bbc.co.uk/2/hi/science/nature/3985229.stm#>>.

⁴⁸⁰ Almeida, *Terras supra* note 22 at 116-117.

⁴⁸¹ The administrative procedure for the official identification of the quilombo lands at Alcântara began in 2005 and the latest development was in 2008 when the deadline for contestations by third parties expired. This latest development is listed amongst the current stage of all procedures pending at INCRA in December 2009, online: INCRA: <www.incra.gov.br>. In 2003, the Federal Office of the Public Prosecutor demanded INCRA, the federal government, FCP and the Brazilian Space Agency before a federal court through the Ação Civil Pública n. 2003.37.00.008868-2 requiring the instauration and undelayed conclusion of the administrative procedure. Still in 2003, a regional quilombola organization, the *Associação das Comunidades Negras Rurais Quilombolas do Maranhão* filed the Ação Coletiva n. 2003.7826-3 against the federal government, the federated state of Maranhão, FCP and INCRA requiring the delimitation of the lands occupied by two communities in the area.

⁴⁸² *Movimento dos Atingidos pela Base Espacial de Alcântara* - MABe. See Almeida, *Terras supra* note 22 at 109, 116-117 and Coordenação de Articulação das Comunidades Negras Rurais Quilombolas, “O que é o MABe”, online: CONAQ <http://www.conaq.org.br/noticia_interna.php?notId=884>.

⁴⁸³ *Decreto de 8 de novembro de 2004*, 8 November 2004 [translated by author].

forward in the right direction, this initiative does not address the issues of land use and ownership or the majority of the issues pending decision in several courts at federal⁴⁸⁴ and international levels.⁴⁸⁵ Moreover, while enacting measures in an attempt to conciliate economic interests and the sustainability of those traditional occupied lands, the government was negotiating and signing international treaties⁴⁸⁶ that would further affect the lands at stake but would serve the purpose of increasing national technological development and reshuffle the national industry patterns by promoting high-tech enterprises in the Northeastern region.

Since 1994 the centre has been managed by the Brazilian Space Agency, a civilian body, and the Ministry of Defence. It has been suggested that the same parameters applied to indigenous peoples should be applied concerning encounters between *quilombola* peoples and those State or State-sponsored agents advancing matters of public interest or national security.⁴⁸⁷ The co-management of the Launch Centre by a civilian and a military entity and its classification as an initiative somehow connected to national security but also linked to issues regarding the overall

⁴⁸⁴ In 2006, 11 individuals from 4 different quilombo communities in the region sought a writ of mandamus against the General Director of the Alcântara Launch Centre claiming that Centre's interference within their traditionally occupied lands was preventing the use traditional lands already identified by INCRA and FCP for the cultivation of crops according to their traditional harvesting techniques. The court decided in favour of the *quilombolas* ordering the Centre not to interfere with their traditional ways of subsistence. In the Sentença n. 027/2007/JCM/JF/MA of the Processo n. 2006.37.00.005222-7, Justice Madeira invoked general constitutional clauses against discrimination; public policies protecting traditional lifestyles of indigenous and tribal peoples and the legislative decree that incorporates ILO 169 into the Brazilian legal system. In 2008, the Federal Office of the Public Prosecutor filed an injunction – Ação Cautelar n. 2008.37.00.003691-5 against the Brazilian Space Agency and the company Alcântara Cyclone Space in order to halt the works for the launching system Cyclone-4 until the final demarcation, granting of property titles and studies of environmental and development sustainability impact regarding the surrounding quilombo communities are final. The decision, also by Justice Madeira, grants the request considering the potential damages to the environment that could adversely and irrevocably affect the traditional uses of the land and the impact on the social practices that form the cultural and ethnic integrity of the community.

⁴⁸⁵ In 2001, a group of NGOs (none of which directly related to the local communities) filed petition 555-01 on behalf of the *quilombola* communities affected by the Alcântara Launch Centre against Brazil before the Inter-American Commission on Human Rights. According to the OAS Report n. 83/06, the Inter-American Commission on Human Rights ruled for the admissibility of the petition in 2006 stating that the petitioners had exhausted domestic measures considering that the disappropriation decrees cannot be subjected to the court and that the pending results of the two 2003 cases, see *supra* note 481 would not resolve the situation in either reach or scope and the final decision is pending. Although a well intentioned step at the time when little had been done regarding the issue, the initiative of this group of NGOs to bring the claim before the Organization of American States might have undermined more recent attempts by the local organization MABe to reach more long-lasting and localized agreements with the State.

⁴⁸⁶ See e.g. *Decreto n. 5.266*, 8 November 2004 (agreement between Brazil and Ukraine on technological safeguards for the use of the Alcântara Launch Centre); *Decreto n. 5.436*, 28 April 2005 (incorporating treaty between Brazil and Ukraine into the national legal system for the long-term use of the Cyclone Launching Vehicle in Alcântara); *Decreto de 24 maio de 2008*, 24 May 2008 (creates Binational Company Alcântara Cyclone Space).

⁴⁸⁷ See e.g. Leandro Mitidieri, "Remanescentes de Quilombos, Índios, Meio Ambiente e Segurança Nacional: Ponderação de Interesses Constitucionais", online: CPISP <www.cpis.org/artigos>.

development of the region as well as the unique geographical location of Alcântara place this possibly everlasting debate in a grey area both legally and socio-politically due to the lack of guidelines to cope with it. Jurisprudence seems to be playing a relevant, pluralist-prone and innovative role in this regard that could be useful for a self-determining discussion beyond the Alcântara case and even the *quilombola* cause.

The challenges enumerated here demonstrate backlash in the implementation of the constitutionally-established pluralist model and the consequent perpetuation of the *circular argument*. As seen thus far, one of the biggest challenges in the consolidation of indigenous and other socio-ethnically distinct peoples' rights is the lack of political will geared towards the enactment of core complementary legislation and supporting ordinary legislation. Another obstacle is the unfortunate perpetuation of the *circular argument* as logical fallacy in itself. The next chapter illustrates that the continuity of State-sponsored paternalism and the circularity of the argument are often State-sponsored through uncohesive legislation, policy and court decisions that perpetuate the integrationist model even after all the advances witnessed locally, nationally and internationally with and since the promulgation of the 1988 Constitution.

CHAPTER 3

Challenges: Backlashes and the Perpetuation of the *Circular Argument*

*El tiempo al sur del sur, se ha detenido se ha distraído con no sé qué y el aire es en realidad una gelatina tan cristalina que no se ve.*⁴⁸⁸

Each society and community is unique. Some collectivities share closer bonds and characteristics than others and live according to their own identities forged during their ancestral and circumstantial existence. Historical, political and many other factors have determined under which State's territory and jurisdiction, each society and community shall exist and with which other peoples it shall co-exist. These relations are often marked by subjugation and exploitation. These encounters and the scenario in which they took and often still take place are instrumental to this thesis, but are not, nevertheless, the object of it. Academic work in the field usually dwells on the consequences of these encounters to contemporary issues, highlighting their unfairness and the disadvantages they perpetuate. Some academic work goes further, surpassing that stage of analysis and attempting to bring forth potential solutions for a fairer and harmonious co-existence.

The theoretical motivation of this thesis is situated in between those two trends to the extent that it brings the weight of the encounters and their unfair consequences to the equation but does not consider them in insulation. The analysis proposed here aims to describe and present perspectives to overcome the one logical fallacy that is the by-product of imposed and unfair encounters and has been irrevocably etched in legislation and policy – the *circular argument* – so that a fairer co-existence can take place. The contribution sought can be defined as an instrumental change in the socio-political process of constitutional, and ultimately, legal reasoning towards indigenous and other socio-ethnic distinct peoples within the Brazilian legal realm.

⁴⁸⁸ Jorge Drexler, *El sur del sur*, CD Frontera, 1999. "Time in the South of the South has stopped and distracted itself with I do not know what. In fact, the air is made of such a transparent gelatine that one cannot see through" [translated by author].

This socio-political process of legal reasoning is understood as encompassing the interpretation of constitutional and other norms through an approach to the right of self-determination of peoples that is *glocally* established and serves as a framework of reference to decision-making processes at all levels of the executive, legislative and judicial powers. The core of this renewed process of constitutional reasoning is proposed here as one that shall enable among other scenarios: identity recognition; self-fulfilment at both individual and collective levels; and the sustainable existence and development of socio-ethnic distinct communities within terms defined by the communities themselves.

Nevertheless, rather than moving forward alongside renewed frameworks regarding indigenous and other socio-ethnic distinct peoples rights that have developed at local and global levels, the majority of the State-sponsored decisions have demonstrated a journey in the opposite direction. The *circular argument* seems to have become more circular than ever in the past decade, with few exceptions, despite the paradoxical official position of support to pluralist international initiatives.⁴⁸⁹

Some legal and political developments that harshly affect indigenous and other socio-ethnically distinct peoples have surfaced in the past decade, most notably, the past five years and are the by-product of an unforeseen and perverse twist in social, legal and political relations in Brazil. Such developments could not have been fully grasped or even anticipated at the outset of this thesis' drafting process. Recent recognition and enforcement of legislation and policy has often come vested by what the political and legal institutions of the dominant society promote as an inclusive human rights-based approach to social relations. The protection of the rights of indigenous and other socio-ethnic distinct peoples has assumed the shape of a goodwill crusade that is repeatedly interpreted through the existing legal and political lenses or by means of international law standards that have received full support of the executive branch in its foreign policy relations, but internally, has been taken lightly and misinterpreted by the executive itself but most notably by the legislative and judiciary powers at high levels of decision-making usually triggered by jurisdictional disputes. The current scenario allows for an

⁴⁸⁹ The analyses in chapters 3 and 4 demonstrate that the perpetuation of the *circular argument* in the past decade has disproportionately affected indigenous peoples in relation to other socio-ethnically distinct peoples in relation to the enactment of legislation and policy as well as court decisions. Certain perspectives of the circular argument and backlashes caused by them exist in relation to other socio-ethnic or traditional distinct peoples as well and will be addressed when appropriate.

unfortunate strengthening of the *circular argument* as a logical fallacy and the continuity of State-sponsored paternalism on the basis of the colonial and neo-colonial shortcomings of the past. In fact, while it simultaneously creates obstacles for an overdue reinterpretation of the legal order it also illustrates, more clearly than ever, the need for such reinterpretation.

The premise establishing the purported incommensurability of the current order with the self-determining reinterpretation proposed in the next chapter is determined by the description of the manifestations of the *circular argument* exposed in the previous two chapters but also, and most notably, through political and legal developments that took place in the past decade. If the construction of the *circular argument* was to be compared to the process of building a house, chapter 1 describes its foundational stones and pillars; chapter 2 the edification of the outside walls as well as the internal walls that compartmentalize areas according to pre-defined functions; and chapter 3 presents the odd-sized slates that compose the roofing of the house.

The roof thus represents the culmination of an enterprise or the State's achievement of the highest point of argument circularity. If the metaphor boundaries are pushed a little further, it could be argued, or at least hoped, that the developments described below have *hit the roof* and will not be produced or reproduced again. On the other hand, the roof can also offer perspective, in the shape of a bird's eye view of the entire scene that can assist in the development of creative solutions to the problem. The method of analysis and critique chosen for this chapter reflects this premise.

Indeed, as argued below, the perpetuation of the *circular argument* and the consequent alienation or unsatisfactory participation of indigenous and other distinct peoples in decision-making processes has peaked in the 2000s. This chapter focuses on the current challenges for changes in the *status quo* and exposes the backlash effects encountered in the recognition and enforcement of the rights even when a more pluralistic approach is undertaken.

The phenomenon witnessed is described and the challenges are identified through a methodology that combines theoretical perspectives and three practical examples of the above-mentioned developments that took place in the past decade. The examples were chosen on the basis of their socio-political strength and legal influence on the perpetuation of the *circular*

argument and their backlash impact for the implementation of a self-determining model despite acting on a pluralist guise. The three examples encompass intertwined measures and decisions, such as executive policies, legislative and executive power initiated bills and a Supreme Court decision.

The theoretical approach proposed to describe the phenomenon, address its effects, and support the move forward with the suggested reinterpretation of the current standards for the recognition and enforcement of the rights of indigenous and other socio-ethnically distinct peoples is two-fold. In this chapter, it instrumentalizes the proposed critique to the *circular argument* through its most recent manifestations. In the next chapter, it serves as a framework of reference, alongside international law developments to break and move away from the *circular argument*. The theoretical perspectives include contributions from both critical and traditional legal pluralism⁴⁹⁰ and the unique approach proposed by Boaventura de Sousa Santos constructed primarily on the basis of his works on *a new legal common sense, a subaltern paradigm of recognition and redistribution, the grammar of time toward a new political culture, the erudite ignorance and post-abyssal thinking*.⁴⁹¹

3.1 Opposite Interests, Same Results: Isolation and Adversarial Agendas

Two very different approaches have been added to the indigenous rights and policy debate in the past decade. These two approaches apply only to indigenous peoples, one of them, however, although with different consequences, affects *quilombolas* too. These two approaches could be considered the two opposite ends of the spectrum regarding the recognition and enforcement of the rights of indigenous and, to certain extent, other socio-ethnic distinct peoples. What is perceived to be the extremely favourable end of the spectrum is the ‘isolated indians’ policy enforced by FUNAI with the endorsement of the Ministry of Justice. On the

⁴⁹⁰ Sally Engle Merry, “Legal Pluralism” (1988) 22:5 Law & Soc’y Rev. 869; Brian Z. Tamanaha, “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism (1993) 20:2 J. L. & Soc’y 192 [Tamanaha, “Folly”]; Brian Z. Tamanaha, “An Analytical Map of Social Scientific Approaches to the Concept of Law”(1995) 15:4 Oxford J. Legal Stud.501 [Tamanaha, “Analytical Map”]; Kayleen M. Hazlehurst, ed., *Legal Pluralism and the Colonial Legacy* (Avebury: Ashgate, 1995); Fajardo, “Special Jurisdictions” *supra* note 43; Antonio Carlos Wolkmer, *Pluralismo jurídico: fundamentos de uma nova cultura do direito*, 3d ed. (São Paulo: Alfa Omega, 2001); Kleinhans & Macdonald, *supra* note 12; Macdonald & Sandomierski, *supra* note 12; and Macdonald, “Methaphors”, *supra* note 12.

⁴⁹¹ Santos, *Crítica da Razão Indolente*, *supra* note 13; Santos, *New Legal Common Sense*, *supra* note 13; Santos, “*Nuestra America*”, *supra* note 13; Santos, *Gramática*, *supra* note 13; Santos, “A Filosofia à Venda”, *supra* note 13; Santos, “Beyond Abyssal Thinking”, *supra* note 13; Santos, “Epistemology”, *supra* note 13.

other end of the spectrum are several bills proposed before the *Congresso Nacional* starting in 2005 and peaking in 2008 that seek to limit indigenous and *quilombola* peoples' rights.

3.1.1 Indigenous Peoples in Voluntary Isolation and Initial Contact

The context of indigenous groups in isolation is accurately summarized by the UN Special Rapporteur who defines them as a significant number of indigenous groups that have had little or no contact with outsiders and about which little information is available;⁴⁹² noting also that FUNAI surveys have identified 65 isolated indigenous groups in addition to 5 that have been recently contacted in Brazil. The UN Report acknowledges FUNAI's efforts to spearhead the government's policy that guarantees their right to remain isolated as well as the integrity of their territories.⁴⁹³ It could be argued that the 'isolated indians' policy has existed in Brazil since the 1960s, officially entering the Brazilian legal and political systems in 1973 through the *Estatuto do Indio*.

The *Estatuto do Indio* defines 'isolated indians' as those that live in unknown groups or about whom there is little or vague information and who seldomly have contact with the 'national communion'.⁴⁹⁴ This conceptualization is presented in connection with definitions of 'indians in the process of integration' and 'integrated indians'. The labels that presuppose integration have been overlooked by FUNAI since the 1990s. The 'isolated indians' terminology, however, has remained effective and inspired the creation of a FUNAI unit with the endorsement of the Ministry of Justice, and active since 1987, that is in charge of identifying such groups and guaranteeing their right to remain isolated.

The identification and characterization of *indigenous peoples in isolation* has reached the international *fora* in recent years. The policy implemented since the 1970s-1980s has existed under different guises in Brazil and has similar counterparts in other States. The existence of indigenous peoples in isolation has been reported in several South American countries, Africa and Asia.⁴⁹⁵ The matter of *indigenous peoples in isolation and in initial contact* entered the

⁴⁹² Anaya, *Brazil Report*, *supra* note 3 at §10.

⁴⁹³ *Ibid.* at §10.

⁴⁹⁴ *Estatuto do Indio*, *supra* note 48 at art. 4, I.

⁴⁹⁵ Argentina, Bolivia, Colombia, Ecuador, Paraguay, Peru, Venezuela, Guyana, Cameroon, Congo, India and Indonesia. See e.g. UN Department of Public Information, "Indigenous Peoples Living in Voluntary Isolation" in *10 Stories the World Should Hear More About*, online: <www.un.org/tenstories>; World Rainforest Movement,

international arena in 2005 when the UN General Assembly adopted the *Programme of Action for the Second International Decade of the World's Indigenous People* containing two specific recommendations: a) “a global mechanism should be established to monitor the situation of indigenous peoples in voluntary isolation and in danger of extinction”; and b) “a special protection framework for indigenous peoples in voluntary isolation should be adopted and governments should establish special policies for ensuring the protection and rights of indigenous peoples with small populations and at risk of extinction”.⁴⁹⁶ A regional seminar on indigenous peoples in voluntary isolation and initial contact in the Amazon Basin and the Chaco areas was organized in 2006 as a follow-up to these recommendations.⁴⁹⁷ A year later, the UN Permanent Forum on Indigenous Issues recognized the event’s contributions, also known as the *Santa Cruz de la Sierra Appeal*,⁴⁹⁸ and recommended to the UN High Commissioner for Human Rights Office to propose guidelines to civil society and government actors regarding the respect and protection of the rights of peoples in voluntary isolation and initial contact.⁴⁹⁹ These draft guidelines, issued in 2009, represent the latest development in the international framework.⁵⁰⁰

Although well intentioned, the draft guidelines are marred with loose and generalized interpretations of the international legislation and principles concerning indigenous peoples. The scope of the guidelines is unclear and there is confusion about whom the protected

“Indigenous Peoples in Voluntary Isolation” (2004) WRM Bulletin n. 87, online: <<http://www.wrm.org.uy/bulletin/87/viewpoint.html>>; Webcast by International Work Group for Indigenous Affairs – IWGIA & Federación Nativa del Río Madre de Dios y Afluentes – FENAMAD, *Indigenous Peoples Living in Isolation*, online: IWGIA <www.iwgia.org>; Webcasts by Survival International, *Uncontacted Tribes*, *Contact and Death in the Amazon*, *Most Isolated*, *Black Oil and Red Gold*, *The Akuntsu’s Last Dance*, online: <<http://www.survivalinternational.org/uncontactedtribes>>. In *Contact and Death in the Amazon* it is highlighted that the Javari Valley in Brazil is the region with more uncontacted or recently contacted indigenous peoples in the world.

⁴⁹⁶ United Nations General Assembly, *Draft Programme of Action for the Second International Decade of the World’s Indigenous People*, 60th Sess., A/60/270, 18 August 2005 at §§45 & 51.

⁴⁹⁷ This regional seminar was organized by the Office of the UN Commissioner for Human Rights in partnership with the Government of Bolivia, the Confederation of Indigenous Peoples of Bolivia and the IWGIA and took place in Santa Cruz de la Sierra, Bolivia.

⁴⁹⁸ UN Permanent Forum on Indigenous Issues, 6th Sess., *Official Records*, E/C.19/2007/3/Add.2, Annex *Santa Cruz de la Sierra Appeal*, 26 February 2007, at 11-18 [PFII, 6th Sess.].

⁴⁹⁹ *Ibid.* § 34.

⁵⁰⁰ United Nations Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, 2^d Sess., *Draft Guidelines to the Protection of Indigenous Peoples in Isolation and in Initial Contact of the Amazon Basin and El Chaco*, A/HRC/EMRIP/2009/6, 30 June 2009. [UNHRC, *Draft Guidelines*].

peoples would be.⁵⁰¹ The 2006 Appeal is written in a very diplomatic-like fashion and is the by-product of a joint UN, States and civil society-sponsored event. Paradoxically, the 2009 guidelines are a document produced by a UN Expert Mechanism with governments and indigenous organizations consultation and are quite dissonant from the usual structured framework of United Nations documents. The guidelines' document is filled with harsh and unfounded generalizations in terms of vocabulary, legal and political premises.⁵⁰² The text presupposes the acceptance of broadly constructed premises that shape the issue's discussion in a narrow and pre-defined direction. This framework of reference, while pressing the importance of the protection of peoples in this context, could also back-step the advancement of the indigenous peoples' cause as a whole in addition to making the guidelines extremely difficult to enforce at all levels.

Within the Brazilian context, indigenous peoples in isolation are defined by FUNAI as “peoples that since the times of the discovery of Brazil have remained detached from all transformations occurred in the country; maintaining the cultural traditions of their forefathers and living off the practice of hunting, fishing, gathering and incipient agriculture; and living in isolation from the national society and other indigenous groups”.⁵⁰³ FUNAI also highlights that “isolated indians bravely defend their territories and when they can no longer undertake the confrontation with the invaders they recoil to more distant regions in the hope to survive hidden forever”.⁵⁰⁴

FUNAI maintains that there is little or no information available about these groups and their languages are unknown. The UN draft guidelines define peoples in isolation as “indigenous peoples or subgroups thereof that do not maintain regular contact with the majority population and tend to shun any type of contact with outsiders”, highlighting that “most of them live in tropical forests and/or in remote, untraveled areas, which in many cases are rich in

⁵⁰¹ While the 2005 Programme of Action mentions peoples in voluntary isolation, peoples in danger and risk of extinction and indigenous peoples with small populations; the 2007 Appeal, by its turn, refers to indigenous peoples in isolation and initial contact; and the 2009 draft guidelines addresses indigenous peoples in voluntary isolation and initial contact.

⁵⁰² The original language of the draft guidelines is Spanish, unlike the usual English-drafted documents that form the body of international law and policy on indigenous peoples. The flourished discourse and emphatic terms that characterize documents of this nature in Spanish is dissonant with the usually diplomatically and objectively phrased UN documents. These characteristics can be perceived and somehow affect the clarity of the translated English version of the draft guidelines.

⁵⁰³ FUNAI, “Indios Isolados”, information factsheet, online: Ministério da Justiça <www.mj.gov.br> [translated by author] [FUNAI, “Indios Isolados”].

⁵⁰⁴ *Ibid.*

natural resources” still adding that “for these peoples isolation is not a voluntary choice but a survival strategy”.⁵⁰⁵

The guidelines expand the protection to indigenous peoples in initial contact defining them as those peoples who “have been in contact for some time but have never become fully familiar with the patterns and codes of relationships in the majority population” because they “choose to remain in semi-isolation” or have intermittent relations with the dominant society.⁵⁰⁶ Moreover, the guidelines define that peoples are considered to be in initial contact as long as they remain vulnerable to disease and loss of territory “regardless of how long this situation lasts”.⁵⁰⁷

Unlike the long gone times in Brazil described by Lévi-Strauss and Hemming when the SPI had teams in charge of establishing contact and a diplomatic-like relationship with indigenous groups that have had little or no contact with the dominant society until the 1920s-1940s, nowadays, FUNAI is much better equipped with pluralist guidelines and human rights compliance standards. The goals of current approaches are also fairer than the contact and protection of groups fifty or more years ago; while at that point contact usually meant the introduction of dominant society’s work methods and ways of life, what is intended now is the preservation of the indigenous peoples’ ways of life and lands. FUNAI maintains there are instrumental factors that would guarantee the physical and cultural survival of indigenous peoples in voluntary isolation and initial contact such as the “demarcation of the lands where they live and the protection of the environment”.⁵⁰⁸ Furthermore, FUNAI highlights the utmost relevance to acquiring knowledge regarding the nature and dimensions of the occupation of lands by ‘isolated groups’, mostly when dealing with development projects to avoid confrontation and the ‘destruction’ of these groups.⁵⁰⁹

⁵⁰⁵ UNHRC, *Draft Guidelines*, *supra* note 500 at § 7.

⁵⁰⁶ *Ibid.* at § 11.

⁵⁰⁷ *Ibid.*

⁵⁰⁸ FUNAI, “Índios Isolados”, *supra* note 503 [translated by author].

⁵⁰⁹ *Ibid.* FUNAI informs that the work of the unit dedicated to ‘isolated indians’ is undertaken by seven teams called ‘Fronts of Contact’ that act in the federated states of Amazonas, Pará, Acre, Mato Grosso, Rondônia and Goiás.

The international framework provided by the 2009 UN guidelines establish similar parameters to the ones previously stated and already applied by FUNAI. The text of the guidelines, however, goes beyond the FUNAI approach, mostly for its deeper analysis of theoretical perspectives and the international legal principles framework. As mentioned above, the draft guidelines are built upon wide premises that are not justified or described in the document but taken for granted from previous unilateral studies and opinions. Some examples are the ‘no-contact principle’ that should guide all relations with peoples in voluntary isolation and wide generalizations regarding the vulnerability to disease and loss of territory of peoples in initial contact. A heavier premise states that the right of self-determination of peoples in voluntary isolation “means that their decision to remain isolated must be respected” and their protection from contact also protects them “from possible violations of their human rights”.⁵¹⁰

Without diminishing the relevance of protection measures, it could be argued that the guidelines adopt a paradoxically broad interpretation of self-determination – despite being established in consultation with indigenous peoples that have expertise in the dominant society’s political processes - the claim that voluntary isolation is the highest expression of self-determination compromises the core of the principle of self-determination. It places the referential framework in the dominant society, or what this society believes to be the understanding of the isolated peoples, thus not considering the peoples in isolation’s awareness and consciousness of their choice when, *grosso modo*, self-determination is precisely the expression of a people’s informed choice regarding the social, economic and political options available. The ideas transmitted in some parts of the 2009 UN guidelines seem to be an attempt to stretch the conceptual boundaries of the principle of self-determination of peoples to promote the relevance of the policy proposed.⁵¹¹ The principle of self-determination of peoples could be argued to be much more complex than the broad generalization it was reduced to in the UN draft guidelines. It could be argued that the meaning of self-determination is different to each people and its applicability should be locally appropriated

⁵¹⁰ UNHRC, *Draft Guidelines*, *supra* note 500 at §22 and §§41-42. According to the guidelines contact, or lack thereof, with the majority population should be seen as the clearest and most unequivocal form in which they exercise their right to self-determination.

⁵¹¹ See *e.g. ibid.* at §51 which states that the respect for this principle means that any contact with indigenous peoples in isolation that is not initiated by those peoples themselves must be regarded as a violation of their human rights) and at §54 – which states that restorative justice should likewise be preventive, in order to guarantee the application of the principle of self-determination.

and discussed among all parties concerned – rather than imposed by external sources, regardless of the purpose of such inference.

The guidelines state that both ILO 169 and the UN *Declaration on the Rights of Indigenous Peoples* are applicable and relevant to peoples in isolation and those in initial contact – including specific rights in the areas of consultation, land rights and health care;⁵¹² “the right to consultation and to free, prior and informed consent” and rights “over their lands, territories and resources”.⁵¹³ Such statements are paradoxical considering that the lack of contact principle presupposes assumptions regarding the terms of the voluntary isolation from the dominant society’s perspective – therefore neither participation nor consultation happen in the terms foreseen by ILO 169 or the UN *Declaration*. The right to self-determination of the peoples in isolation could be questioned from the prism of their lack of input on the delimitation of what their traditionally occupied lands would be or their supposed peremptory choice for the sole use of their traditional medicines and health practices. It could be argued that the perspective offered by the UN draft guidelines is naïvely inoperative within the present national and international legal context and unfair to all indigenous peoples as an ‘easy way out’ of a recurring problem as it presupposes that “the mechanisms established in the [UN *Declaration on the Rights of Indigenous Peoples*] including free, prior and informed consent, participation and consultation, are exercised merely through their decision not to maintain contact”.⁵¹⁴

FUNAI’s policy clearly illustrates this perspective: it assumes the agency of peoples in isolation and leave them ‘out of the loop’ or ‘at bay’ of the socio-legal and political decisions regarding them. The approach could be argued to be a form of self-referent paternalism and perpetuation of the *circular argument* because these groups would not have access to the information that a reality of non recognition and rights violations, at least in theory, has changed or is in the process of changing for the better, to a more inclusive environment where the gap between the two sides of the abyss that represents their way of life and the dominant society’s way of life can be bridged. Furthermore, it could be argued that ostracizing these groups and leaving them in relative isolation can transform them into second-class citizens,

⁵¹² *Ibid.* at §30.

⁵¹³ *Ibid.* at §31.

⁵¹⁴ *Ibid.* at §41.

under a disguised *tutela* or guardianship, as they are not able to enjoy rights they would be entitled to if they were not in isolation such as the right to healthcare; input on the demarcation of their lands or the right to claim the lands they originally occupied and not the lands to which they were displaced to while isolating themselves from external threats.

Additionally, a permafrost approach to the indigenous ways of life⁵¹⁵ is undertaken both in national and international guidelines and becomes a qualifying characteristic of the isolated groups as full protection is only granted to those who ‘maintain the cultural traditions of their forefathers’ exactly as they were before colonization. This approach, when used to frame the matter, could bring backlash effects to the peoples protected and the indigenous peoples who are not in isolation. It could be argued that indigenous peoples who historically did not have a choice to remain in voluntary isolation in order to preserve what remains or has been reconstructed of their ways of life would have an undue burden in the quest for protection in comparison to those who were successful in distancing themselves from badly intentioned incursions of the dominant society. The peoples in isolation right to self-determination could also be argued to be violated from this perspective, and ironically, in the name of the principle itself – the protection of isolated peoples according to the dominant society’s parameters exposed in the FUNAI as well as the supervening international guidelines would impose a permafrost existence upon them in order for them to retain their special rights and status.

Moreover, with the observation of the current situation in Brazil, the national and international guidelines become even more unrealistic; they do not consider either indigenous peoples’ agency or indigenous peoples’ own processes of adaptation to internal colonization and involuntary incorporation. The current system, embedded in the *circular argument*, presents two distinct choices of protection: indigenous peoples must either maintain their ways of life unchanged since the arrival of the colonizers or assume the dominant society’s ways of life. None of the policies, legislation or any other document or action demonstrates that what is

⁵¹⁵ The critique to the idea of permafrost rights is explained, *e.g.* in Bradford W. Morse, “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon* (1996-1997) 42:4 McGill L. J. 1011 and in Borrows, “Landed Citizenship”, *supra* note 429 at 77 (aboriginal practices and traditions are not “frozen”. Identity is constantly undergoing renegotiation. We are traditional, modern, and postmodern people. Our values *and* identities are constructed and reconstructed through local, national, and sometimes international experiences. “Aboriginality” is not confined to some pristine moment before the arrival of Europeans in North America). The concept and critique can surely be extended to the Americas as whole.

most likely to have happened is a symbiosis of both lifestyles and that it is not because the indigenous lifestyles did not remain unchanged since colonization that they are not worth protecting as an inherent part of socio-culturally differentiated ways of life. The perceived favourable policy of protection of indigenous peoples in isolation could, therefore, hinder as much as help the consolidation of indigenous rights.⁵¹⁶

The 'isolated indians' initiative has been labelled by FUNAI, the Ministry of Justice and the media as extremely positive, an opinion somewhat shared by the UN Special Rapporteur. Through this lens, the policy is hailed as a restorative justice initiative – regarding these isolated groups as the dominant society's last chance of finally doing the right thing in their contact with indigenous peoples and reflects a commoderate approach to the easier route in the encounters between isolated indigenous peoples and the dominant society and its governing bodies nowadays. Indeed, the remoteness of the areas inhabited by the isolated indigenous peoples has enabled them to maintain little or no contact with the dominant society. However, although vast and inhospitable, the country's outback territory is not unlimited and in five hundred years of co-existence, it is self-deceptive and naïvely paternalistic to presuppose that every single one of the isolated groups in fact wishes to remain isolated.

The indigenous peoples that managed to 'escape' were escaping from violent incursions into their territories and ways of life. In other words, they might have been escaping – and continue to escape – assimilationist and integrationist policies, such as the testimonies provided by FUNAI itself when recounting these groups' forced displacement experiences. The notion of 'contact' within a territory that has been internally colonized for more than five-hundred years cannot be simplistically built. Encounters between indigenous peoples and the dominant society in a post-internally colonized territory cannot, especially within the current legal and political scenario, be categorized as automatic assimilation or presupposed segregation. Legal and political development on the rights of indigenous peoples and most notably the universal

⁵¹⁶ FUNAI's approach to indigenous peoples in voluntary isolation and initial contact precedes the UN guidelines but is axiologically very similar to them. FUNAI has not, so far, declared its approval or allegiance to the international draft guidelines proposed in 2009 but their co-relation is undeniable in terms of content and also the Brazilian government and civil society contributions to the draft documents that served as basis to the 2009 guidelines such as the *Santa Cruz de la Sierra Appeal*, PFII, 6th Sess., *supra* note 498 and the conclusions of the 2nd Regional Seminar on Indigenous Peoples in Voluntary Isolation and Initial Contact with representatives from the 7 countries of the Amazon Basin and El Chaco held in Quito in 2007.

human rights framework requires a reinterpretation of the local reality rather the construction of arguments on the basis of a perceived reality of integration and human rights violations.

3.1.2 Adversarial Agendas: Competence Clashes and Indigenous Rights

On the other side of the spectrum are legislative proposals against the consolidation of indigenous peoples' rights. Over sixty proposals for constitutional amendments; ordinary and complementary legislative bills, including core legislation to replace the *Estatuto do Índio* are currently being debated in both houses of the *Congresso Nacional*. Two bills date from as early as 1990, nine other bills or constitutional amendments were proposed throughout that decade alone. From 2000 to 2004 eleven bills and constitutional amendments were proposed either in favour of indigenous peoples or aiming to introduce mild limitations to indigenous peoples' rights attempting to solve legal conflicts that may arise between indigenous peoples and the State or indigenous peoples and the dominant society.⁵¹⁷

In 2005, three bills were proposed, but for the first time after the promulgation of the 1988 Constitution, a piece of anti-indigenous rights legislation emerged. The pre-existing propositions were formatted as *Proposta de Emenda à Constituição*, *Projeto de Lei Complementar* or *Projeto de Lei* – respectively, proposals for constitutional amendments, and complementary and ordinary legislation bills. The road chosen for this anti-indigenous bill was a *Projeto de Decreto Legislativo* sponsored by members of the ruralist lobby.⁵¹⁸ This legislative decree seeks the suspension of the presidential decree that homologated the demarcation of the *Terra Indígena Raposa Serra do Sol*.⁵¹⁹ The framework of the decree is unusual but loaded with political strategy. Legislative decrees, unlike other types of legislation, do not require presidential sanction and serve to regulate issues under the exclusive competence of the legislature such as the suspension of normative acts undertaken by the executive power - clearly the goal in this

⁵¹⁷ Bills that are either in favour or propose mild limitations to indigenous peoples' rights, including the core legislation proposal to replace the *Estatuto do Índio* will be analysed below at 3.2.2.

⁵¹⁸ The ruralist lobby is an informal but permanent group of members of parliament, active in both Houses of *Congresso Nacional* that defend interests of large-scale rural property owners. Their strategies include the proposition of legislation that hinder agrarian reform and small-scale rural enterprises; and refusal of measures that interfere with large-scale rural oligarchies' monopolies. See e.g., *supra* note 345.

⁵¹⁹ *Projeto de Decreto Legislativo n. 1.622/05*, 20 April 2005.

case.⁵²⁰ On this same path, another thirteen legislative decrees were proposed in 2007 and 2008,⁵²¹ seeking to suspend normative acts issued by the executive, *e.g.*, presidential decrees; and Ministry of Justice and FUNAI ordinances concerning the demarcation of indigenous lands.⁵²² One of the bills targets an executive decree authorizing the operation of an indigenous radio station;⁵²³ another three bills take aim at presidential decrees that homologated the demarcation of indigenous lands;⁵²⁴ five seek the suspension of Ministry of Justice ordinances that declare the limits of indigenous lands⁵²⁵ and two other seek suspension of Ministry of Justice ordinances declaring the enlargement of limits of certain indigenous lands;⁵²⁶ another is aimed at the suspension of FUNAI ordinances appointing interdisciplinary technical groups to analyse the physical extension and socio-anthropological aspects of demarcations.⁵²⁷

It could not be argued; however, that all legislative decrees reflect an anti-indigenous agenda and that their sole purpose is to undermine the consolidation of indigenous rights mostly because documents pertaining to the administrative procedures targeted are often not readily available for public consultation. Nevertheless, it can be said, that there are regimental procedures within FUNAI and the Ministry of Justice to verify corruption or legitimacy claims regarding the ordinances that could be used before legislative representatives would have to make use of the legislative decree formula. It could also be argued that this legislative decree trend has been fuelled by the fact that the legislative power does not have a say in the demarcation process of indigenous lands within the current legal regime.

Indigenous issues are of federal competence and, indeed, several federal measures regarding indigenous peoples have been constitutionally delegated to the *Congresso Nacional* - the

⁵²⁰ Other issues that may be addressed by legislative decrees are the approval of international acts; approval or renewal of permit for radio diffusion; authorization for the president to leave the country; calls for referenda, amongst others, online: <www.camara.gov.br/internet/glossario>.

⁵²¹ As of June 2010, the 2007-08 bills were still pending analysis and no other bills of this nature and scope had been proposed in 2009 or the first half of 2010.

⁵²² Demarcations in the States of Mato Grosso, Mato Grosso do Sul and Santa Catarina, all federated states with representatives associated with the ruralist lobby, have been specifically targeted.

⁵²³ *Projeto de Decreto Legislativo do Senado Federal n. 44/07*, 14 March 2007.

⁵²⁴ *Projeto de Decreto Legislativo n. 393/07*, 29 October 2007; *Projeto de Decreto Legislativo n. 510/08*, 10 April 2008; and *Projeto de Decreto Legislativo n. 475/08*, 14 February 2008.

⁵²⁵ *Projeto de Decreto Legislativo n. 48/07*, 22 May 2007; *Projeto de Decreto Legislativo n. 50/07*, 22 May 2007; *Projeto de Decreto Legislativo n. 70/07*, 19 June 2007; *Projeto de Decreto Legislativo n. 480/08*, 5 March 2008; and *Projeto de Decreto Legislativo n. 1.323/08*, 10 December 2008.

⁵²⁶ *Projeto de Decreto Legislativo n. 47/07* and *n. 49/07*, 22 May 2007.

⁵²⁷ *Projeto de Decreto Legislativo n. 797/08*, 13 August 2008.

legislative power, rather than the executive power. This context is exemplified, as seen above, by the requirement of authorization by the *Congresso Nacional* both *erga omnes* and on a case by case basis for the exploitation of mineral and hydric resources on indigenous lands.⁵²⁸

In the case of land demarcation, however, the 1988 Constitution delegates the responsibility to the *União* – or the federated union. This leaves the competence field fairly open to legal as well as political interpretation. Eight bills have surfaced from 1992 to 2009 in both houses seeking amendments to the Constitution, to control the executive power's competence through legal provisions, or merely to legislate in order to secure legislative power in the *erga omnes* procedure of demarcation and homologation of indigenous lands.⁵²⁹ A legislative decree from 2008 seeks to suspend *Decreto n. 1.775*, the executive decree that defines the procedure for the demarcation and homologation of indigenous lands.⁵³⁰

In the present conjuncture, it could be argued that the participation of the *Congresso Nacional* in the processes of indigenous lands' demarcation and homologation could enhance the input of federated States and other stakeholders in the decision-making process at the national level and

⁵²⁸ *Constituição*, 1988, *supra* note 23 at art. 231, §3; see also text accompanying note 251. Since 1990, ten bills in addition to the core legislation bill also refer to this authorization requirement. Five attempt to set regulations in general terms and five refer to specific cases. The first five are *Projeto de Lei n. 4.916/90*, 7 May 1990 defining parameters for mining activities in indigenous lands; *Proposta de Emenda à Constituição n. 98/95*, 17 May 1995; *Projeto de Lei n. 1.610/96*, 11 March 1996; and, *Projeto de Lei do Senado n. 605/07*, 18 October 2007; and *Projeto de Lei n. 2.830/03*, 18 December 2003 that establishes the mandatory requirement for a geological survey in areas to be demarcated before their homologation as indigenous lands, a measure that could prove to be a two-edged sword delaying or impeding demarcations for economic reasons on the part of the State but also other stakeholders such as current private owners of the lands or federated states or, assist indigenous peoples once the demarcation is homologated towards the most sustainable ways of exploitation of natural resources in their lands also taking into consideration the impact in their traditional socio-economic structures and ways of life. The other five are *Projeto de Decreto Legislativo n. 381/99*, 8 December 1999 granting 1% of royalties of the hydroelectrical dam of São Jerônimo in the Tibagi river, Paraná to be awarded to the Kaingang people from the *Terra Indígena São Jerônimo da Serra*. *Projeto de Decreto Legislativo n. 1.790/05* authorizing hydroelectrical developments in the areas of Jirau and Santo Antônio, Madeira river, Rondônia. Hydroelectrical developments are also authorized in Roraima by *Projeto de Decreto Legislativo n. 2.540/06*, 21 December 2006; *Projeto de Decreto Legislativo do Senado Federal n. 200/07*, 14 June 2007 and *Projeto de Decreto Legislativo do Senado Federal n. 201/07*, 14 June 2007 in the Cotingo, Mucajaí and Branco rivers respectively. It should be noted that with the exception of the 1999 decree, all others refer to hydroelectrical developments in areas where not all the population, indigenous and otherwise, have access to electricity. It could be argued that the fact that all proposals for the exploitation of natural resources specifically analysed to date refer to hydroelectrical developments rather than mineral exploitation, for instance, could lead to the conclusion that rather than addressing contexts that would bring wealth to indigenous peoples or the State itself on a long term basis, the members of the *Congresso Nacional* have chosen to deal with cases that do not benefit the indigenous population in its vulnerable and socio-ethnic distinctiveness but rather the entire population within an electoral area; harvesting votes in the next elections for those who facilitate the development of the region.

⁵²⁹ *Proposta de Emenda à Constituição n. 133/92*, 15 January 1992; *Proposta de Emenda à Constituição n. 38/99*, 5 May 1999; *Proposta de Emenda à Constituição n. 215/00*, 28 March 2000; *Projeto de Lei do Senado Federal n. 188/04*, 16 June 2004; *Proposta de Emenda à Constituição n. 161/07*, 20 September 2007; *Projeto de Lei n. 490/07*, 20 March 2007; *Proposta de Fiscalização e Controle n. 55/08*, 16 October 2008; and, *Projeto de Lei n. 4.791/09*, 4 March 2009.

⁵³⁰ *Projeto de Decreto Legislativo n. 1.346/08*, 17 December 2008.

enable more detailed analyses of each case in terms of fairness; constitutionality; and human rights, environment, sustainability, amongst other compliance standards,⁵³¹ nevertheless, the legislative bureaucratic and lobby-prone structure would certainly bring further delays to the process of demarcation and homologation of indigenous lands rather than bring additional legitimacy to the system that is currently in force.

This context provides a sense that the *Congresso Nacional* feels overpowered by the executive for holding greater autonomy in the management of indigenous rights on behalf of the State and by the judicial power as well for upholding the fairness and legitimacy of the competence of the executive power for enacting legislation and policy regarding indigenous rights. The latest demonstration of this political struggle was the *Terra Indígena Raposa Serra do Sol* decision to uphold the presidential decree homologating the demarcation of the land in this specific case and reinforcing the executive power's competence to demarcate and homologate indigenous lands in general terms. The Supreme Court decision went as far as to enumerate the limited competences of the *Congresso Nacional* within the indigenous lands context.⁵³²

Over sixty bills, including the ones enumerated above as well as others that do not represent adversarial agendas to the enforcement of indigenous rights were proposed in both houses of the *Congresso Nacional* over the past twenty years and yet all except one bill enacted as legislation through the House or the Senate addressed indigenous rights issues peripherally or as a part of a larger policy issue.⁵³³ The existing legislation in force that fully addresses indigenous rights

⁵³¹ While members of the *Câmara dos Deputados* represent the people, *Senado Federal* members represent the federated States. Each State and the Federal District elect three senators, regardless of territory or population sizes. Representation at the *Câmara dos Deputados*, on the other hand, is proportional to each State's population. See generally Silva, *supra* note 23 at 509-511. According to the Constituição, 1988, *supra* note 23 at art. 45, §1, no federated State shall have less than eight or more than seventy representatives. From the twenty-six States and Federal District that form the federation, the State of São Paulo has the largest representation, seventy members. Another ten states and the Federal District have the minimum representation. Both the Senate and the House of Representatives have several internal commissions that analyse issues of fairness, constitutionality and compliance standards. See online: <<http://www2.camara.gov.br/comissoes>> and <<http://www.senado.gov.br/sf/comissoes>>.

⁵³² Supremo Tribunal Federal, PET 3388, Min. Ayres Britto, Voto do Relator, 10 December 2008, §70-71 [PET 3388, Ayres Britto]. The Supreme Court noted the relevance of the issue by questioning the recent wave of legislative decrees aiming to suspend executive power ordinances and decrees regarding the demarcation and homologation of indigenous lands, many of which, previously analysed and upheld by courts. The potential suspension of such decrees, including the one that homologates the *Raposa Serra do Sol* indigenous land, would interfere and violate the constitutionally guaranteed standards of legal certainty.

⁵³³ See e.g., *Lei n. 9.394*, *supra* note 378 (national education policy with special rules for indigenous education) and *Lei n. 9.836*, *supra* note 389 (public health system establishing the indigenous health subsystem).

has been enacted through executive decrees or ordinances. The only bill enacted as a law originating from the *Congresso Nacional* emblematically illustrates the appalling and self-referent context of legislative decision-making processes in Brazil on indigenous rights: *Lei n. 11.696*, proposed in 2006 and promptly enacted in 2008 is one sentence long and establishes the *Dia Nacional de Luta dos Povos Indígenas*, a yearly commemorative date to be observed throughout the national territory that celebrates the ‘Indigenous Peoples’ Struggle’.⁵³⁴

3.1.3 Adversarial Agendas: Competence Clashes and *Quilombola* Rights

Executive decrees regarding *quilombola* rights have also been challenged, although to a lesser extent and less often than legislation and policy regarding indigenous rights. *Decreto n. 4.887*, enacted by the executive power in 2003 defining the procedure for the identification, recognition, delimitation, demarcation and issuance of title of lands traditionally occupied by *quilombola* peoples has been the main target of criticism.

The first adversarial measure came in 2004 when a centre-right political party, with strong influence of members of the ruralist lobby from its ranks, filed an *Ação Direta de Inconstitucionalidade*, directly challenging the decree’s constitutionality before the *Supremo Tribunal Federal*.⁵³⁵ *Ação Direta de Inconstitucionalidade* or ADI, for its acronym in Portuguese, is one of the four possible means to challenge the constitutionality of legislation or policy enacted at infraconstitutional level. According to art. 103 of the 1988 Constitution, the *Supremo Tribunal Federal* is the Constitution’s keeper thus retaining original and exclusive competence to decide upon the unconstitutionality of laws or normative acts (e.g. decrees) at federal and federated state levels.⁵³⁶ This ADI is pending decision by the STF and advisory opinions have been

⁵³⁴ *Lei n. 11.696*, 12 June 2008.

⁵³⁵ STF, ADI-3239-DF, *supra* note 451.

⁵³⁶ *Constituição*, 1988, *supra* note 23 at art. 103. Historically, the first type of challenge was established by the 1891 Constitution – *diffuse control by exceptional means* – in which the constitutionality of a provision is discussed within an existing case beyond the direct challenge but that are closely related or directly affected by it. Any court at any level may issue a decision rendered valid *intra partes*. The second type, introduced in the constitutional framework in 1965, is the *ação direta de inconstitucionalidade* to be proposed directly before the STF. The claim must target a specific normative act or parts of it and can only be proposed by the President of the Republic; the President of the Senate and House of Representatives; Presidents of the House of Representatives of the federal district or any federated state; State or Federal District Governors; the Public-Prosecutor; the Federal Council of the Brazilian Bar Association, a political party with members currently elected to the *Congresso Nacional*; and, unions or other official bodies representing a profession or trade. The same criteria of proposition are valid to the third and fourth modalities too. The third type of challenge, introduced with the Constitution in 1988 is the *ação de inconstitucionalidade por omissão*. Any of those stakeholders mentioned above can prompt the STF to declare that a right established by the Constitution is not being fulfilled by the lack of complementary legislation and thus order

issued by legal authorities and will be discussed below, namely the one issued by the Republic's Public-Prosecutor. Moreover, the constitutionality and applicability of *Decreto n. 4.887* were challenged through a legislative decree in 2007, in a similar manoeuvre to those described above in relation to indigenous rights granted by executive decrees and challenged through proposed legislative decrees. In fact, this *Decreto Legislativo n. 44* was proposed by the same group of representatives that authored several of the bills attempting to hinder indigenous peoples' rights and its text is very similar to that of the 2004 ADI claim.⁵³⁷ The legislative decree's exposition of motives as well as some of the advisory opinions given by the parliamentary commissions that analysed it so far make several references to the claims of the 2004 ADI and the advisory opinions issued in connection to it.

The legislative decree has not yet been submitted to a vote in a plenary session at the House of Representatives. An advisory opinion against the decree has been issued by the Office of the Public Prosecutor and it was analysed by the House's Commissions on Human Rights and Minorities; Agriculture, Live Stock and Rural Development; and, the Constitution, Justice and Citizenship. The first commission proposed the dismissal of the legislative decree and the other two voted for its approval with an amendment proposed by the second commission. The amendment determines that only four articles deemed unconstitutional should be revoked rather than the entire decree. The two commissions agree that revoking the decree completely could cause further delays in the fulfilment of the right recognized in art. 68 of the ADCT. However, by revoking the articles under scrutiny, the provision is emptied of core elements that characterize the purpose and uniqueness of the status of traditionally occupied lands. Some of the criteria brought forth by *Decreto n. 4.887* and, specifically targeted by these adversarial measures fully comply with international standards currently established regarding socio-ethnic distinct communities and minimize the use of self-referential concepts and tools within the procedures of identification and demarcation of the lands.

the competent power to legislate in this regard. Finally, the fourth type of challenge, the *ação declaratória de inconstitucionalidade* was introduced through a constitutional amendment in 1993. In case the constitutionality of a normative act has been repeatedly challenged before lower level courts, any of the stakeholders mentioned above can propose a declaratory action by which the STF will issue an opinion that will become valid to all cases under analysis at lower level courts. See e.g. Silva, *supra* note 23 at 48-63.

⁵³⁷ *Projeto de Decreto Legislativo n. 44/07*, 17 May 2007.

The amendment, presented in full *circular argument* style, announces that while the preservation of the rights of *quilombola* peoples is a cause worth pursuing, thus, acknowledging that the right is legitimate; it claims that the identification and recognition of those who are entitled to the right should be done according to parameters established by the legislative power. Ultimately, the proponents of the amendment claim that *quilombola* peoples do not have the right to determine who they are or suggest the geographical areas of their traditionally occupied lands for the sake of fairness to all other citizens. The amendment empties the decree of its true meaning and makes it even more susceptible to unstable interpretation.⁵³⁸

Both the ADI and the legislative decree bill claim the unconstitutionality of *Decreto n. 4.887* on the same grounds: the scope of the decree, in other words, the enforcement of a constitutional provision, overrides the normative competence of the executive power and is not justified by the lack of action of the legislative power on the matter until this date. Those who defend the constitutionality of *Decreto n. 4.887* refute this argument by claiming that art. 68 of the ADCT is a provision of full efficacy and immediate applicability,⁵³⁹ therefore, only requiring an administrative procedure to be established. Taking this approach into account, such procedure was established by the executive power through *Decreto n. 4.887* and does not create new rights or otherwise enlarge the constitutional provision in any sense.⁵⁴⁰

With regards to the claim of the supposed enlargement of the rights granted by art. 68 of the ADCT, the proponents of the 2004 ADI and the 2007 legislative decree have identical arguments. They state that the decree surpasses the constitutional text by proposing that the criterion for the identification of the remnants of quilombos protected by the constitutional provisions is the self-identification of individuals and communities.⁵⁴¹ Moreover, the determination that the identification of the lands will consider the territoriality criteria

⁵³⁸ See *e.g.*, Comissão de Agricultura, Pecuária, Abastecimento e Desenvolvimento Rural, Projeto de Decreto Legislativo n. 44, de 2007, Voto, 12 June 2007, Relator Dep. Eduardo Sciarra at §50-52 [CAPADR, Sciarra].

⁵³⁹ See, *supra*, text accompanying notes 295-297.

⁵⁴⁰ Within the ADI context, this argument is defended by Procuradoria-Geral da República, Parecer n. 3333/CF pela improcedência da Ação Direta de Inconstitucionalidade n. 3.239-9-DF, 17 September 2004 at §§ 8-24 [Parecer n. 3.333/CF] and Advocacia-Geral da União, Parecer AGU/MC – I/2006, Gabinete de Segurança Institucional da Presidência da República, Interpretação da questão quilombola na Constituição de 1988, 24 November 2006, §§ 41-44. By its turn, within the legislative decree's context, the argument is presented by Procuradoria-Geral da República, Grupo de Trabalho sobre Quilombos, Povos e Comunidades Tradicionais, Parecer contrário ao projeto de decreto legislativo n. 44, de 2007, 17 September 2007 [Parecer contrário PDC n. 44].

⁵⁴¹ *Decreto n. 4.887*, *supra* note 30 at art. 2, *caput* and art. 2 §1.

indicated by the communities who traditionally occupy the lands⁵⁴² is also portrayed as an excess to the constitutional right. Both arguments were widely discussed, favourably and unfavourably, by commissions of the House of Representatives that analysed the legislative decree's proposal.

Those who question the constitutionality of *Decreto n. 4.887* present their arguments using excessive formalism and outdated legal strictness in the definition of property rights. The claims state that the title of the traditionally occupied property is granted to *quilombola* peoples directly by the 1988 Constitution and the issuance of the title is a mere administrative formality. The argument does not consider, for instance, that communities might have been displaced from their traditional lands and/or due to land encroachment might not have enough lands for their physical and economic survival.⁵⁴³ Despite also being voiced in documents defending the constitutionality of *Decreto n. 4.887*, a separate opinion issued by representatives of the Agriculture, Live Stock and Rural Development Commission exposes this specific conundrum and, precisely on these terms, demonstrates disagreement with the Commission's majority decision, thus defending the constitutionality of *Decreto n. 4.887*. The separate opinion argues, similarly to argumentation proposed in the opinion issued by the Human Rights and Minorities Commission⁵⁴⁴ and the Public Prosecutor's advisory opinion regarding the 2004 ADI,⁵⁴⁵ that art. 68 of the ADCT must be interpreted in connection to arts. 215 and 216 of the Constitution.⁵⁴⁶ As analysed in the previous chapter, the association of the three articles exists due to the protection arts. 215 and 216 grant to the manifestations of Afro-Brazilian culture and material and immaterial assets pertaining to the memory of the different

⁵⁴² *Ibid.* at art. 2, §3.

⁵⁴³ A separate opinion supporting *Decreto Legislativo n. 44* provides an example of this understanding. It interprets that the rights to lands traditionally occupied by *quilombolas* is a transitional constitutional provisions because it applies only to situations in which *quilombola* communities have the possession but not the property of traditionally occupied lands at the time of the Constitution's promulgation, and therefore, only those in that specific situation could benefit from the provision of ADCT's art. 68. Comissão de Constituição, Justiça e de Cidadania, Projeto de Decreto Legislativo n. 44, de 2007, Voto em Separado, 11 November 2008, Dep. Roberto Magalhães at §19 [CCJC, Magalhães].

⁵⁴⁴ Comissão de Direitos Humanos e Minorias, Projeto de Decreto Legislativo n. 44, de 2007, Voto, 30 October 2007, Relatora Dep. Iriny Lopes at §7.

⁵⁴⁵ Parecer n. 3.333/CF, *supra* note 540 at §24.

⁵⁴⁶ Comissão de Agricultura, Pecuária, Abastecimento e Desenvolvimento Rural, PDC n. 44, de 2007, Voto em Separado, 19 December 2007, Relator Dep. Nilson Mourão, concurring Dep. Domingos Dutra, Anselmo de Jesus, Beto Faro and Assis Miguel de Couto at § 9-10 [CAPADR, Mourão].

groups that are part of the Brazilian nation-building project.⁵⁴⁷ Additionally, the separate opinion also voices a relevant critique, spelling out the context exposed here of adversarial agendas in place at the *Congresso Nacional*. It states that “regarding the merit of the issue under analysis, this is yet another proposition to reach the Commission that aims at suppressing the constitutionally guaranteed rights of minorities such as the legislative decree bills against the demarcation of indigenous lands”.⁵⁴⁸

In addition to targeting the executive power enactment of *Decreto n. 4.887*, those that oppose its constitutionality do so by targeting the self-identification criteria to define entitlement to the rights in question. The self-attribution of *quilombola* identity criteria is often indissociably linked to the premise granted by the decree for *quilombola* peoples to indicate territoriality criteria to be considered in the identification of the lands. Indeed, this seems to be the most controversial issue because it supposedly clashes with the constitutional principle of isonomy and highlights historical inequalities often unrelated to socio-ethnic distinctiveness associated-discrimination.

The ADI claim, repeated *ipsis literis* in an opinion issued by a specialized commission regarding *Decreto Legislativo n. 44*, argues that the areas referred to in the Constitution are those identified by historical and anthropological studies, rendering the indication of criteria by the *quilombola* communities unnecessary.⁵⁴⁹ Clearly, the premise suggests the understanding that the rights’ entitlement presupposes a permafrost *quilombola* identity that dates back to the slave trade period not considering interactions with the dominant society or changes on the community’s lifestyle and dynamics. The *circular argument* nuance of this approach is stressed when the majority opinion rendered by the Rural Development Commission states that *Decreto n. 4.887* entitles ‘communities of the remnants of quilombos’ to traditional land claims, thus, altering the objective of the constitutional provision that merely refers to ‘remnants of the communities of quilombos’.⁵⁵⁰

The majority opinion as well as all three separate opinions issued by the members of the Constitution, Justice and Citizenship Commission declare that *Decreto Legislativo n. 44* is

⁵⁴⁷ See, *supra*, text accompanying note 419. See also CPISP, *Report*, *supra* note 418 and Almeida, *Terras*, *supra* note 22.

⁵⁴⁸ CAPADR, Mourão, *supra* note 546 at §6 [translated by author].

⁵⁴⁹ Parecer n. 3.333/CF, *supra* note 540 at §36 and CCJC, Magalhães, *supra* note 543 at §28.

⁵⁵⁰ CAPADR, Mourão, *supra* note 546 at §30.

constitutional and vouch for its approval with the amendment proposed by the Rural Development Commission. The majority opinion was drafted by a ruralist lobby member – which in itself compromises the entire opinion due to a conflict of interest. Despite these circumstances and still considering that *Decreto Legislativo n. 44* in itself is formally constitutional – this scenario attests to a shocking reality as it is the Constitution Commission that utters the heaviest criticism to the criterion of self-identification. The main obstacle is that the constitutionality of *Decreto n. 4.887*, due to several political reasons, is not being discussed taking into account the totality of the 1988 Constitution but rather only art. 68 of the ADCT and at times arts. 215 and 216. If the whole Constitution was under scrutiny, as a system that supposedly guides the interpretation of the entire text, the argument that implies the unconstitutionality of the self-identification criteria of socio-ethnic distinct peoples becomes void and is reproachable. It is also surprising that the opinion issued by the Human Rights and Minorities Commission barely discusses the issue from this standpoint –illustrating how ingrained the *circular argument* is in the reasoning of all those concerned – even those who purportedly support the socio-ethnic distinctive peoples’ rights cause.⁵⁵¹

The harshest critiques to the self-identification criteria, as a matter of fact, arise from the opinions issued by the members of the Constitution Commission. The majority opinion states that “it is known that the criteria are based on anthropological studies” and “anthropological concepts cannot be transformed, as if by magic, into regulatory norms unless there are legal or constitutional provisions determining it”.⁵⁵² A separate opinion states that “criteria of ‘*self-attribution*’, ‘*self-definition*’ and ‘*indicated by the remnants themselves*’ do not create rights and are based on historical and anthropological facts that by themselves can generate doubt taking into account the complexity of the studies in the subject, not to mention that such criteria are deemed to generate fraud”.⁵⁵³ It seems that, once again, the intrinsic plurality of the socio-ethnic distinct societies is used against them as a legal argument, in addition to the puzzling assertive, also used as a legal argument, that a right, such as the right of self-identification of

⁵⁵¹ In fact, the Human Rights and Minorities Commission opinion, *supra* note 544 is extremely weak in terms of constitutional and international legal arguments to defend the constitutionality of the *Decreto n. 4.887* considering its supposedly prominent role in the defence of legislation in this field.

⁵⁵² Comissão de Constituição e Justiça e de Cidadania, PDC n. 44, de 2007, Voto, 2 April 2008, Relator Dep. Gonzaga Patriota at §17 [translated by author] [CCJC, Patriota].

⁵⁵³ Comissão de Constituição e Justiça e de Cidadania, PDC n. 44, de 2007, Voto em Separado, 5 November 2008, Rel. Dep. Regis de Oliveira at §20 [translated by author] [CCJC, Oliveira].

one's own socio-ethnic distinctiveness, can be denied to those entitled to it because such right can be misused by others.⁵⁵⁴

The right of self-identification of one's own or a community's collective socio-ethnic distinctiveness can be found in the 1988 Constitution, as analysed in detail below. It can be argued to constitutionally derive from the overarching principle of human dignity, from fundamental rights enumerated in art. 5 and arguably from the right to self-determination. The Public Prosecutor's advisory opinion against the ADI does not mention any of these provisions but asserts that the self-attribution criteria chosen to identify *quilombola* communities is not unconstitutional and determines that what is at stake is a controversy regarding methodologies employed to determine identity. Even when defending the decree and socio-ethnic distinct peoples' rights, the *circular argument* remains as the Public Prosecutor then suggests that the "the methodological issue must be resolved by the anthropology science field rather than the Law"⁵⁵⁵ instead of recognizing the constitutionality and, thus, the recognition of self-identification rights within the legal realm. Paradoxically, later on in the text of the advisory opinion, the Public Prosecutor alludes to the fact that self-identification is the criterion suggested by ILO 169, referring to the Brazilian ratification decree.⁵⁵⁶

The *Decreto Legislativo n. 44* claim that the self-attribution criterion exceeds the constitutional provision is addressed in the advisory opinion issued against it by the Office of the Public Prosecutor. Similar to the advisory opinion against the ADI mentioned above, this one draws upon the applicability of the concepts offered by ILO 169 but also resonates with theoretical arguments that support the validity of self-identification within legal systems. It cites local and international authors, including arguments from Kymlicka's analysis of communitarianism – "we must find some other way of securing legitimacy, one that does not continue to define excluded groups in terms of an identity that others created for them".⁵⁵⁷ This perspective ultimately highlights the constitutional legitimacy of the self-identification criteria.

⁵⁵⁴ In *Parecer n. 3.333/CF*, *supra* note 540 at §8, the Republic's Public Prosecutor defends *Decreto n. 4.887* by stating (without any constitutional support) that the self-identification is an ethnic group's essential defining condition and the regularization of land tenure must necessarily respect the plurality of forms of land occupation as a consequence of the socio-cultural and ethnic diversity.

⁵⁵⁵ *Ibid.* at §26.

⁵⁵⁶ *Ibid.* at §33.

⁵⁵⁷ Will Kymlicka, *Contemporary Political Philosophy: an introduction*, 2ed. (Oxford: Oxford University Press, 2002) at 259 [Kymlicka, *Political Philosophy*].

It is relevant to note that while ILO 169 is cited in several documents that defend the constitutionality of *Decreto n. 4.887*, most notably, for determining the validity of the self-identification criteria of socio-ethnic distinct peoples – in all stances, ILO 169 is scarcely regarded as an example of a legal document that deals with the matter at hand.⁵⁵⁸ The role of the ILO Convention within the Brazilian legal system and its constitutional status, are never discussed within the context of the current views regarding the status of human rights treaties *vis à vis* the 1988 Constitution after the 2004 amendment – either as ordinary legislation that is an integral part of the Brazilian legal system guiding constitutional interpretation or as an international human rights treaty that has constitutional status.⁵⁵⁹ It is yet again surprising that the opinion issued by the Human Rights and Minorities Commission does not mention ILO 169 at all.

One of the heaviest critiques imposed by the proposed *Decreto Legislativo n. 44* and the opinions that support its claims of unconstitutionality refer to existing property rights in demarcated lands and the modalities of disappropriation proposed by *Decreto n. 4.887* to resolve ownership issues when the *quilombolas* are not the official owners of the lands they traditionally occupy. The critique is usually phrased with complete disregard to the constitutionally recognized differentiated rights of socio-ethnic distinct peoples and to a pluralist approach towards recognition and restorative justice. Further analysis of the opinions defending *Decreto Legislativo n. 44* reveal, however – that despite its adversarial reasoning towards the enforcement of socio-ethnic distinct peoples’ rights – the critique houses a legitimate concern relating to social justice voiced by representatives on behalf of their constituents. This somehow legitimate critique is often undermined due to the unjustifiable discriminatory language against *quilombolas* that is used to advocate it. The critique addresses an omnipresent social issue in Brazil – this time taking place in rural areas. The critique to *quilombola* land right recognition is not so much a critique preaching the denial of *quilombola* rights *per se* but a justified concern, although not very aptly voiced, that rural afro-descendants, *quilombola* or not, have the possibility to self-declare themselves as *quilombolas*, giving them an advantage on the issues pertaining to agrarian reform

⁵⁵⁸ Parecer n. 3.333/CF, *supra* note 540 at §33; Parecer contrário PDC n. 44, *supra* note 540 at §9, 25, 38 citing ILO 169 as an international compromise assumed by Brazil that should be honoured.

⁵⁵⁹ See, *supra*, text accompanying note 335 for introductory information regarding the debate and, section 4.2.1 below, for a discussion of this debate to a self-determining interpretation of the Brazilian Constitution favourable to socio-ethnic distinct peoples.

and overall access to land over white rural workers of the same economic and social situation.⁵⁶⁰ The critique disregards, nevertheless, other aspects in addition to the self-identification of the communities and traditionally occupied lands that are part of the administrative process and assist in the establishment of the socio-ethnic distinctiveness that entitles some afro-descendant communities and not others to *quilombola* peoplehood and the rights that derive from it. The critique, although ineptly phrased, have validity due to the defence, by some theorists and policy makers that the term *quilombola* has socially evolved to encompass any type of organized afro-descendant rural community.⁵⁶¹

Furthermore, both sides of the constitutionality debate surrounding *Decreto n. 4.887* have highlighted two issues worth discussing briefly in light of the overarching *circular argument* critique proposed in this thesis. For the sake of argument, they will be called ‘socio-ethnic shopping’ and ‘socio-ethnic overlegalization’.

The Public Prosecutor opinion defending the constitutionality of *Decreto n. 4.887* uses anthropological and sociological arguments to defend self-identification. Within this context it defends that the identities of socio-ethnic distinct peoples are socially rather than biologically construed citing the example of overlapping indigenous and *quilombola* identities in the formation of ancient quilombos that remain to this date. Taking this assertion into account, it is interesting to note that current claims of a mixed socio-ethnic identity occur in relation to *quilombola* lands but not indigenous lands. It could be speculated that the more flexible and modern construction of constitutional rights to lands traditionally occupied by *quilombola* peoples as opposed to the strict paternalistic model adopted towards indigenous land rights might motivate mixed communities to disclose or hide this characteristic depending on the land status. The *quilombola* cause, as seen above, was somehow created in 1988 and has become somewhat of a ‘fashionable’ topic of discussion by academics and the judiciary power especially in comparison with the long-lasting indigenous peoples struggle. It could be argued that this factor has prompted a current and interesting legal analysis of the possibilities for the

⁵⁶⁰ See CCJC, Magalhães, *supra* note 543 at §11-14; 21-22; 26-28; CCJC, Oliveira, *supra* note 553 at §19-22; Comissão de Constituição e Justiça e de Cidadania, PDC n. 44, de 2007, Voto em Separado, 3 November 2008, Dep. Moreira Mendes at §6; CAPADR, Sciarra, *supra* note 538 at §36-39.

⁵⁶¹ See *e.g.* Almeida, *Terras*, *supra* note 22 at 133-141; 162-168.

enforcement of *quilombola* rights that does not occur in relation to indigenous peoples' rights and could impose a 'socio-ethnic shopping' pattern when circumstances allow for its existence.

The second issue is raised by the critics of *Decreto n. 4.887*. The agreement with the critique proposed by those opposing the concretization of *quilombola* rights indeed exists but, within the *circular argument* analysis' perspective adopted here, it is based on different motives. In support of *Decreto Legislativo n. 44*, the Constitution and Rural Development Commissions highlight that *Decreto n. 4.887* has overstretched constitutional boundaries in parts of the text of art. 17. This article stipulates that title of traditionally occupied lands shall be collective and indivisible with a compulsory clause stating that the lands are inalienable, unavailable and rights over them are imprescriptible. Furthermore, art. 17 states that the communities will be represented by their "legally constituted associations".⁵⁶² The connection between title specifications with representation by *legally constituted associations* almost certainly implies the issuance of title to these associations representing the communities rather than the communities as such. All titles issued since the promulgation of the decree have been to *legally constituted associations* that either existed previously to the issuance of the title acting as advocacy organizations or as associations that were formed by the communities at stake in order for the property title to be issued.

The criticism exerted by the parliamentary commissions is that the executive decree had no power to recognize property rights to associations.⁵⁶³ From the perspective of the critical analysis proposed in this thesis, however, the criticism extends to the fact that the decree could be imposing a 'socio-ethnic overlegalization' by determining the constitution of a legally framed association in order for communities to be granted their land title. It could be argued that the constitution of an association could create an additional bureaucratic step towards the concretization of the rights of *quilombola* communities and could force aspects of the community's socio-ethnic distinctiveness and organization to fit and be limited to a *legally constituted association* – and it is almost needless to highlight that the parameters historically established for the constitution of associations are part of the dominant society's legal realm.

⁵⁶² *Decreto n. 4.887*, *supra* note 30 at art. 17.

⁵⁶³ CCJC, Patriota, *supra* note 552 at §23; CAPADR, Sciarra, *supra* note 538 at §28.

Another strategy adversarial to the recognition of *quilombola* land rights emerged in 2008 when *Decreto n. 4.887*'s constitutionality was challenged again before a federal court. Another pathway foreseen in 1988 for the control of constitutionality of ordinary legislation is the *diffuse control by exceptional means* criterion.⁵⁶⁴ In other words, the analysis takes place at lower level courts and within an existing case addressing issues beyond the direct constitutionality challenge but directly affected by it.⁵⁶⁵ In this case, filed in 2008, an agro-industrial co-op sued INCRA seeking the annulment of an administrative procedure to demarcate the land historically known as *Invernada Paiol de Telha* claiming the unconstitutionality of the decree establishing the procedure for land demarcation and title.⁵⁶⁶ A preliminary decision, granted anticipated judicial protection to the claimant, thus, suspending the procedure of demarcation until a final decision was reached over the constitutionality of the executive decree. The judge who rendered the preliminary decision interpreted that the unconstitutionality of *Decreto n. 4.887* could be argued on the grounds that art. 216 does not foresee “disappropriation of any site of historical value pertaining to ancient quilombos but only their registration as a site of heritage value” and the land rights mentioned on art. 68 of the ADCT ought to be acquired only through acquisitive prescription⁵⁶⁷ rather than disappropriation”.⁵⁶⁸ INCRA filed an interlocutory appeal seeking the reversal of the decision. The appeal was granted, declaring and justifying the decree’s constitutionality in great detail by emphasizing the principle of protection of human rights above other rights; the constitutional rights of socio-ethnically distinct peoples; and, international law relevant to the theme in analysis.⁵⁶⁹

The first instance decision sadly illustrates the reality about how constitutional rights of socio-ethnic distinct peoples are perceived by lower level courts. The arguments are centred on traditional property rights and civil procedure rather than the human rights standards proposed

⁵⁶⁴ See generally Silva, *supra* note 23 at 52-53.

⁵⁶⁵ See, *supra*, text accompanying note 536.

⁵⁶⁶ The *Instituto Nacional de Colonização e Reforma Agrária* – INCRA is the branch of the executive power at federal level that holds the mandate, through *Decreto n. 4.887* of demarcating *quilombola* lands. Due to INCRA’s status as a federal government entity, the case was filed as an ordinary action filed before the Environmental Issues Chamber of a Federal Court in the State of Paraná where the lands are located. Justiça Federal, Ação Ordinária n. 2008.70.00.000158-3/PR, initiated 7 Jan 2008, pending decision, online: <http://www.trf4.jus.br/trf4/processos>.

⁵⁶⁷ The term acquisitive prescription is used here as a translation of the Portuguese term *usucapião*. See e.g. Maria Paula Gouveia Andrade, *Dicionário Jurídico Português-Inglês Inglês-Português*, 3d ed. (Lisboa: Quid Juris?, 2008) at 206. The *Civil Code of Quebec* offers a similar provision in art. 2923, the extinctive prescription of immovable real rights.

⁵⁶⁸ Ação Ordinária n. 2008.70.00.000158-3/PR, *supra* note 566 [translated by author].

⁵⁶⁹ Justiça Federal, Agravo de Instrumento n. 2008.04.00.010160-5/PR, Acórdão, Deferimento da Tutela Antecipada, 1 July 2008. Neither the demarcation nor the final decision at Chambers’ level had occurred until December 2009.

within the constitutional order.⁵⁷⁰ Moreover, the reference to the traditionally occupied lands by present-time socio-ethnic distinct communities as ancient or as sites of exclusive archaeological or historical interest demonstrates the approach undertaken by decision-makers at all levels regarding constitutional provisions and international legislation sanctioned by Brazil. The interlocutory appeal decision, on the other hand, is elaborated in the exact opposite direction and is a glimmer of hope in a renewed interpretation of the constitutional provisions that guarantee rights to socio-ethnic distinct peoples in Brazil. The decision rendered is a rare example of forward-thinking judicial decision-making on the basis of a pluralist interpretation of the 1988 Constitution.⁵⁷¹

The manoeuvres are innovative due to the inexistence of previous action by private parties or public officials before courts challenging decrees enacted by the executive that establish procedures in general and abstract terms for the identification and demarcation of traditionally occupied lands by socio-ethnically distinct peoples.⁵⁷² The two judicial challenges exemplify

⁵⁷⁰ In the interlocutory appeal's decision, Justice Luz Leiria cites UN monitoring reports from the 2003 Committee on Economic, Social and Cultural Rights; the 2004 *Convention on the Elimination of All Forms of Racial Discrimination* and the 2004 Report of the UN Special-Rapporteur on Adequate Housing following his visit to Brazil highlighting that all three reports mention lack of training in human rights issues and thematic international treaties to judges and public agents in general. On a similar path, the initial claim's representatives attempted to disqualify the land rights of the *quilombolas* by highlighting the occupation's origin. The slave owner had freed her slaves and upon her death in 1864, according to her will, a parcel of her lands was transferred to those who became the first inhabitants of the quilombo *Invernada Paiol de Telha*. The claimants attempted to argue that because they were not runaway slaves their lands would not qualify as a quilombo rather than discuss the fact that the transfer was never formalized. This demonstrates the dominant society's lack of information regarding the past and present existence of *quilombolas* as socio-ethnically distinct peoples or strong prejudice to the *quilombola* identity-building criteria disguised as lack of information.

⁵⁷¹ The contents of the interlocutory appeal's decision by Justice Luz Leiria, that include a thorough comparative constitutional survey of the rights of *maroon* peoples in South and Central America as well as an interpretation of art. 68 of the ADCT on the basis of Santos' perspectives on legal pluralism, reinterpretation of collective rights and intercultural democratic values; such perspectives are analysed in detail in the following chapter alongside other measures that advance the proposed self-determining interpretation of the 1988 Constitution regarding the rights of socio-ethnically distinct peoples. Moreover, the Parecer n. 3.333/CF, *supra* note 540 at §8 proposes that the regularization of rural property in Brazil must respect the plurality of forms of land occupation decurrent from socio-cultural and ethnic diversity.

⁵⁷² Several specific executive decrees that homologate or form part of other stages of the procedure towards the recognition of lands traditionally occupied by both indigenous and *quilombola* peoples have been previously challenged before the Judiciary. Some poignant examples are cited by Deborah Duprah, a well known Public Prosecutor for her forward and pluralist minded Advisory Opinions advocating in favour of the recognition of the rights of indigenous and other socio-ethnically distinct peoples in "Decisões que causam perplexidade", *Poros Indígenas no Brasil* online encyclopaedia, online: ISA <<http://pib.socioambiental.org/direitos/o-papel-do-judiciario>>. Moreover, the adversarial agendas against *quilombola* rights have only emerged in the mid-2000s when the ruralist lobby gave relevance to the matter through court challenges and the legislative decree proposal. As noted by the opinion against *Decreto Legislativo n. 44* rendered by the Office of the Public Prosecutor – Parecer contrário PDC n. 44, *supra* note 540 at §11 – *Decreto n. 3.912*, issued in 2001 and revoked by *Decreto n. 4.887* had

two out of the four procedures foreseen within the Brazilian legal system for constitutionality control, thus, demonstrating deliberate attempts to undermine the consolidation of *quilombola* land rights from several fronts.

3.2 Walking in Circles: the Continuity of Self-Referent Paternalism

The executive and judicial powers, internally and at the international arena, boast that the current mechanisms of guarantee and enforcement of indigenous peoples rights are ‘one of the best in the world’ – mirroring the national culture of self-reference with aggrandizing compliments.⁵⁷³ The 1988 Constitution is placed at the forefront of this perspective, praised as forward-thinking and often referred to as an instrument that grants more rights to indigenous peoples than the international regime. More often than not, this narrow and self-deceptive perspective serves as an excuse for the disregard of international indigenous peoples’ rights standards in legislative and policy-making processes and in judicial decisions.

Self-referent provisions⁵⁷⁴ and the lack of enforcement of consultation mechanisms clearly demonstrate the reigning approach, reinforced by the executive, legislative and judicial powers and to a certain extent by the media, public opinion and civil society that indigenous peoples lack agency to fully enjoy the rights granted to them or to be active decision-making stakeholders in drafting, enforcing and evaluating legislation and policy. Circumstantially, although for different reasons, this paternalistic attitude is also dispensed towards other socio-ethnically distinct peoples.

In the specific case of indigenous peoples, this perception prism has been gradually formed since the first encounters between indigenous and non-indigenous peoples. It was fuelled by the lack of ability and willingness of the first colonizers to deal with diversity and streamlined from there through the segregationist, assimilationist and integrationist models of governance

deeply rooted unconstitutionality and was replaced precisely for this reason but was not questioned at any legislative stance.

⁵⁷³ This trend can be seen in the *Terra Indígena Raposa Serra do Sol* judgement or the Brazilian statement regarding the adoption of the UN *Declaration on the Rights of Indigenous Peoples*, Department of Public Information, “General Assembly Adopts the Declaration on the Rights of Indigenous Peoples”, 13 September 2007, online: UN <www.un.org/Press/2007/ga10612.doc.htm>.

⁵⁷⁴ As exposed above, *supra* note 6, the idea of self-referent or self-cultural referent premises is taken from the work of Marés de Souza. The expression highlights a trend that consists in the use of the dominant society’s cultural paradigm as an underlying principle in legislation and public policy.

adopted in the past five hundred years of co-existence. This framework is, simply put, a *circular argument*.

Law, politics, and all other societal frames are imposed by the dominant society. This everlasting self-referent and paternalistic approach has created profound patterns of forced dependency and subjugation. Within this context, as seen above, it has been proven hard to recognise diverse ways of social organization, customs, languages, creeds and traditions when such ways have been systematically encroached by other cultures and altered due to internal colonization. Moreover, harmful practices of assimilation and integration were considered legitimate until the enactment of the 1988 Constitution and for different reasons have continued thereafter for more than twenty years. In a broader analysis, Santos maintains that is impossible to engage in multicultural dialogues when certain cultures have been reduced to silence and their ways of knowing the world became unspeakable. According to Santos, the great challenge to legitimate multicultural dialogues is to enable those who have been silenced to speak but not through the use of the hegemonic speech that they are usually expected to use.⁵⁷⁵

The imagery of the obsolete culture and the lack of agency of the socio-ethnically distinct peoples who practice it are reinforced by the politically inferior subordination of indigenous institutions. Yrigoyén Fajardo observes that the history of repression has fragmented political systems and often driven them to clandestinity. The illegality or the continuous undermining of the indigenous legal and political structures by the assimilationist and integrationist policies⁵⁷⁶ give them an image of weak, fragmented and underdeveloped when compared with the dominant society's structures. This image is fuelled by the government and often by public opinion and the media to justify the perpetuation of the legal and political *status quo* with regards to the relationship between indigenous and non-indigenous peoples. Inadequate theoretical approximations of the indigenous and dominant society's legal and political structures may hinder an appreciation of the normative and political systems in their entirety considering that colonial history, wars, economic and political mechanisms of marginalization of the indigenous world have reduced the enforceability of indigenous normative systems. This

⁵⁷⁵ Santos, *Crítica da Razão Indolente*, *supra* note 13 at 30.

⁵⁷⁶ Yrigoyén Fajardo, *Pautas*, *supra* note 10 at 26.

perceived image of indigenous peoples' legal and political structures should not mean that those systems have an intrinsic limited capacity and, therefore, should only be allowed to deal with minor cases and/or certain legal fields.⁵⁷⁷

In an essay entitled 'Indian Agency and Taking What's Not Yours' Borrows proposes a critical analysis of the Canadian system that holds true to the Brazilian scenario and perhaps many others as well. Borrows understands that Law has played a crucial role in hiding indigenous peoples' agency from public view and that indigenous peoples have been systematically buried under levels of law and bureaucracy that have little to do with their understanding and aspirations for their place in the world.⁵⁷⁸ Moreover, Borrows highlights that indigenous peoples' "immersion under other's structures was not always from a failure of effort to make it otherwise" as they are not "passive objects in the sweep of colonial history" employing "choice and will to contest and sometimes subvert institutions and ideologies imposed to them".⁵⁷⁹ The interrelation proposed by Borrows, when paralleled with the Brazilian scenario, provides relevant insight - the positive praise for the recognition and affirmation of indigenous rights in the 1980s Canadian Constitution was seen with scepticism by indigenous peoples because those rights should have been of constitutional relevance all along and still, even after their inclusion in the Constitution, much room was left "for subsequent negotiation and interpretation".⁵⁸⁰

This paradigm was also partially expressed by the UN Special Rapporteur in the current Brazilian context: "a lack of empowerment of indigenous peoples in the design, management and delivery of services, and in the decisions affecting their territories and resources, through their own institutions, in partnership with the State and other actors, contributes to a persistent

⁵⁷⁷ *Ibid.*

⁵⁷⁸ John Borrows, 'Indian Agency and Taking What's Not Yours' (2003) 22 Windsor Y.B. Access Just. 253 at 258 [Borrows, "Agency"].

⁵⁷⁹ Furthermore, Borrows pinpoints that dominant society's legislation contained a detailed code that imposed a structure on Indian communities largely inconsistent with their teachings and traditions – although referring to the Canadian context this sentence undoubtedly holds true for the *Estatuto do Índio* and to its framework of reference, still instilled in current court decisions as well as current and proposed (future) executive and legislative decision-making processes. *Ibid.* at 258-259.

⁵⁸⁰ *Ibid.* at 261.

relationship of dependency and inhibits the realization of the right to self-determination”.⁵⁸¹ This self-referent and purposeful self-deceptive paradigm – the *circular argument* - reigns in order to continue the diversification of the legal, social, and political structures only within the dominant society’s terms. The continuation of the paradigm is convenient for the dominant society and its government; thus, the lack of agency ‘excuse’ is retained and the subjugation maintained. The perpetuation of the *circular argument* is fuelled by the quiet denial of rights and mechanisms that could ensure truly plural dialogues in the social, legal and political spheres,⁵⁸² namely the right to ‘internal’ self-determination. The dominant society’s ‘excuse’ of indigenous peoples’ – and other socio-ethnically distinct peoples – lack of agency to enjoy complex rights decurrent from the right of self-determination, such as self-governance rights, or the right to participate in decision-making processes towards the enactment of legislation and policy that affects them - proves to be very convenient in this context, considering they are indeed minority peoples without strong electoral power in a country where political priorities are often established by the amount of votes they shall bring in the next elections or urgent needs reported by the media that are determined by natural disasters or extreme poverty conditions. As seen above, indigenous and other peoples akin to them are not demographically representative, especially when compared to the Brazilian population’s dominant society, which also includes several other vulnerable groups.

The *circular argument* is formed through the denial of indigenous peoples’ agency – agency that was undermined in the first place by the dominant society’s interference with indigenous peoples’ social, legal and political structures and ways of life. The perpetuation of the *circular argument* is not perceived here as an omnipresent and fully conscious process put in motion by legislators, judges and policy-makers in every encounter, legal or otherwise, among indigenous and non-indigenous peoples. The *circular argument* facets of government, legislature or court measures as proposed and illustrated throughout this thesis are considered here to be a by-product of an almost unconscious analytical trend adopted by the dominant society when

⁵⁸¹ Anaya, *Brazil Report*, *supra* note 3 at §25.

⁵⁸² The UN Report points out some aspects of this politically embedded scenario by expressing that indigenous communities and organizations are not effectively in control of the design and delivery of programs directed at their communities. The Special Rapporteur suggests that to be successful and break from cycles of dependency; development programs for indigenous peoples need to be both culturally appropriate and serve to enhance indigenous autonomy, including in the management and delivery of the program benefits. *Ibid.* at §61.

faced with the need or duty to regulate interactions and contextualize the existence and participation of indigenous peoples in the State order.

This section delves further into the *circular argument* debate and the continuity of self-referent paternalism. The analysis of legal instruments in force regarding, directly and specifically, indigenous and *quilombola* peoples' rights currently in force was exhausted in the first two chapters; followed by an analysis of the proposed legislation that blatantly undermines indigenous and *quilombola* peoples' rights in the section above. What follows is an analysis of the perpetuation the *circular argument* as a logical fallacy from the perspective of somehow well-intentioned practical measures to recognize and enforce indigenous peoples' rights on the basis of weak pluralist standards.⁵⁸³ It should be noted that no legislation or policy has been proposed specifically related to *quilombola* rights within this context.⁵⁸⁴ The nearly unconscious perpetuation of the *circular argument* is then examined through a court decision - the emblematic *Terra Indígena Raposa Serra do Sol* case. The analysis that follows seeks to highlight that even well-intentioned proposals may require reinterpretation as they contribute to the perpetuation of the *circular argument* as a consequence of entrenched paternalism and weak pluralist parameters currently in force.

3.2.1 Legal 'Combos' and Action-Reaction Decision-Making

The continuation of the *circular argument* paradigm is convenient for the dominant society and its government. The implementation and enforcement of legislation and policy that recognize socio-ethnic diversity and its implications are widely known to be politically and financially demanding. However, a fair co-existence will only take place when social, legal and political structures become truly diverse.

⁵⁸³ See, *supra*, text accompanying notes 533-534. It should be highlighted, as mentioned above, that the only proposed legislation regarding indigenous peoples and specific to them enacted to date establishes a yearly commemorative date that celebrates the 'Indigenous Peoples' Struggle'. All other bills referred to hereinafter are still under analysis at one of the two Houses of the *Congresso Nacional*.

⁵⁸⁴ Legislation and policy recognizing rights to socio-ethnic distinct peoples in general - under the guise of *traditional peoples and communities* - which incidentally include indigenous and *quilombola* peoples has been enacted. These will be analysed in section 4.2.2 as they are more conducive to the reinterpretation proposed in this thesis taking self-determination approaches into account despite mild *circular argument*-like shortcomings regarding the enforcement of those rights.

As discussed above, legislation favourable to indigenous peoples is usually advanced by representatives from regions with a sizable indigenous population or where those populations' activities may considerably impact the dominant society. Representatives who advocate on behalf of other socio-ethnic distinct peoples are usually connected to small-scale, sustainable and natural extractivist practices and perceive the indigenous cause as worth pursuing.

There are two trends intrinsic to legal, political and judicial decision-making in Brazil that should be highlighted before delving into the description and critique of bills proposed by elected representatives. One is the phenomenon of *action-reaction decision-making*, perhaps a characteristic of minority-related rights' enactment worldwide. The second trend, consolidated within the Brazilian context over the past decade, is designated here as *legal combos*.

The phenomena defined here as *action-reaction decision-making* and *legal combos* are intertwined legal concepts. The action-reaction context is characterized by 'politically loaded' legislation, policy and court decisions motivated by claims other than the direct recognition and enactment of rights inherent to indigenous and other peoples' socio-ethnic distinctiveness. It could be argued that the majority of indigenous or socio-ethnic distinct peoples' rights enacted or proposed were set in motion or came into being to address claims by civil society organizations; public opinion outcries of all sorts often driven by the media; environmental concerns; or under political pressure in response to agrarian reform-related violence. The clearest picture in this regard is aptly explained through Arruda's anthropological lens: "the indigenous cause currently holds a secondary place in Brazil, subjecting itself to other dynamic, political and economic vectors such as agrarian issues, border control strategies, economic development and so on";⁵⁸⁵ consequently, the indigenous rights become unavoidably connected to "other thematic axis, appearing as an extension or a particularity of them".⁵⁸⁶

⁵⁸⁵ Rinaldo Sérgio Vieira Arruda, "Imagens do Índio: Signos da Intolerância" in Luis Donisete Benzi Grupioni *et al.* eds. *Povos Indígenas e Tolerância: Construindo Práticas de Respeito e Solidariedade* (São Paulo: EdUSP, 2001) 43 at 47 [translated by author].

⁵⁸⁶ *Ibid.*

This ‘interference’ of other factors related but not absolutely indissociable from the indigenous or other traditional socio-ethnic distinct peoples’ cause is very evident in jurisprudence; and, in legislation and policy-making processes but the trend is rarely exposed by authors. In most action-reaction scenarios, decision-making may have little to do with pressure or outcries for the direct enactment and enforcement of indigenous and other socio-ethnic distinct peoples’ rights and much to do with legislation, policy or court decisions that attempt to address other co-related issues, for example: sustainability, environment, national defence, accessibility to education and employment, etc. The methodology for the assessment of such arguments here is the discussion of legal documents and practical examples that demonstrate the harmful and eventually positive approaches that the interplay of other legal issues may cause.⁵⁸⁷

Positive and negative consequences of the co-relation between indigenous and other socio-ethnic distinct peoples’ rights and other supposedly assimilated contexts are illustrated by Arruda’s anthropological study of indigenous peoples’ image in relation to the currently trendy environmental and sustainable development discourse. Arruda states that indigenous peoples and their allies propose a rights’ advocacy discourse of political inclusion that seeks to confer a higher degree of legitimacy to their socio-ethnically distinct and environmentally-friendly way of life by means of appropriation of the tools of the colonizer⁵⁸⁸ presenting their cause with “one foot in the tradition of ecological preservation which is inherent to their socio-cultural practices and another foot in the elaboration of a renewed beneficial authoritarianism that holds indigenous peoples along with traditional rural populations almost exclusively responsible for the country’s fauna and flora”.⁵⁸⁹

⁵⁸⁷ Unfortunately, after completing the research on the current and proposed legislation, public policy and court decisions regarding indigenous and other distinct peoples, it is nearly evident that harmful approaches seem to outnumber positive ones.

⁵⁸⁸ This argument has been previously presented by many authors, see especially Rigoberta Menchú, “Identidad, Pluralidad y Tolerancia” *Cultura de Paz* n.14 (Managua: Editorial Universidad Politécnica de Nicaragua, 1998); Enrique Dussel, *Ética de la liberación: en la edad de la globalización y de la exclusión* (Madrid: Editorial Trotta, 1998) [Dussel, *Ética*]; and Dussel, *Invention* *supra* note 67 .

⁵⁸⁹ Arruda, *supra* note 585 at 49 [translated by author].

This appropriation may be conducive to the perpetuation of self-referent stereotypes because indigenous definitions and their historical and cultural perspectives are not validated in legislative, policy and court decision-making processes. Furthermore, the identification of indigenous peoples in the legislation that subordinates them to the preservation of nature and sustainable development constitutes them as objects and consequently denies them legitimacy as subjects.⁵⁹⁰ Moreover, Arruda concludes that this choice of discourse appropriation may hinder the indigenous peoples' strategy and reinforce the stereotypical notion of necessity of preservation of the culture of indigenous peoples rooted in a spectrum of projections on the basis of models and variants of surpassed anthropology⁵⁹¹ - a critique very much in sync with the *circular argument* critique proposed here.

Legal 'combos', in turn, are understood here to define legislation and policy that propose actions to mainstream racialized diversity within the dominant society. A platform to combat discrimination has emerged following strong political lobbying of the Black Movement since the late 1990s. It has culminated with a large number of legal and administrative provisions creating affirmative action policies.⁵⁹² These are geared mainly towards the inclusion and proportional representation of the Afro-Brazilian population in education and the labour market. Nevertheless, in an effort to confer higher legitimacy to these policies created with the objective of increasing ethnic diversity in education and employment, the recognition of affirmative action-related rights to Afro-Brazilians is regularly coupled with the same rights being granted to indigenous peoples as well.⁵⁹³

⁵⁹⁰ *Ibid.* at 48-49.

⁵⁹¹ *Ibid.* at 48.

⁵⁹² See *Lei n. 10.558*, 13 November 2002; *Lei n. 10.639*, *supra* note 112; Kaufmann, *supra* note 27 at 274-286; Iolanda de Oliveira & Petronilha Beatriz Gonçalves da Silva, *Identidade Negra: Pesquisas sobre o negro e a educação no Brasil* (Rio de Janeiro; São Paulo: Associação Nacional de Pós-Graduação e Pesquisa em Educação; Ação Educativa, 2003); "Tarso Genro pede aprovação rápida do sistema de cotas" *Agência Brasil* (20 October 2004) <www.agenciabrasil.com.br>. Marcio Campos, "Movimento negro festeja presença recorde na UFPR" *Gazeta do Povo* (14 January 2005), online:<www.globo.com>.

⁵⁹³ See *Lei Estadual n. 13.134*, Estado do Paraná, 18 April 2001; French, *supra* note 25 at 179-185; Guimarães, *supra* note 25 at 47-77; Kaufmann, *supra* note 27 at 211-286; Magnoli, *supra* note 27. See also, Anaya, *Brazil Report*, *supra* note 3 at §67.

The positive and negative effects of such ‘combo’ policies towards the effective and pluralist enforcement of indigenous peoples’ rights and the rights of peoples akin to them is multi-fold and could be the object of an entire study of its own. Several overlapping layers can simultaneously contribute to the reinforcement of indigenous rights or jeopardize the claim of indigenous peoples and peoples akin to them in their socio-ethnically distinct existence. Consequently, the issue will not be exhausted here but its relevance within the national scenario makes it worth mentioning as a factor that may contribute to the perpetuation of the *circular argument*. It could be speculated that this opportunistic and artificial association between Afro-Brazilians and indigenous peoples geared towards redressing historical wrongs could jeopardize recognition and enforcement of indigenous peoples’ rights considering their diverse histories of internal colonization and socio-ethnic distinctiveness.

Affirmative action programs have been an extremely controversial topic in Brazil in the past decade as the policies have divided public opinion and caused great social commotion.⁵⁹⁴ The pertinence of the analysis resides in the critique of those who oppose the recent racialization of the inclusion debate in Brazil and take into account that no segregationist legislation or policy of the black-versus-white-type has existed in Brazil after the abolition of the slave trade.⁵⁹⁵ Some argue that the racialization of the debate masks core historical reasons for exclusion, mainly the overlap between social and ethnic exclusion. Many authors have speculated that this newly born racial approach to circumstances of exclusion in countries such as Brazil are related with the transplantation of American models of critical race theory and affirmative action policies.⁵⁹⁶ Bourdieu & Wacquant argue that a historical representation, born from the fact that

⁵⁹⁴ The recent publication of two books entitled *Não Somos Racistas: uma reação aos que querem nos transformar numa nação bicolour* and *Fala, Crioulo: o que é ser negro no Brasil* - that could be loosely translated into ‘We Are Not Racist: a reaction to those who wish to transform us in a bicolour nation’ and ‘Speak Out Creole: what does it mean to be Black in Brazil’ by two political analysts well-known to the popular media clearly illustrate the two sides of the debate. Kamel, *supra* note 27 and Haroldo Costa, ed., *Fala Crioulo: o que é ser negro no Brasil* (Rio de Janeiro: Record, 2009). Moreover, Magnoli, *supra* note 27 at 16, describes the development of ethnic-based affirmative action policies in Brazil in political terms stating that an incipient attempt to divide citizens into whites and blacks was sponsored by the Cardoso government as measures towards multicultural inclusion – the Lula government, by its turn, has sponsored the introduction of the first racial-based laws in Brazilian history.

⁵⁹⁵ Kaufmann, *supra* note 27 at 211.

⁵⁹⁶ See Kaufmann, *supra* note 27 and Magnoli, *supra* note 27; Thomas Sowell, *Affirmative Action Around the World: an empirical study* (New Haven: Yale University Press, 2004); Diogo Schelp, “Entrevista: Kwame Anthony Appiah” *Revista Veja*, 1946 (8 March 2006) 11 [Appiah]; and, Pierre Bourdieu & Loïc Wacquant, “On the Cunning of Imperialist Reason” (1999) 16(1) *Theory, Culture and Society* 41.

the American tradition superimposes a rigid dichotomy between whites and blacks, can impose itself in countries where the operative principles and division of ethnic differences, codified or practical, are quite different and which, like Brazil, were until recently considered as counter-examples to the American model, observing furthermore, that a generous comparative analysis can, without its authors even realizing it, contribute to making a problematic made by and for Americans seem to be universal.⁵⁹⁷

Kaufmann argues that while in the United States affirmative action policies were put in place to address a concrete problem of the reversal of disparities caused by official segregation legislation, in Brazil, the inexistence of official racial segregation renders it difficult to gather indicia demonstrating that social disparities are exclusively related to skin-colour.⁵⁹⁸ Appiah highlights that it is precisely the lack of official racial segregation that makes the legal and political framework in Brazil so different than the American one.⁵⁹⁹ Authors acknowledge that prejudice against Afro-Brazilians exist and is a barrier to be conquered, but, as Kaufmann observes: such a barrier is “not the only one, and is not even the most important racial problem in Brazil”.⁶⁰⁰

The core of the matter to the analysis proposed in this thesis regarding affirmative action policies and more specifically the legal combos’ dynamics they impose is the lack of differentiation by Brazilian legislators and policy makers between indigenous and other socio-ethnic distinct peoples that are akin to them; and the other racialized communities who are fully and willingly integrated into the dominant society. The main critique echoes the approach outlined by Sheppard in the Canadian context: “while both aboriginal peoples and racialized communities confront problems of racism at work and educational contexts, the specificity of each group’s situation requires separate analysis”.⁶⁰¹

⁵⁹⁷ Bourdieu & Wacquant, *supra* note 596 at 44-45.

⁵⁹⁸ Kaufmann, *supra* note 27 at 211;

⁵⁹⁹ Appiah, *supra* note 596 at 15.

⁶⁰⁰ Kaufmann, *supra* note 27 at 212 [translated by author].

⁶⁰¹ Colleen Sheppard, “Challenging Systemic Racism in Canada” in Elaine Kennedy-Dubourdieu, ed., *Race and Inequality: World Perspectives on Affirmative Action* (Aldershot: Ashgate, 2006) 43 at 52 [Sheppard, “Systemic Racism”].

Within the Brazilian context, the specific case of indigenous peoples, for instance, is very different than the case of Afro-Brazilians,⁶⁰² considering the legacy of internal colonization and the historical enforceability of the segregationist, assimilationist and integrationist models. It could be argued that the implementation of affirmative action policies is accelerated when it comes to Afro-Brazilian persons because they are a racialized community who despite being entitled to historical redress, share the social and political organization of the dominant society with certain cultural differentiations. The Afro-Brazilian claims are restricted to certain types of cultural recognition and inclusion into the mainstream education and employment structures but the reinterpretation of existing structures, such as language accommodation, is never required. It should be noted, nevertheless, that measures facilitating indigenous peoples' access to mainstream non-indigenous education and employment initiatives should be encouraged to those who seek it considering that they have an important role to play in securing substantive equality for indigenous peoples.⁶⁰³ A core aspect of affirmative action programs simultaneously aimed at indigenous peoples and racialized communities, nevertheless, has been absent from the debate at national level. Sheppard observes that in the case of indigenous peoples, integration may in some instances be insufficient or inconsistent with the preservation of indigenous peoples'⁶⁰⁴ cultural, social and political structures.

The enactment of legal combo-type affirmative action policies and the debates they have enabled, have somehow triggered, for example, the resurfacing of a discourse that reinforces a created pejorative vision of indigenous agency⁶⁰⁵ and pre-existing discriminatory patterns.

⁶⁰² This statement merely claims that the historical circumstances of exclusion of Afro-Brazilians and indigenous peoples are different. It does not seek to diminish or claim the inexistence of historical circumstances that caused the present conditions of exclusion of Afro-Brazilians which are out of this study's scope.

⁶⁰³ Sheppard, "Systemic Racism", *supra* note 601 at 58. Opportunities for admission in universities, regardless of the field of study and geared exclusively to indigenous peoples exist by unilateral initiatives of some universities. See *e.g.* the programs adopted at Universidade Federal do Paraná and Universidade Estadual de Maringá, both public universities in the State of Paraná. The first program includes differentiated options of financial support, health insurance, meal plans and flexibility of certain institutional requirements, online: <www.ufpr.br>. The second offers a round of admission exams exclusive for indigenous persons at locations in close proximity to their lands. This round of exams complements the on campus round offered to all applicants, including indigenous persons, online: <www.uem.br>.

⁶⁰⁴ Sheppard, "Systemic Racism", *supra* note 601 at 58

⁶⁰⁵ See Guimarães, *supra* note 25 at 137-195; Joubert Max Maranhão Piorsky Aires, "Identificações Indígenas e Negras no Universo Infantil Tapeba" in Oliveira & Silva, *supra* note 592, 171 at 171-183; José Roberto Pinto de Góes, "Cotas, um remédio que é veneno" *O Estado de São Paulo* (13 April 2004), online: <www.estadao.com.br>; Rolf Kuntz, "A ilusão das cotas e a realidade da pobreza" *O Estado de São Paulo* (18 May 2004), online:

Moreover, a socio-legal gap has emerged because indigenous education legislation enacted since promulgation of the 1988 Constitution have endorsed an approach towards the local development of education initiatives in tune with cultural values and indigenous pedagogical methods. It could be argued that such approach is a vital initiative towards the achievement of a long-term pluralistic model of education.⁶⁰⁶ However, in their current shape, affirmative action policies encourage the inclusion of indigenous peoples within mainstream education systems and may hinder socio-ethnic differentiated initiatives as they become an excuse for halting and trampling further development of localized indigenous efforts considering overall inclusion, regardless of the type of inclusion, takes place through the affirmative action policies.

The aim of this brief description and critique of the affirmative action policies introduced in the past decade and currently in force in Brazil does not serve the purpose of dismissing the connections between the reality of ethnic discrimination and the indigenous and other socio-ethnic distinct peoples' cause. The role of action-reaction decision-making in this and other fields exemplified above, however, have deeply impacted and continue to influence legislative, policy and judicial decision-making processes thus serving as a background analysis to the sections that follow.

3.2.2 So Many Bills, So Little Change: Action-Reaction Interest Protection

One of the concluding remarks of the UN *Report on the Situation of Indigenous Peoples in Brazil* pinpoints that further efforts are needed to ensure that indigenous peoples are able to exercise control over their lives, communities, and lands within a State framework that is respectful of diversity.⁶⁰⁷ This assertion is complemented by a caveat – that incidentally demonstrates the omnipresence of the *circular argument* - the sentence that immediately follows the Special Rapporteur's statement that further efforts are needed declares that "sustaining such efforts is complicated by entrenched paternalism toward indigenous peoples, by an apparent lack of

<www.estadao.com.br>; André Augusto de Castro, "Judiciário de olho nas cotas" *Assessoria de Comunicação Social da Universidade de Brasília* (16 November 2004), online: <www.unb.br/acs/unbagencia>.

⁶⁰⁶ The analysis proposed in Section 2.2.2 illustrates this trend.

⁶⁰⁷ Anaya, *Brazil Report*, *supra* note 3 at §71.

understanding among much of the public and the news media of indigenous issues, and by opposing political forces”.⁶⁰⁸ The role of opposing political forces has been addressed above in the analysis of the adversarial agendas. Entrenched paternalism, however, can be present in both adversarial and favourably intentioned legislation and policy. The analysis that follows comprises the other bills proposed before the *Congresso Nacional* from 1990 to 2009 with the objective of replacing the *Estatuto do Índio* or otherwise aiming at the recognition and mostly the enforcement of indigenous peoples’ rights or rights related to the co-existence of the indigenous peoples and the dominant society in specific settings.⁶⁰⁹

A *circular argument*-centred critique of the bills requires a methodological and analytical choice that takes into account the action-reaction nature of the legislative process in Brazil regarding indigenous rights described above and the lack of harmonization of government commitments towards the economic development of indigenous⁶¹⁰ and often other socio-ethnic distinct peoples as well. The method entails the allocation and critique of the bills within four different categories: a)proselytistic action-reaction; b)tangential action-reaction; c)action-reaction for the protection of others; and, d)power-sharing action-reaction; followed by a separate analysis of the core legislative bills seeking to replace the *Estatuto do Índio*.

The first category, proselytistic action-reaction, comprises four bills that are blatant logical fallacies. While two of these bills are well-intentioned, they also demonstrate the dominant society’s cultural self-reference patterns in legislative drafting which by consequence, perpetuate the *circular argument*.⁶¹¹ The other two bills in the first category were proposed by representatives of the evangelical lobby. The bills vilify indigenous culture and promote the lack of agency discourse.⁶¹²

⁶⁰⁸ *Ibid.*

⁶⁰⁹ In fact thirty bills were proposed in this time frame. The three bills proposed to replace the *Estatuto do Índio* will be addressed in 3.2.2.3 and *Projeto de Lei do Senado n. 216/08*, *supra* note 367 and *Projeto de Lei do Senado n. 69/04*, *supra* note 470 have been discussed in 2.2.1 and 2.2.4, respectively, as part of contextualized analyses of criminal liability and multiple attribution of lands.

⁶¹⁰ As highlighted in the concluding remarks of Anaya, *Brazil Report*, *supra* note 3 at §75.

⁶¹¹ *Projeto de Lei da Câmara dos Deputados n. 45/07*, *supra* note 198 and *Projeto de Lei n. 2.669/07*, 19 December 2007.

⁶¹² *Projeto de Lei n. 1.057/07*, 11 May 2007; *Proposta de Emenda à Constituição 303/08*, 11 November 2008.

The second category, tangential action-reaction, illustrates the trend through which indigenous peoples' rights are recognized as a consequence of or as an 'add-on' to other thematic axes sometimes loaded with circular argumentation but at other times also advancing a pluralist recognition of indigenous peoples and other socio-ethnic distinct peoples' rights. Three bills in the third category, action-reaction for the protection of others, demonstrate the trend of protection of rural workers or small-scale farmers who are not socio-ethnically distinct peoples;⁶¹³ this same trend, as seen above, is also present in the adversarial agendas debate regarding *quilombola* land rights. Two bills represent a blurry line found between the third category, action-reaction for the protection of others; and the fourth category, power-sharing action-reaction which discusses the power-sharing arrangements between dominant society stakeholders over the enforcement of indigenous peoples' rights.⁶¹⁴ The fourth category gathers the highest amount of bills from all categories proposed here, and, ironically, not one of them refers to potential power sharing with indigenous peoples, their communities or organizations.

The first category contains the set of proposals more closely related with the *circular argument* critique while the remaining categories and core complementary legislation proposals contain some favourable provisions that promote pluralist approaches to the recognition of indigenous peoples and other socio-ethnic distinct peoples' rights. All proposals in the first category are unmistakably embedded in a hegemonic discourse of cultural imperialism; consequently, they are the object of a separate and more detailed analysis.

3.2.2.1 Proselytistic Action-Reaction

Existing and proposed legislation to recognize and enforce indigenous peoples' rights in Brazil is generally deeply embedded in a self-referent and hegemonic discourse.⁶¹⁵ The impact and

⁶¹³ *Proposta de Emenda à Constituição n. 409/91*, 29 August 2001; *Projeto de Lei do Senado n. 177/04*, 4 June 2004; *Projeto de Lei n. 3.764/08*, 17 July 2008.

⁶¹⁴ *Projeto de Lei Complementar n. 260/90*, 29 October 1990; *Projeto de Lei Complementar n. 273/08*, 6 March 2008.

⁶¹⁵ See Marés, *Renascença*, *supra* note 6 at 161 and Santos, *New Common Sense*, *supra* note 5 at 428-441.

influence of the dominant society's values is often expressed through measures proposed by legislators and policy-makers that lack participation and/or consultation of the socio-ethnically distinct communities concerned.

This high-level of self-reference can be compared to Bourdieu & Wacquant's notion of *cultural imperialism* presented as "the power to universalize particularisms linked to a singular historical tradition causing them to be misrecognized as such".⁶¹⁶ In this sense, the authors propose that the dominant society's paradigms are transformed into universal common sense and progressively ignore the complex and controversial realities of that particular society becoming "tacitly constituted as a model for every other and as a yardstick for all things" in "the context of massive and multifarious state retrenchment".⁶¹⁷ The *circular argument* perpetuation within this context can be identified in all four bills grouped here that have been proposed in 2007 and 2008.

Projeto de Lei da Câmara dos Deputados n. 45/07 seeks to change the name of *Parque Indígena do Xingu* to *Parque Indígena do Xingu Orlando Villas Boas*. Xingu refers to the name of the extensive river that crosses the indigenous land. The river has maintained its indigenous name against the odds, in opposition to other landmarks in the region historically renamed to meet Eurocentric religious standards. Since the recognition of the indigenous land in the 1960s, the word Xingu has also come to define the people composed by the fourteen different ethnic groups that have traditionally inhabited or were transferred to the area. The proposed change is to honour Orlando Villas Boas, one of the key players in the creation of the *Parque Indígena do Xingu*.⁶¹⁸ The segregationist approach proposed for the creation of *Parque Indígena do Xingu* and the integrationist strategy Villas Boas used during his long-term mandate as manager of the park are at the core of an unsolved controversy.⁶¹⁹ Villas Boas was undeniably an indigenous

⁶¹⁶ Bourdieu & Wacquant, *supra* note 596 at 41.

⁶¹⁷ *Ibid.* at 42.

⁶¹⁸ See *supra* note 198.

⁶¹⁹ See e.g. Menezes, *supra* note 21 at 286-292.

peoples' advocate, his ideals, however, were very true to the integrationist era in which he lived and worked.⁶²⁰

The decision to propose the change in the name of the lands is an unequivocal political move of great impact when analysed through the *circular argument* lens. The proposal to include a dominant society's integrationist referential to the name of an indigenous land while recognition is expected to move forward on the basis of the 1988 Constitution pluralist compromise is puzzling. Indeed, Villas Boas advocated for the protection of cultures and the survival of indigenous peoples but he also believed in the integrationist need of an emissary of the dominant society to manage the lands and protect those living within them – a role he undertook at Xingu for many decades. It seems absurdly culturally imperialistic for the legislature to attempt to impose the name change in relation to lands traditionally occupied by indigenous peoples. In an era in which the recognition of the right to self-determination, including the right to self-government, is suggested as the main tool for enforcement of indigenous peoples' rights, the proposition seems out of place. In fact, it moves in the opposite direction of restorative justice trends that encourage the reinstatement of indigenous names to indigenous sites that were renamed according to dominant standards or the dual naming of sites of shared heritage throughout the world. A brief comparative analysis of dual naming policies demonstrates that the practice is common in relation to places of shared heritage by indigenous peoples and the dominant society.⁶²¹ The decision to propose the renaming of a place traditionally occupied by indigenous peoples and identified only by its indigenous name seems to be contradictory with, to say the least, the pluralist constitutional standards.

⁶²⁰ Orlando Villas Boas was born in the State of São Paulo in 1914 and lived in the Xingu region for several decades. He died in São Paulo in 2002.

⁶²¹ In Australia, for instance, a dual naming policy adopted in 1993 in the Northern Territory and the geological formation known as Ayers Rock was renamed Uluru/Ayers Rock. The *Northern Territories Rules of Nomenclature 2001* (N.T.) are an updated version of that policy which does not apply for areas where federal nomenclature rules apply as established by the *National Parks and Wildlife Act 1975* (Cth.) and the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth.). The federal legislation states that only former original feature names shall be used rather than the dual naming standard. For instance, the park that houses the Uluru/Ayers Rock is named only in the Pitjantjatjara language as Uluru Kata Tjuta National Park. New South Wales has a similar dual naming policy, see e.g. Land and Property Management Authority; Geographical Names Board of New South Wales, *Dual Naming – Supporting Cultural Recognition*, April 2010, online: <<http://www.gnb.nsw.gov.au>>. Similar standards of original or dual nomenclature are adopted in New Zealand, see, e.g. *New Zealand Geographic Board (Ngā Pou Taumaha o Aotearoa) Act 2008* (N.Z.), online: <<http://www.legislation.govt.nz>>.

The other bills in the first category were presented with clear religious intent by members of the evangelical lobby group. The first one, *Projeto de Lei n. 2.669/07*, proposes that the Catholic Church Blessed Father José de Anchieta be designated as Patron of the Indigenous Peoples. Whilst so many rights remain to be recognized and enforced to improve the often dismal situation of indigenous peoples and considering the long-standing political and legal separation of State and church in Brazil – the proposition of such a bill in 2007 is nearly surreal. Anchieta, a missionary who lived in Brazil from 1552 to 1597 was undoubtedly an outspoken whistleblower of the abuses committed against indigenous peoples in Brazil and his written work is ideologically connected to Francisco de Vittoria and Bartolomé de las Casas. The proposal, however, is insufferably embedded in patterns of cultural imperialism. The proponent mentions Anchieta’s ability as a linguist and mediator, but later and matter-of-factly refers to him as a “pacifier of indigenous peoples”.⁶²² Besides the use of discriminatory language, a critique of the bills could also be extended to the fact that the dominant society is, once again, imposing its own standards towards socio-ethnically distinct peoples, this time around, the religious convictions of the majority of the country’s population. A considerable number of indigenous peoples practice the Christian faith, more specifically, evangelical Christianity, but this hardly justifies the measure. The core of the matter concerns the belief that such provision has a place within the pluralist constitutional framework in place.

This perspective is somehow raised by an advisory opinion against the enactment of the bill by the House of Representatives’ Education and Culture Commission. The opinion deems the proposal unnecessary considering existing legislation regarding symbolic references to indigenous peoples.⁶²³ The advisory opinion states that “the choice could cause problems within today’s communities because some indigenous people practice protestant faiths while others maintain their original pre-Colombian religions”.⁶²⁴ The advisory opinion undertakes a positive pluralist perspective but it also has its troubling aspects. It rebuts the bill on the basis of pre-existing legislation commemorating indigenous peoples rather than the blatant generalization of a one-sided cultural claim. Moreover, the plurality within the indigenous

⁶²² *Projeto de Lei n. 2.669/07*, *supra* note 611 at §5.

⁶²³ Comissão de Educação e Cultura, *Projeto de Lei n. 2.669*, de 2007, Voto, 12 March 2009, Rel. Dep. Angelo Vanhoni at §3-4 [CEC, Vanhoni], referring to *Lei n. 11.696*, *supra* note 534 and *Lei n. 5.540*, 2 June 1943 that establishes the 19 of April as *Dia do Índio*.

⁶²⁴ CEC, Vanhoni, *supra* note 623 at §5 [translated by author].

groups is also generalized by the Culture Commission by implying that individuals have either been religiously converted by the dominant society or still practice a permafrost version of their pre-Colombian religions. Although possibly unintentionally, the Commission's discourse clearly disregard change and adaptation of traditionally practiced religions or creeds and religious' syncretism. This approach demonstrates the insistence of legislators to include the hegemonic discourse within a framework that should include plurality in the realm of religion too.⁶²⁵

The pattern of cultural imperialism and hegemonic religious paradigm is found in the two remaining proselytistic propositions examined within the first category. *Projeto de Lei 1.057/07* is a generalizing antic that completely disregards the universal human rights protection granted by the Constitution. It seeks to "combat nocive traditional practices and the protection of the fundamental rights of indigenous children and those pertaining to other non traditional societies".⁶²⁶ First of all, it should be noted that the term "non traditional societies" is employed here in contrast to dominant or hegemonic society rather than the most current use of the term traditional peoples as a synonym to socio-ethnic distinct societies. Secondly, the harmful practices referred to are usually generalized as 'indigenous infanticide' as if to imply this is a current and common feature of all indigenous peoples in Brazil.⁶²⁷ Reactions supporting or refuting *Projeto de Lei 1.057/07* have been tremendous and widely publicized by the media. The bill is strongly related to a campaign by a foreign right-wing missionary movement that denounces practices defined as indigenous infanticide.⁶²⁸ The issue gained even

⁶²⁵ The Constitution, Justice and Citizenship Commission has not issued opinion regarding the bill, therefore, a parliamentary debate concerning its constitutionality is still lacking. Perhaps the most notable imposition of the hegemonic religious discourse, despite the separation of church and State, is the statement in the 1988 Constitution's preamble that it is promulgated under the protection of God.

⁶²⁶ *Projeto de Lei n. 1.057/07*, *supra* note 612.

⁶²⁷ *Ibid.* at art. 2 lists as harmful practices all attempts against the life or psychological and physical integrity of persons, such as: homicide of a newly-born who is the child of a single parent; of one of newly-born twins; newly-born with a physical or mental handicap; when there's gender preference; if a short time has elapsed since the birth of an elder sibling; if the number of children exceeds the number deemed appropriate for the group; if the newly-born has a birthmark; if the newly-born is considered a bad-omen or curse for the group; intentional homicide by malnutrition; perpetration of sexual abuse or harassment in case of developmental problems [translated by author].

⁶²⁸ The movement is linked to the production of the movie *Hakani* which has its own website. The director is connected to the American evangelical organization Youth with a Mission but there is no information available regarding the producers of the movie. According to the movie's website *Hakani* is a purported survivor of indigenous infanticide. The initial and more complete interface of the website is in English with poorly and incomplete translations of parts of it to Portuguese. Moreover, the site makes indiscriminate and uncredited use

more momentum with the proposition of an amendment to art. 231 of the Constitution through *Proposta de Emenda à Constituição n. 303/08* which implies that the recognition of the social organization, customs, creeds and traditions of indigenous peoples are conditioned to the inviolability of the right to life.⁶²⁹

Both propositions disregard the systematic complementarity in the interpretation of constitutional norms, most notably, fundamental rights. *Projeto de Lei n. 1.057/07* overlooks the fact that legislation must conform to constitutional principles. The right to life is protected not only in art. 5 of the 1988 Constitution but in the specific case of children and adolescents by the *Estatuto da Criança e do Adolescente*.⁶³⁰ Within this context, the *Proposta de Emenda à Constituição n. 303/08* states the obvious by proposing to remedy the concern voiced through the *Projeto de Lei n. 1.057*. Besides demonstrating the proponents' misinformation about constitutional rights and hermeneutics; the issue of highest interest to the critique developed here is the form and vocabulary used in both proposals as well as the argumentative paths taken in advisory opinions both in favour and against the bills.⁶³¹

All modalities of infanticide listed in the bill refer to homicide of children after birth. Therefore, the bill does not implicate the pro-life versus pro-choice debate, although it should

of images and pictures of indigenous peoples. It is filled with 'anonymous testimonies' of non indigenous peoples who work in the Amazon. The project supporters are several organizations of pro-life religious ideology. A trailer of the movie has gone viral after being posted online. The montage interchanges disconnected images of indigenous peoples giving testimonies in their own languages, subtitled in English without translation credits, and roughly dramatized images of a community burying an infant alive. The testimonies are allegedly from relatives of infanticide victims who were coerced to sacrifice their children. The website provide supporters with the e-mail addresses of the President of *Congresso Nacional* and the House of Representatives Human Rights and Minorities Commission as well as a sample letter of support to the bill to be sent to Brazilian Embassies and Consulates. The world-renowned organization Survival International and the Brazilian Association of Anthropology have issued statements refuting the credibility and impartiality of the video and the organizations promoting it. See Survival International, Stephen Corry, "Hakani and paving the road to hell", online:<www.survivalinternational.org>; Associação Brasileira de Antropologia; João Pacheco de Oliveira, "Infanticídio entre as populações indígenas – Campanha humanitária ou renovação do preconceito?", online:<www.abant.org.br>; Elaine Moreira *et al.*, "Crianças Indígenas: intrusão legislativa" *Correio Braziliense* (7 July 2009) 15.

⁶²⁹ *Proposta de Emenda à Constituição n. 303/08*, *supra* note 612 at art. 1.

⁶³⁰ *Lei n. 8.069*, 13 July 1990.

⁶³¹ For example, those who defend the measures proposed compare statistics of child mortality among indigenous children to those of non indigenous children to suggest that a higher mortality rate before the age of five is related to infanticide practices. The fact that indigenous peoples usually lay below the lines of quality of life of the dominant society and, therefore, health standards would be lower and mortality rates higher, is not at all considered.

be noted that abortion is illegal in Brazil with very few exceptions.⁶³² In a statement against *Projeto de Lei 1057/07*, Stephen Corry, director of Survival International, objectively points out that it is “already illegal in Brazil to kill children: there is no need for new legislation”.⁶³³ Furthermore, an advisory opinion of the Human Rights and Minorities Commission highlights that the bill adopts an outdated view of indigenous agency that does not follow advances supported by indigenous peoples, for example, ILO 169.⁶³⁴ The opinion refers directly to ILO 169 within the context that indigenous peoples “shall have the right to retain their customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights”.⁶³⁵

The proponents of the bills maintain that cultural relativism cannot be tolerated if the right to life and dignity are at stake. A valid point, if the proposition of the bills were not an oxymoron considering the general legislation already in force. The heart of the matter is, however, that by presenting the practice of infanticide as widespread and indiscriminate – the entire indigenous population is vilified and demoralized by their portrayal as barbaric and cruel.⁶³⁶ Corry states that *Projeto de Lei n. 1.057* “rolls Brazil back centuries, to a time when ‘heathen’ natives were attacked and destroyed by colonists relying on religious belief which justified their own barbarism”.⁶³⁷

Critics of the bills do their share to complicate matters by adding their own version of a circular hegemonic discourse. Those refuting the infanticide claim do so, not by clarifying unverified data about its current practice but with data about the generally unsafe condition of

⁶³² *Código Penal*, *supra* note 362 at art. 128.

⁶³³ Corry, *supra* note 628 at 3.

⁶³⁴ Comissão de Direitos Humanos e Minorias, *Projeto de Lei n. 1.057*, de 2007, Voto, 17 July 2008, Rel. Dep. Janete Rocha Pietá at §4-5. The Commission also suggests that the bill should be amended as to replace the criminalization of infanticide by the promotion of pedagogical campaigns within the ‘tribes’ that still practice it. The assertion demonstrates that the use of controversial vocabulary is still commonplace even among those who are mandated with the protection of indigenous peoples.

⁶³⁵ ILO 169, *supra* note 212 at art. 8(2).

⁶³⁶ Moreira *et al.*, *supra* note 628 at §3.

⁶³⁷ Corry, *supra* note 628 at 3. The justification of the *Projeto de Lei n. 1.057/07*, *supra* note 612 states that the bill seeks to enforce the *International Convention on the Rights of the Child* mentioning efforts by the international community to end female genital mutilation. The inclusion of this problem, which is inexistent in Brazil, can only be interpreted as intentionally misleading.

children of all backgrounds and ethnicities and by defending the pluralistic approach adopted by the 1988 Constitution which purportedly allows for the continuation of practices if they indeed exist. On the upside, all of them defend the right of indigenous peoples to be consulted regarding the legislation proposed.⁶³⁸

The most puzzling argument, however, comes from the advisory opinion issued by the Constitution, Justice and Citizenship Commission against the *Proposta de Emenda à Constituição n. 303/08*.⁶³⁹ The opinion defends a blanket norm of cultural relativism by interpreting indigenous rights as fundamental rights, thus, hindering any proposal for constitutional amendments relating to them. Consequently, it states that any practice in accordance with indigenous traditions should be considered constitutional. Within this proposed scenario, not only would infanticide practices be tolerated but also the application of traditional criminal law should not follow the caveat established by the *Estatuto do Índio* that restrains the use of degrading punishments or the death penalty. Surprising as these arguments may sound coming from the Constitution, Justice and Citizenship Commission, the justification for the cultural relativism is restricted to indigenous peoples with “little contact with the so-called civilization and who maintain themselves in a primitive state”. Additionally, it defends that it is not possible to amend the text because “the original constituent power demonstrated its clear intention of tutelage towards the indigenous culture and the will to prevent interferences of other cultures towards the traditions of the forest-dwellers”. After stating that it does not defend infanticide, and enumerating several animal species as well as ancient civilizations that practice it, the advisory opinion maintains that the Constitution’s role is not to defend the practice in itself but to defend traditional practices “of groups who live in its most primitive form”.⁶⁴⁰

The debates surrounding the proposal of all four bills analysed thus far demonstrate challenges and backlash presented by hegemonic discourses recurrent in legislative decision-making. The

⁶³⁸ Moreira *et al.*, *supra* note 628; Pacheco de Oliveira, *supra* note 628 and Corry, *supra* note 628.

⁶³⁹ Comissão de Constituição, Justiça e Cidadania, Proposta de Emenda à Constituição n. 303, de 2008, Voto, 10 February 2009, Rel. Dep. Regis de Oliveira.

⁶⁴⁰ *Ibid.* at §11; 50; 71 [translated by author]. Further confusion permeates the opinion as it categorizes the constitutional status of indigenous rights as affirmative action initiatives.

next sections comprise proposals that are less controversial but also contribute in substantive terms to the perpetuation of the *circular argument* and in formal terms to the delay in the recognition of indigenous and to some extent other soico-ethnic distinct peoples' rights.

3.2.2.2 Other Types of Action-Reaction Interest Protection

The other proposed bills can be classified into the three remaining categories. The second category, tangential action-reaction, includes initiatives of recognition of indigenous rights as a consequence or an 'add-on' to other thematic axis - advancing a pluralist approach to indigenous peoples' rights or perpetuating the *circular argument*. The third category, action-reaction for the protection of others, highlights the trend of bills proposed for the protection of small-scale farmers who are not socio-ethnically distinct from the dominant society as well as the legislative power attempts to regulate or clarify the State's control over natural resources. The fourth category, power-sharing action-reaction, describes proposed agreements between dominant society authority sources over the enforcement of indigenous peoples' rights.

Tangential action-reaction includes proposals in the fields of education, culture, health, criminal law and environmental protection in traditionally occupied lands. The nature of the proposed legislation is very similar to the existing framework of non-cohesive efforts towards pluralism described in the previous chapter.

Projeto de Lei n. 2.462/91 and *Projeto de Lei 6.418/05* are extensive legislation proposals in the criminal legal field. They address, respectively, crimes against humanity; and, hate crimes such as homicide, attacks or defamation related to discrimination on the basis of race, ethnicity, colour, religion or origin as well as work-place discrimination on the same grounds, or attack to cultural manifestations directly related to ethnic or religious identities.⁶⁴¹ *Projeto de Lei n. 2.462/91* directly mentions indigenous peoples in relation to protection against genocide proposing that the displacement of indigenous peoples with the intent of partially or fully decimating the community or the intentional trespassing on indigenous lands for economic

⁶⁴¹ *Projeto de Lei n. 2.462/91*, 6 March 1992; *Projeto de Lei n. 6.418/05*, 14 December 2005.

exploitation be typified as genocide.⁶⁴² The existence of a proposal acknowledging the vulnerability of indigenous peoples as potential victims of genocide is very positive; nevertheless, the suggestion that invasion of indigenous lands for economic exploitation should be considered amongst the typified conduct could be considered an abusive overstretch of the subjective boundaries and historical significance of the crime of genocide. Furthermore, the enactment of new genocide-related legislation appears to be quite unnecessary considering Brazil signed the *Convention on the Prevention and Punishment of the Crime of Genocide* in 1948 and ratified it through *Decreto n. 30.822* in 1952.⁶⁴³

Projeto de Lei n. 3.352/04 connects land rights with criminal law. It proposes an amendment to art. 58 of the *Estatuto do Índio*. It suggests that the “intrusion or non-authorized use of indigenous lands” and “non-authorized use of indigenous lands’ natural resources” be added to the list of crimes against indigenous peoples and culture.⁶⁴⁴ The bill is an essentially positive tool; however, it is conditioned to the existence of the *Estatuto do Índio* – and in spite of being a bold move forward towards the protection of indigenous peoples’ rights within the existing legal framework, at this moment in time, a more cohesive approach would be to advance the enactment of overdue core legislation in accordance with the 1988 Constitution. It is relevant to note, however, that the justification of the bill is entirely built upon the need to adapt national legislation to the requirements of ILO 169.⁶⁴⁵

Projeto de Lei n. 5.442/09, proposed by a representative on behalf of the ruralist lobby in 2009, brings the tangential action-reaction to the environmental field. It proposes an amendment to the *Estatuto do Índio* stating that if indigenous persons or groups are declared guilty of committing environmental crimes on indigenous lands, this would imply the cancellation of

⁶⁴² *Projeto de Lei n. 2.462/91*, *supra* note 642 at art. 10, I & IV.

⁶⁴³ *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 U.N.T.S. 277; incorporated into the Brazilian legal system through *Decreto n. 30.822*, 6 May 1952.

⁶⁴⁴ *Projeto de Lei n. 3.352/04*, 13 April 2004 [translated by author]. The sentencing proposed is of 3 to 6 years of reclusion regime. See text accompanying notes 368-371 for an analysis the scope of art. 58.

⁶⁴⁵ *Ibid.* at §1. ILO 169, *supra* note 212 at art. 18 (adequate penalties shall be established by law for unauthorized intrusion upon, or use of, the lands of the peoples concerned, and governments shall take measures to prevent such offences).

the title and the return of the lands' possession to the State.⁶⁴⁶ The discourse justifying the bill is filled with circular and generalizing argumentation, e.g.: “indigenous peoples are protected by soft legislation and feel unobliged to respect Brazilian laws”, “illicit mining and logging are practiced indiscriminately in indigenous lands and tolerated by the authorities to avoid conflict with indigenous communities who are protected by a powerful network of non-governmental organizations”, or “when an area is assigned by the State for indigenous usufruct, the State expels hundreds of farmers who own land title and also illegal settlers who occupy the area in good faith for the exclusive use of the indigenous peoples”.⁶⁴⁷ Furthermore, in an interview about the bill, the proponent stated that the objective is not to punish the community but to encourage indigenous peoples to create internal monitoring mechanisms; adding that the measure is necessary because “in the tribe the idea of one individual committing a crime does not exist, it is collective punishment because the crime is collective”.⁶⁴⁸ The bill has not yet been examined by the Constitution Commission; if an unbiased opinion is issued, it should be declared unconstitutional *vis à vis* the universal premise of individual criminal responsibility of natural or moral persons consolidated in art. 5, XLV of the 1988 Constitution as well as the unavailability and imprescriptibility of indigenous land title according to art. 231, §4. Moreover, the bill does not consider the possibility of the undue burden of proof that will befall indigenous peoples for actions undertaken by others in their lands – an unfortunate and widespread reality. The discriminatory nature of the debate is evidenced, furthermore, by the fact that if the environmental crime is committed by a private land owner, the titles of property and/or possession are never at stake in the sentencing process.⁶⁴⁹

Tangential action-reaction in the fields of education, culture and health has enabled the proposal of four bills essentially favourable to indigenous peoples. Within the health field, *Projeto de Lei n. 6.952/02* proposes the creation of epidemiology, environmental health and indigenous health national systems. The proposition is the result of a joint study undertaken by

⁶⁴⁶ *Projeto de Lei n. 5.442/09*, 17 July 2009. The proposed amendment establishes that the lands would be reallocated only after sentencing by the final possible instance of judgment in accordance to *Lei n. 9.605*, 12 February 1998 that disciplines environmental crimes.

⁶⁴⁷ *Ibid.* at §1,2,4 [translated by author].

⁶⁴⁸ Iberê Thenório, “Projeto prevê perda de reserva para índios que cometerem crimes ambientais” *Globo Amazonia* (9 November 2009), §1-2, online: <www.globoamazonia.com> [translated by author].

⁶⁴⁹ *Lei n. 9.605*, *supra* note 646.

the Ministry of Health and the Ministry of Planning, Budget and Management in order to unify several non-cohesive policies, projects and initiatives currently in force and provide more (cost)-effective health services.⁶⁵⁰ Undoubtedly, the proposed approach is an interesting solution to the chaotic policies of indigenous health currently in force. Nevertheless, it does not foresee any modality of consultation or participation of indigenous peoples in the processes of creation, management or evaluation of the system once it is in place⁶⁵¹ despite stating that the ethnic and cultural uniqueness of each community should be considered in actions towards the promotion, protection and recovery of indigenous peoples' health.⁶⁵²

In the cultural field, *Projeto de Lei n. 3.242/04* proposes an amendment to *Lei n. 8.313* that establishes and disciplines the National Program for Culture – a legislative tool that provides and ensures funding for the arts, most notably, the visual arts.⁶⁵³ The bill seeks to enlarge the program's mandate to include “promotion of indigenous, Afro-Brazilian, minority cultures, and, traditional folkloric manifestations with the objective of preserving the roots of the national culture”.⁶⁵⁴ Moreover, it proposes priority should be given to manifestations considered “roots of national folklore”.⁶⁵⁵ Despite representing a relevant step forward for indigenous and other socio-ethnic distinct peoples, the bill dangerously implies a permafrost approach to indigenous and other traditional cultures presenting them as closely related to folklore rather than living and evolving manifestations.

In the education field, *Proposta de Emenda à Constituição n. 48/07* proposes the increase in the outreach of art. 210 of the 1988 Constitution. The current provision ensures minimal standards of use of cultural, artistic, national and regional values in the elementary education curricula also safeguarding the right of indigenous communities to the “use of their own languages and their culturally-specific learning methods”.⁶⁵⁶ The core of the proposition is the

⁶⁵⁰ *Projeto de Lei n. 6.952/02*, 11 June 2002.

⁶⁵¹ *Ibid.* at art. 11-14; 20.

⁶⁵² *Ibid.* at art. 20, III.

⁶⁵³ *Lei n. 8.313*, 23 December 1991.

⁶⁵⁴ *Projeto de Lei n. 3.242/04*, 23 March 2004 at art. 1, X [translated by author].

⁶⁵⁵ *Ibid.* at art. 1, XI [translated by author].

⁶⁵⁶ *Constituição, 1988*, *supra* note 23 at art. 210, §2; see also, *supra*, text accompanying note 275.

addition of another caveat - the constitutionally guaranteed availability of elementary education in sign language - but the proponent also takes the opportunity to suggest the increase in the outreach of the article's standards from elementary to elementary and secondary education. Consequently, if approved, it would expand the guarantee for the use of indigenous languages and learning methods to secondary education as well. Sadly, as highlighted above, due to the social damage caused by the *circular argument* and its perpetuation, the use of indigenous languages and distinct learning methods is currently the exception rather than the rule in elementary education initiatives.⁶⁵⁷

Still within the education field, *Projeto de n. 4.257* was presented in 2008, proposing the creation of an autonomous indigenous peoples' university. It could be argued that it follows the trend of affirmative action policies geared towards the access to higher education of racialized minorities although it does not specify that enrolment would be exclusive to indigenous persons. The bill proposes that the university shall provide higher education and promote research and outreach initiatives emphasising the history, culture, arts and scientific activities inherent to indigenous peoples.⁶⁵⁸ It is undeniably an interesting proposal that would certainly foster the pursuit of higher education for indigenous persons that wish to do so and also broaden the options for non-indigenous persons. However, the chronic underfunded condition that plagues public higher education in Brazil does not make for an encouraging scenario to foster a completely new initiative that requires a unique approach to education. A more realistic path would be perhaps the creation or improvement of departments or schools within existing public and private universities. This formula would broaden the spectrum of locations for those interested in indigenous studies – by potentially increasing non indigenous engagement and by enabling indigenous peoples who wish to pursue indigenous studies to remain relatively close to their communities.⁶⁵⁹

⁶⁵⁷ See *e.g. supra* note 384.

⁶⁵⁸ *Projeto de Lei n. 4.257/08*, 10 November 2008 at art. 1,§1.

⁶⁵⁹ It could be argued that an indigenous studies' department within an existing university could motivate interdisciplinary initiatives and foster the mainstreaming of indigenous knowledge in pre-existing curricula.

The third category of analysis, action-reaction for the protection of others, is composed by two types of bills. On the one hand, there is the protection of small-scale rural workers who own or occupy areas declared indigenous lands. On the other hand, there are bills aimed at protecting lands or areas of public interest that are very much related to the ongoing debates amongst the legislative and executive powers about jurisdiction over indigenous affairs discussed above within the context of indigenous rights' adversarial agendas.

The compensation criteria for non indigenous owners of lands declared as territories traditionally occupied by indigenous peoples are clear and quite fair, notwithstanding the volatile agrarian context in Brazil that facilitates discriminatory discourses almost every time an indigenous land title is issued. It is interesting to note, nevertheless, the number of propositions aimed solely at regulating, and therefore, granting efficacy to art. 231, §6 of the Constitution by ensuring that rural workers who occupy or possess indigenous lands in good faith be compensated for material losses – incidentally also demonstrating the country's precarious agrarian condition.

Proposta de Emenda à Constituição n. 409/01 proposes an amendment to §6 of art. 231 that grants the provision full efficacy and immediate applicability status.⁶⁶⁰ *Projeto de Lei n. 3.764/08* seeks to fulfill the efficacy and applicability criteria set out by art. 231 and state the rules for regularization of compensation for material losses to be paid to rural workers who occupy the lands.⁶⁶¹ *Projeto de Lei do Senado 177/04*, by its turn, proposes funding solutions for the expedited payment of indemnification to those who own or occupy indigenous lands claiming that it would “help diminishing conflicts between indigenous and non-indigenous local populations”.⁶⁶²

⁶⁶⁰ *Proposta de Emenda à Constituição n. 409/01*, *supra* note 613. See, *supra*, text accompanying note 296 for a detailed description of the efficacy and applicability criteria of constitutional norms.

⁶⁶¹ *Projeto de Lei n. 3.764/08*, *supra* note 613.

⁶⁶² *Projeto de Lei do Senado n. 177/04*, *supra* note 613 at art. 1 [translated by author].

The protection of public interest in the face of indigenous land demarcation has been a constant in the debates over competence to regulate recognition and enforcement of indigenous rights between the legislative and executive powers. Constitutional art. 231 clearly establishes the direct competence of the legislative power in three stances: art. 231 §3 regarding authorization of the *Congresso Nacional* for the exploitation of natural resources in indigenous lands; art. 231 §5 that establishes the requirement of approval of the *Congresso Nacional* for the removal of indigenous peoples from their lands; and art. 231, §6 that declares null and void all legal acts concerning possession and exploitation of natural resources in indigenous lands, except for acts of relevant public interest to be defined in complementary legislation.

In order to address the complementary legislation requirement of art. 231, §6, two bills have been proposed: *Projeto de Lei Complementar n. 260/90* and *Projeto de Lei Complementar n. 273/08*. The first defines relevant public interest as imminent danger of invasion by another State; grave threat or danger of catastrophe or epidemic and exploitation of resources deemed necessary to national sovereignty.⁶⁶³ The second bill states that roads, railroads and rivers used for transportation that are located in indigenous lands are of relevant public interest.⁶⁶⁴

The action-reaction nature of the bills becomes evident upon analysis of their slightly different conceptualization of the same constitutional provision. They address two agendas that respond to different political and public opinion claims exposed during the timeframe of their respective proposition. The first is geared towards the national security agenda,⁶⁶⁵ reinforced by an amendment proposed by the External Relations and National Defence Commission, and supported by the Constitution Commission stating that relevant public interest includes settlement initiatives in border areas, *e.g.*: “villages or cities; agricultural production areas;

⁶⁶³ *Projeto de Lei Complementar n. 260/90*, *supra* note 614 at art. 1, I-III.

⁶⁶⁴ *Projeto de Lei Complementar n. 273/08*, *supra* note 614 at art. 1.

⁶⁶⁵ See text accompanying notes 456-461.

military installations; infra-structure works on the transportation, energy and communications sectors”.⁶⁶⁶

Projeto de Lei Complementar n. 273/08 addresses concerns with transportation and communications related not only to national security but also to logistical difficulties of a social nature considering some land demarcation processes have not considered infra-structure works, for instance, roads or telecommunication towers used by the entire population in the area. Following the proposition of the bill, media reports have emerged about indigenous groups barricading public roads that crossed indigenous lands and charging tolls for the passage of vehicles, thus arguably abusing their rights and causing an undue burden to the non-indigenous population that depends on and has also contributed the construction of the infra-structure.⁶⁶⁷

In both stances, it is clear that rather than enacting general legislation to facilitate the co-existence of indigenous and non-indigenous peoples, the legislative power has acted-reacted to respond to concrete problems that have emerged and to defend their own agendas depending on the circumstances. It is clear that the proponents of the first bill and most notably the National Defence Commission have used an open-ended legislative provision to serve their own purposes, in other words, the use of existing and well-known settlement models in border areas to facilitate military action. The *circular argument* is once again in motion as the national defence policy insists in well-known formulas self-culturally referent to the dominant society. This approach does not consider the rights of indigenous peoples to their traditionally occupied lands nor the potential for the formulation of creative models that respect all rights and prerogatives involved in the areas at stake. The same critique serves for the 2008 proposal although in this case the action-reaction and conceptualization of relevant public interest seems more plausible than the one proposed in 1990.

⁶⁶⁶ Comissão de Relações Exteriores e de Defesa Nacional, Projeto de Lei Complementar n. 260, de 1990, Voto, 24 November 2006, Dep. Alceste Almeida; and Comissão de Constituição, Justiça e Cidadania, Projeto de Lei Complementar n. 260, de 1990, Voto, 27 April 2010, Dep. Regis Oliveira.

⁶⁶⁷ See, e.g. “Índios cobram pedágio em estrada que passa por reserva de MT” *G1* (14 October 2008), online: Globo G1 <www.g1.globo.com>.

The bills that form the fourth category seek power-sharing arrangements in order to guarantee State management prerogatives or some level of interference or profit of the dominant society in relation to indigenous lands. Two of these bills, however, are exceptions to this rule. The first exception is *Projeto de Lei n. 3.410/08* that proposes an amendment to the Code of Civil Procedure that would grant priority to legal procedures involving indigenous persons or communities over indigenous lands.⁶⁶⁸ The second exception is *Projeto de Lei n. 173/99* proposing an effective and creative contribution to the indigenous land challenge. The proposition encompasses a formula that would enable the federal government to delegate the demarcation of lands to member-States and municipalities directed only at indigenous communities in favour of whom it is not possible to demarcate traditionally occupied lands.⁶⁶⁹ It is interesting to note that this is the first and only bill ever presented before the *Congresso Nacional* that proposes the co-sharing of the mandate for land demarcation – a challenge to the entrenched concept of exclusive federal competence – despite doing so by appeasing the federal authority and seeking delegation rather than transference of competence. It masterfully takes into account that if the demarcation of traditionally occupied lands is under the competence of the federal government according to art. 231, member-States and municipalities could be helpful to addresses the needs of indigenous communities that do not meet constitutional requirements in order to claim rights to the lands they occupy.

As of now, only the federal government has the prerogative to demarcate indigenous lands – in opposition to the criteria applied for *quilombola* land demarcation and the legislation regulating socio-ethnically distinct uses of land by other traditional peoples or communities. The co-sharing of competence for land demarcation and use in the case of *quilombola* and other socio-ethnic distinct peoples between all levels of the federation has made a great deal of difference in expediting the processes of land demarcation and use and the processes of compensation due to those whose land titles were annulled or restricted in order to enforce land rights for

⁶⁶⁸ *Projeto de Lei n. 3.410/08*, 15 May 2008 at art. 2; The proposal seeks to amend the *Código de Processo Civil*, *Lei n. 5.869*, 11 January 1973 by adding art. 1.211-D to the current text. Previous amendments to this article include priority for senior citizens and persons suffering from severe chronic diseases.

⁶⁶⁹ *Projeto de Lei n. 173/99*, 4 March 1999.

quilombola and other-socio-ethnically distinct peoples.⁶⁷⁰ It is interesting to note that *Projeto de Lei 173/99* was proposed before the creation of any of the other formulas now in force for *quilombolas* or other socio-ethnically distinct peoples. The proposal has been under analysis for more than a decade evidencing the lack of interest for power-sharing at the federal level. The delay also attests to the lack of recognition of innovative formulas of restorative justice despite approval by several Commissions, including the Constitution, Justice and Citizenship Commission advisory opinion issued in 2008 that defines the bill as “a fair and consistent solution to a current and widespread problem in the country”.⁶⁷¹

In fact, participation of member-States in the process of demarcation of indigenous lands, or the lack thereof, has been a recurrent source conflict.⁶⁷² Due to the formula currently in place – indigenous lands are under the jurisdiction and are property of the federal government – the federated States claim that jurisdiction transfer from the State to the federal level cause loss of State territory resulting in economic losses. In an attempt to answer to some of these claims while also advancing the indigenous peoples’ cause, *Projeto de Lei Complementar n. 351/02* was presented before the Senate in 2002. It proposes the creation of a participation reserve fund for federated States that house environmental protection areas and/or demarcated indigenous lands to be applied towards projects of sustainable development.⁶⁷³ Although it is clear that the main goal of the proposal is to foster environmental protection, therefore, making it suitable for classification within the tangential action-reaction type of legislation as well, the bill is thoroughly presented on the basis of the need for harmonization among economic growth, environmental protection and sustainable development. The reserve fund would provide support rather than profit to member-States which renders a possible explanation of the delay in its analysis and approval. The lack of political will to approve the proposal is

⁶⁷⁰ See, respectively, *supra* note 434 and below, section 4.2.2.

⁶⁷¹ Comissão de Constituição, Justiça e Cidadania, Projeto de Lei n. 173, de 1999, Voto, 28 May 2008, Dep. Manoel Ferreira at §3.

⁶⁷² See *e.g.* below the issues of this nature raised within the context of the *Raposa Serra do Sol* case.

⁶⁷³ *Projeto de Lei Complementar n. 351/02*, 6 December 2002. The innovative and cohesive approach of the bill is intertwined with the life trajectory of its proponent, Sen. Marina Silva. Born and raised in Acre – a State with a considerable population of indigenous and other traditional peoples and heavily dependent on the exploitation of natural resources, Sen. Silva was a rubber-tapper, her family’s trade, until she eventually became a politician. Sen Silva’s work relates mostly to environmental causes and sustainable development in her native Amazon region. She was appointed Environment Minister in 2003 and resigned in 2008 citing lack of support from the federal government to environmental and sustainable development initiatives.

counterbalanced by the approval of the bill by the Constitution, Citizenship and Justice Commission in 2006 hailing the proposal as a relevant step forward in the consolidation of social justice in Brazil.⁶⁷⁴

The issue of sustainable exploitation of resources in indigenous lands has been the object of two other bills since *Projeto de Lei Complementar n. 351/02* – none of which, however, has the same impartiality and proficient legal technique, and, do not directly engage member-States. *Projeto de Lei n. 2002/03* and *Projeto de Lei do Senado n. 115/08* aim to regulate non indigenous exploitation of resources in indigenous lands. *Projeto de Lei n. 2002/03* states that FUNAI may celebrate contracts for the exploitation of indigenous lands with workers from areas adjacent to the lands with the intervention of the executive power of the municipalities concerned.⁶⁷⁵ Moreover, it foresees that fifty percent of the profits be destined to the ‘indigenous assistance fund’ to be created upon the enactment of the bill.⁶⁷⁶ *Projeto de Lei do Senado n. 115/08*, by its turn, seeks to amend the *Estatuto do Índio*. It proposes an addition to the provision on possession rights of indigenous lands and the exclusive rights for the exploitation of resources⁶⁷⁷ through the possibility of partnership contracts between indigenous and non-indigenous organizations for crops, cattle and touristic exploitation.⁶⁷⁸

In full *circular argument* fashion, by suggesting that the mandate be shared between FUNAI and the municipalities concerned, *Projeto de Lei n. 2002/03* presupposes that, regardless of the circumstances, indigenous peoples lack agency to enter contracts and partnerships with non-indigenous peoples or manage the fund that would result from it. However, it assigns 50% of the profits to the indigenous fund contrary to *Projeto de Lei do Senado n. 115/08* that despite presupposing the possibility of direct negotiation with indigenous peoples, suggests that profits should be redistributed to the indigenous community concerned at a minimum rate of 5%⁶⁷⁹ -

⁶⁷⁴ Comissão de Constituição, Justiça e Cidadania, Projeto de Lei Complementar, n. 351, de 2002, Voto, 4 April 2006, Dep. Sigmaringa Seixas at §1-2.

⁶⁷⁵ *Projeto de Lei n. 2002/03*, 17 September 2003 at art. 1, §1.

⁶⁷⁶ *Ibid.* at art. 1, §2; arts. 2-3.

⁶⁷⁷ *Estatuto do Índio*, *supra* note 48 at art. 24.

⁶⁷⁸ *Projeto de Lei do Senado n. 115/08*, 2 April 2008 at art. 1.

⁶⁷⁹ *Ibid.*

an amount that would arguably become the rule rather than a minimum standard upon approval of the bill. Furthermore, a critique outlined above regarding *quilombola* land rights is also pertinent here: a proposal that partnerships between legally constituted organizations of indigenous and non-indigenous peoples could take place subsumes indigenous peoples to the dominant society's contractual and business framework – which is neither fair nor pluralistic especially considering the territories concerned are lands traditionally occupied by indigenous peoples.

Power-sharing discussions among federated States and the federal government over indigenous peoples' issues have taken an interesting direction with the proposition of *Proposta de Emenda à Constituição n. 188/07*. It should be noted, firstly, that before 1988, the Brazilian Federation was composed by 22 States, the federal district and 4 federal territories.⁶⁸⁰ The political structure was reshuffled shortly before and finally by the 1988 Constitution and the country is now composed of 27 federated States and the federal district. The possible creation of federal territories, however, has not been discarded as art. 33 determines the parameters for the eventual creation of new territories, entities with a certain degree of legal and political autonomy but without certain prerogatives of federated States. Federal territories are considered an extension of the federal government – much like the status currently enjoyed by indigenous lands.

It could be argued that *Proposta de Emenda à Constituição n. 188/07* was built upon this parallel. It seeks to amend art. 33 in order to grant federal territory status to all lands homologated as indigenous lands.⁶⁸¹ The framework of the proposal, however, renders it inoperable as it foresees the creation of one single territory encompassing all indigenous lands.⁶⁸² Nevertheless,

⁶⁸⁰ The 1988 Constitution homologated the secession of the state of Goiás into 2 federated States – Goiás and Tocantins effective since 1989. The Federal Territory of Fernando de Noronha was incorporated to the State of Pernambuco and the 3 remaining territories, Rondonia, Amapá and Roraima acquired federated State status in 1982, 1988 and 1991 respectively.

⁶⁸¹ *Proposta de Emenda Constitucional n. 188/07*, 14 November 2007 at art. 1.

⁶⁸² This challenge has been pointed out in the advisory opinion for the inadmissibility of the bill issued by the Comissão de Constituição, Justiça e Cidadania, *Proposta de Emenda à Constituição n. 188*, de 2007, Voto, 18 March 2009, Rel. Dep. Hugo Leal. It should be noted that there are currently two legislative decree proposals – *Projeto de Decreto Legislativo n. 725/00*, 14 November 2000 and *Projeto de Decreto Legislativo n. 1.097/01*, 16 August

the inoperability of this specific proposal cannot inhibit ideas about the effectiveness of granting federal territory status to indigenous lands. A political repositioning of the lands would enable the migration of their legal status from the private to the public sphere. The public status of the territories would also allow for broader legal and political autonomy.⁶⁸³

Lastly, two bills were proposed in 2008 seeking the revitalization of the support system at the federal level to enforce indigenous peoples' rights. *Projeto de Lei 3.571/08* was drafted by the executive power and forwarded to the *Congresso Nacional* – it seeks the creation of the *Conselho Nacional de Política Indigenista* – a council formed by federal executive power representatives; indigenous organizations; and, indigenist entities and its objective is to propose guidelines for a national indigenist policy.⁶⁸⁴ *Projeto de Lei n. 4.295/08* proposes to amend *Lei n. 5.371* that created and established FUNAI's mandate.⁶⁸⁵ The restructuring proposed through the amendment promotes, without much detail, a cohesive approach among the federal agencies that provide services to indigenous peoples and coordination policies with non-governmental organizations with an interest in supporting the State in this regard.⁶⁸⁶ An interesting proposal in principle, the beneficial potential of the bill is overshadowed by the lack of revision of the integrationist language of the law it seeks to amend as well as the constant reference throughout the proposal's justification to indigenous peoples as 'forest-dwellers'. The short time elapsed between the presentation of both proposals and their similar objectives are strong evidence of the lack of coordination between the executive and legislative powers in this regard.

2001 - calling for referendums within the federated States of Amazonas and Amapá seeking their dismemberment and enabling the creation of four federated territories. The areas where the territories would be are all border areas with extensive territories already homologated as indigenous lands. Although the justification of the bills does not mention national security concerns over the multiple attribution of indigenous lands in border areas, the timing and the representatives in charge of the proposals leave room for speculation.

⁶⁸³ A legislative decree has been proposed in 2003 calling a referendum to transform the Pantanal area into a federal territory. The justification of the bill claims that destructive economic exploitation would be avoided and economic development promoted if the lands were directly managed by the socio-ethnic distinct peoples that inhabit the area – the *pantaneiros* – with direct support of the federal government. *Projeto de Decreto Legislativo n. 1.027/03*, 25 November 2003. The claim raises the question of if indeed a change of management from the federated State to the federal level would increase the preservation and sustainability of the region.

⁶⁸⁴ *Projeto de Lei n. 3.571/08*, 12 June 2008 at art. 1.

⁶⁸⁵ *Lei n. 5.371*, *supra* note 187.

⁶⁸⁶ *Projeto de Lei n. 4.295/08*, 12 November 2008 at art.1-2.

3.2.2.3 Ongoing Circle: Core Complementary Legislation

Debates are ongoing in the *Congresso Nacional* in order to replace the *Estatuto do Índio* with new comprehensive legislation since 1991. The process towards the enactment of post-1988 core legislation regarding indigenous peoples' rights has been long and remains inconclusive. The *Estatuto das Sociedades Indígenas* bill was originally proposed by legislative power representatives in 1991 aiming to replace the outdated *Estatuto do Índio*⁶⁸⁷ and it was followed by two bills proposed with the same objective: *Projeto de Lei n. 2.160/91* presented by the executive power under the title *Estatuto do Índio*,⁶⁸⁸ and *Projeto de Lei n. 2.619/92* proposed by another group of legislative representatives and named *Estatuto dos Povos Indígenas*.⁶⁸⁹ A special commission was formed in 1994 to update and consolidate all three propositions under *Projeto de Lei n. 2.057/91* bearing the name *Estatuto do Índio*.⁶⁹⁰ In 2000, after debates over the 1994 version, a renewed proposal was presented by the special commission and the name *Estatuto do Índio* was maintained.⁶⁹¹ In 2001 the latest version of the bill was presented, entitled *Estatuto das Sociedades Indígenas* and is pending approval.⁶⁹² The proposed legislation is not only more detailed than the 1973 statute, it is also broader in content and scope.⁶⁹³ However, it still falls short of the international standards in force in the 1991-2001 timeframe. Moreover, the potential approval of the bill has been delayed by extended discussions regarding provisions related to land, natural resources, environmental protection, self-government and military operations on indigenous lands.

Furthermore, in 2006, the executive power instituted the *Comissão Nacional de Política Indigenista*, the CNPI, within the Justice Ministry's institutional structure.⁶⁹⁴ The CNPI is an advisory body that gathers representatives from several government institutions and indigenous organizations and whose mandate is to propose guidelines regarding indigenist policy. The latest development regarding the enactment of post-1988 core complementary legislation took place

⁶⁸⁷ *Projeto de Lei n. 2.057/91*, *supra* notes 48; 304.

⁶⁸⁸ *Projeto de Lei n. 2.160/91*, *supra* note 305.

⁶⁸⁹ *Projeto de Lei n. 2.619/92*, *supra* note 306.

⁶⁹⁰ *Substitutivo da Comissão Especial para o Projeto de Lei n. 2.057/91*, *supra* note 307.

⁶⁹¹ *Proposta Substitutiva ao Projeto de Lei n. 2.057/91*, *supra* note 308.

⁶⁹² *Projeto de Lei n. 2.057/91* (*Proposta Substitutiva ao Projeto de Lei n. 2.057/91-2001*), *supra* notes 48; 304.

⁶⁹³ The 1973 *Estatuto do Índio* has 68 articles while the *Estatuto das Sociedades Indígenas* has, in the 2001 version, 126 articles.

⁶⁹⁴ *Decreto de 22 de Março de 2006*, *supra* note 312; and “Criada a comissão que irá organizar a política indigenista”, *supra* note 313.

in 2009 when the Minister of Justice met with the President of the House of Representatives and presented, on behalf of the CNPI, a draft proposal to replace the *Estatuto do Índio* entitled *Estatuto dos Povos Indígenas*.⁶⁹⁵ The CNPI suggests that this new draft, elaborated in consultation with indigenous organizations should replace *Projeto de Lei n. 2.057/91*, currently known as *Estatuto das Sociedades Indígenas*, and debate and approval by the House should be expedited.⁶⁹⁶

The creation of the *Comissão Nacional de Política Indigenista* (CNPI), by the executive power and the development of a new proposal of core complementary legislation to replace the *Estatuto do Índio* is yet another chapter in the power struggles between the executive and legislative branches of government. The 1991 proposal and its 2001 consolidated version, the *Estatuto das Sociedades Indígenas*, belong to a different political context than the 2009 version of the *Estatuto dos Povos Indígenas* and hardly match the power-sharing structures and policies adopted since the political shifts in Brazil that started in 2003.⁶⁹⁷ It could be argued that the executive power is making use of legal and political manoeuvres to take control of indigenist policy and dictate its terms of existence. This theory is evidenced by the creation of the *Comissão Nacional de Política Indigenista* followed by the proposal of *Projeto de Lei 3.571/08* seeking the creation of a *Conselho Nacional de Política Indigenista* – a governmental agency that would have wider deliberative powers than the Commission. The delimitation of the mandate of this potential Council, with advisory as well as decision-making powers, makes it different and more far-reaching than the existing advisory-only Commission, thus, requiring enactment through a legislative instrument. Regardless of legislation authorizing the creation of the Council, the existing Commission as it was created by the executive power has the outreach to propose legislation such as the *Estatuto dos Povos Indígenas*.

⁶⁹⁵ *Estatuto dos Povos Indígenas proposto pela CNPI*, *supra* note 315.

⁶⁹⁶ As mentioned above, the presentation of the CNPI draft was publicized by the Ministry of Justice and followed by the publication of a joint opinion piece by the Minister of Justice, the president of FUNAI and the Ministry of Justice's Secretary of Legal Affairs in one of the newspapers of largest circulation in the country directly referring to the present legislation as 'exclusionist, paternalist and obsolete' and calling upon the *Congresso Nacional* to appreciate the relevance of the approval without undue delay of the *Estatuto dos Povos Indígenas*. Genro *et al.*, *supra* note 316.

⁶⁹⁷ The contexts referred to are the considerable political shift from the 1995-2002 government led by President Fernando Henrique Cardoso and the *Partido da Social Democracia Brasileira* to the 2003-2010 government of President Luiz Inácio Lula da Silva and the *Partido dos Trabalhadores*.

It could be argued that the creation of the *Comissão Nacional de Política Indigenista* and, the potential creation of the *Conselho Nacional de Política Indigenista* have two underlying objectives. First, the promotion of the centralization of indigenous issues at federal and executive levels and second, the downsizing of FUNAI's operational and policy-making capacities. Moreover, this conjecture is supported by the enactment of *Decreto n. 7.056* by the executive power which alters FUNAI's statutes and reshuffles internal management structures.⁶⁹⁸

The procedural manoeuvres of the executive over the control of indigenous issues and supposedly over the regulation of the exploitation of natural resources in traditionally occupied lands have cast a shadow over the debates towards a pluralist recognition of indigenous peoples' rights. Furthermore, there is a disconnection between the executive and legislative branches towards the enforcement of these rights. The judicial power is also a force to be reckoned with, although often aligned with the approaches adopted by the executive power. It should also be noted that the policy-making tools chosen by the executive to unilaterally lead the way in terms of stating and managing indigenous issues diminish the relevance of the proposals it advances. It should be highlighted, however, that the *Estatuto dos Povos Indígenas*, with the exception of certain State-centred power-concerns, is much more pluralistic and also more coordinated with international law developments than the *Estatuto do Índio* and the 2001 version of the *Estatuto das Sociedades Indígenas*.

Despite the Ministry of Justice's request that the proposal developed by the CNPI and presented to the *Congresso Nacional* in 2009 becomes the bill that once approved shall replace the *Estatuto do Índio*, the *Estatuto dos Povos Indígenas* has not acquired that status – therefore, the

⁶⁹⁸ *Decreto n. 7.056*, *supra* note 187. As a consequence of the decree, several FUNAI field offices have been deactivated or reallocated causing an uproar among certain indigenous communities that feel deprived of access to public services and ultimately deprived of their rights as a consequence of this administrative reshuffle. See e.g. "Índios queimam boneco de Lula e bloqueiam saída do Terminal de Ônibus" *Jornal de Londrina* (18 January 2010), online: <www.portal.rpc.com.br/jl>; Vitor Geron, "Índios ameaçam queimar torres de energia caso impasse não seja resolvido" *Gazeta do Povo* (26 January 2010), online: <www.gazetadopovo.com.br/vidaecidadania>; Daniel Costa, "Mulher entra em coma depois de levar pedrada de índios que ocupam Funai" *Jornal de Londrina* (8 February 2010), online: <www.portal.rpc.com.br/jl>; "Índios irão a Brasília discutir futuro da Funai no Paraná" *Gazeta do Povo* (9 February 2010), online: <www.gazetadopovo.com>; "Grupo de índios é impedido de entrar na Câmara dos Deputados" *G1* (19 May 2010), online: <www.g1.globo.com>; "Manifestação indígena termina em conflito na Câmara" *G1* (19 May 2010), online: <www.g1.globo.com>.

Estatuto das Sociedades Indígenas is currently the document with that specific objective under analysis at the *Congresso Nacional*. As a consequence, the *circular argument* critique developed below takes aim at the *Estatuto das Sociedades Indígenas* with pertinent incidental references to the *Estatuto dos Povos Indígenas*. The methodology chosen to present the critique proposes the analysis of the texts through four main thematic axes: : language; micromanagement of rights; oppressive epistemology; and, agency.

The language employed in the *Estatuto das Sociedades Indígenas* abandons, in most part, the integrationist vocabulary used in the *Estatuto do Índio* and follows the same patterns of the Constitution and legislation enacted after 1988. It does not consider, however, the advancements of ILO 169, adopted in 1989 and ratified in 2002.⁶⁹⁹ The core of the matter is the use of the term *peoples*, therefore, implying the recognition of indigenous peoplehood, thus recognizing their right to self-determination according to the international parameters developed throughout the 1990s.

When the project emerged, the text produced by legislative representatives was in harmony with the country's external relations policy. Cordeiro states that for many years, Brazil inflexibly resisted the use of the expression indigenous peoples by the United Nations and this was one of the determinant factors for the Brazilian abstention during the ILO 169 vote. As the debates over the United Nations and the Organization of American States' Declarations on the Rights of Indigenous Peoples progressed, a task force with representatives of several branches of the executive power concluded in 1999 that such position should be revisited but the use of the term populations rather than peoples was preferable.⁷⁰⁰ The ratification of ILO 169 in 2002 was justified upon the caveat of art. 3(1) of the Convention that loosely connects indigenous peoplehood only with State-negotiated levels of internal self-determination.⁷⁰¹ The Brazilian positioning in favour of the UN *Declaration on the Rights of Indigenous Peoples* in 2007 follows the same perspective.

⁶⁹⁹ ILO 169, *supra* notes 212; 214 and *Decreto n .5.051*, *supra* note 215.

⁷⁰⁰ Cordeiro, *supra* note 21 at 124-128.

⁷⁰¹ ILO169, *supra* note 212 at art. 3(1) (the use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to them under international law).

The vocabulary used in the legislative proposals mirrors the caution employed by the executive's external relations policy. It is also embedded in hegemonic discourse and the dominant society's parameters for the identification of indigenous peoples. Art. 1 states that the *Estatuto das Sociedades Indígenas* regulates the "legal situation of indians, their communities and societies", to whom art. 2 "extends the protection of the law of the State, in equal conditions with other Brazilians taking into account the peculiar conditions recognized in this law".⁷⁰² Furthermore, art. 4 outlines the indigenous peoples' "protection and assistance policy" guaranteeing their "access to knowledge about the Brazilian society and how it functions".⁷⁰³ Rather than instrumentalizing the enforcement, thus granting full efficacy to constitutionally recognized rights, as is the role of complementary legislation, the wording of the bill objectifies indigenous peoples and their rights.

The discourse used deliberately presupposes that the recognition and enforcement of indigenous rights is under the jurisdiction of the legislative power and ultimately, the State, inhibiting the possibility of a broader and more legal and political pluralist interpretation of constitutionally recognized rights. The use of terms such as "legal situation", which imply indigenous peoples' status under State law, suggests that the recognized social, legal and political realms of "organization, customs, languages, traditions, ethnically distinct lifestyles, artistic and cultural values as well as other forms of expression"⁷⁰⁴ should be interpreted according to hegemonic standards.

Moreover, the bill specifically refers to an extension of the State law's protection to indigenous peoples, as much as it is relevant to affirm the protection of all citizens regardless of origin, the discourse employed suggests that indigenous peoples are not part of or are a minor player in the nation-building project – and, as a consequence, their citizenship/nationality status is objectified and must be clarified through the statutory provisions. A pessimistic interpretation

⁷⁰² *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 1-2 [translated by author].

⁷⁰³ *Ibid.* at art. 4, III [translated by author].

⁷⁰⁴ *Ibid.* at art. 4, VI [translated by author].

of the statute's discourse could suggest that guarantees are extended to those who have no or partial knowledge *about the Brazilian society and how it functions*. The legislator's choice to use the term Brazilian society as a synonym of dominant society presupposes that indigenous peoples are not a part of it or have to achieve membership in it – and evidences the asymmetric existence⁷⁰⁵ of indigenous peoples in the supposed pluralist order established by the 1988 Constitution.

Indirect expressions of hegemonic discourse can be found throughout the document. Examples of such subtle incursions into circular argumentation are art. 31, VII and art. 103. The first provision safeguards intellectual property rights' title to "any work or spiritual creation of indigenous communities or societies *even if* only transmitted by oral tradition and independently of its temporal origin".⁷⁰⁶ If the constitutionally recognized indigenous peoples' rights to their forms social organization, traditions, distinct artistic and cultural values and other forms of expression are enforced – the caveat *even if* is self-referent and in a broad interpretation could be argued to be unconstitutional. Art. 103 addresses loss of lands due to hydric resources exploitation by guaranteeing the reallocation of the indigenous peoples affected to "lands of equal size, quality and ecological value".⁷⁰⁷ While the article provides a relevant safeguard to a common challenge; it is built upon the dominant society's fungible standards of territorial occupation. The right to have lands traditionally occupied replaced does not seem to entail consultation on the impact of such measures to social and political structures of the communities affected, or in constitutional terms, it disregards the relevance of traditional occupation of a specific territory to the safeguard of customs, traditions, cultural values, lifestyles and social organization.

In contrast with the *Estatuto das Sociedades Indígenas*, the *Estatuto dos Povos Indígenas* compromises fully with the use of the term peoples – following a trend that includes the favourable vote for the UN *Declaration on the Rights of Indigenous Peoples* and the adoption of *Decreto n. 6.040* that

⁷⁰⁵ The notion of asymmetric existence is inspired in the theory of asymmetrical knowledges and asymmetrical powers proposed by Boaventura de Sousa Santos. See *e.g.* Santos, "A filosofia à venda", *supra* note 13 at 27-29.

⁷⁰⁶ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 31, VII [translated by author] [emphasis added].

⁷⁰⁷ *Ibid.* at art.103 [translated by author].

establishes the *Política Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais*.⁷⁰⁸ The full text of the *Estatuto dos Povos Indígenas* demonstrates in itself, however, that the replacement of the words *societies* and *communities* by *peoples* does not necessarily entail a deeper commitment to self-determination rights or other international standards considering that, for the most part, it replicates the language of the *Estatuto das Sociedades Indígenas* criticized above. In fact, the *Estatuto dos Povos Indígenas* is quite a patchwork of indigenous rights' trends, in terms of scope and timeline, therefore, different and often contradictory vocabulary can be found throughout the text which could potentially hinder rather than advance its adoption if indeed this draft project comes to replace the *Estatuto das Sociedades Indígenas*.⁷⁰⁹

Furthermore, the *Estatuto dos Povos Indígenas* adds the protection of “peoples at risk of extinction, in voluntary isolation or not contacted”,⁷¹⁰ an issue that was absent from previous core legislation proposals despite the fact that the Brazilian policy towards voluntary isolation is built on the basis of *Estatuto do Índio* provisions.⁷¹¹ Another innovation introduced by the 2009 proposal is a definition of indigenous peoples that is not restrictive but provides the necessary acknowledgement of their uniqueness in comparison to other traditional or socio-ethnic distinct peoples: “indigenous peoples are collectivities of pre-Colombian origin distinguished from the social whole and amongst themselves, with their own identity and organization, specific cosmovision and a special relationship with the lands they inhabit”.⁷¹²

Language, understood here as the use of specific vocabulary to steer the enforcement of rights according to hegemonic interests and structures, can assist in the identification of mechanisms that perpetuate the *circular argument* as a separate axis of analysis. However, it is through this

⁷⁰⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17; *Decreto n. 6.040*, *supra* note 454. The analysis undertaken in the following chapter will delve further into the increasing use of the word peoples within the Brazilian legal framework and possible interpretations of this trend regarding the internationally recognized right to self-determination.

⁷⁰⁹ An example of such discrepancies are *Estatuto dos Povos Indígenas proposto pela CNPI*, *supra* note 315 at arts. 3 and 30 [translated by author]. Art. 3 states that all internal relations shall be regulated by the community's uses, customs and traditions and art. 30 is nearly a replica of art. 3 stating that uses, customs and traditions of indigenous communities shall be respected in the realization of acts and businesses among indigenous individuals or their communities and adding that they may opt for the application of State law.

⁷¹⁰ *Ibid.* at art. 8, VIII [translated by author].

⁷¹¹ See text accompanying note 494.

⁷¹² *Estatuto dos Povos Indígenas proposto pela CNPI*, *supra* note 315 at art. 9,I [translated by author].

approach to language that the other three axes proposed for this study are identified and their critique developed.

Upon analysis of both proposals it becomes evident that the core complementary legislation role is understood as a 'one-stop shop' or single point of contact to all issues referring directly or indirectly to indigenous peoples as both texts clearly attempt to exhaust all legislative activity needed to regulate the rights granted by the 1988 Constitution. Few provisions are geared towards the enforcement of rights but rather towards the regulation and control over the encounters between indigenous and non-indigenous peoples. When seen from this perspective even the name of the proposals seem quite unfitting.

If the core proposals were to be placed under the categories used for the analysis in the previous subsection they would certainly fit into all four, since they contain provisions that are of proselytistic and tangential action-reaction nature; that seek the protection of others and establish power-sharing arrangements. Provisions in the tangential action-reaction and power-sharing approaches, however, are much more prominent and presented in much more detail, thus, contributing to the perspective that the statutes seek to primordially regulate encounters between indigenous and non-indigenous peoples rather than enforce rights recognized in the Constitution and in international law. Recognition and enforcement of indigenous peoples' rights require a great deal of management of the encounters between them and the dominant society. However, micromanagement is defined here as the tendency to use complementary legislation as a tool to regulate specific interactions between indigenous and non-indigenous peoples in excessive detail.

The hegemonic micromanagement of tangential action-reaction-type provisions can be found at the outset of the *Estatuto das Sociedades Indigenas*. Art. 3 describes the federal government's exclusive role in the definition of legislation and policy in case of overlap between indigenous

peoples' rights and national security, especially in case of double attribution of indigenous lands in border areas.⁷¹³

In fact, most issues addressed in extreme detail refer to land rights. The exception is the regulation of intellectual property.⁷¹⁴ Several provisions varying from protection of cultural heritage to copyright assume different names and frameworks of reference in all versions of the *Estatuto das Sociedades Indígenas*⁷¹⁵ and *Estatuto dos Povos Indígenas*⁷¹⁶ simultaneously demonstrating the uniqueness of indigenous peoples and other socio-ethnic distinct peoples within the existing legal framework on the field and the role played by interest groups. These external stakeholders seek either to assist indigenous peoples in the protection of their traditional knowledge or the enactment of specific legislation that would clarify existing grey areas and define boundaries of negotiation with regards to traditional knowledge.⁷¹⁷

The micromanagement of intellectual property rights is an example of overregulation of a right that is also covered by specific legislation applicable to the dominant society. This approach could be argued to alienate indigenous peoples from the main legal framework in the field, thus reducing their spectrum of self-determining action regarding the use and transfer of traditional knowledge. It also potentially alienates stakeholders in the field of intellectual property that do not usually work within the traditional knowledge *sui generis* rights' framework. This critique highlighting possible isolation and alienation of indigenous peoples and dominant society stakeholders is easily observed in the intellectual property context but could be argued to exist within other fields that are also the object of micromanagement in the proposed legislation. One of the possible solutions to this dilemma could be the enactment of specific

⁷¹³ *Ibid.* at art.4.

⁷¹⁴ It should be noted that, to some extent, the field of education is also micromanaged in the *Projeto de Lei n. 2.057/91*, *supra* note 48 at arts.134-146. Art. 145 for instance, describes in detail a quota system for the access to higher education. The system suggested implies that each university shall admit at least one indigenous candidate per year without any type of admission exam or criteria – a borderline discriminatory provision that nearly ignores pre-existing academic merit among indigenous persons.

⁷¹⁵ *Ibid.* at arts.18-41.

⁷¹⁶ *Estatuto dos Povos Indígenas proposto pela CNPI*, *supra* note 315 at arts.19-27.

⁷¹⁷ See Alfredo Wagner de Almeida, “Amazônia: a dimensão política dos ‘conhecimentos tradicionais’” in Almeida, *Conhecimento tradicional*, *supra* note 22, 11; Joaquim Shiraishi Neto & Fernando Dantas, “A ‘Commoditização’ do Conhecimento Tradicional: notas sobre o processo de regulamentação jurídica” in Almeida, *Conhecimento tradicional*, *supra* note 22, 57.

legislation regarding indigenous peoples within the legal frameworks concerned and not within the core complementary legislation regulating indigenous peoples' rights as the former are more related to the overlap of rights claims by indigenous peoples and dominant society stakeholders than the enforcement of constitutionally recognized indigenous peoples' rights.

Other micromanagement stances include the detailed chapters regulating exploitation of natural resources on indigenous lands. The regulation of exploitation of natural resources comprise one-fourth of the *Estatuto das Sociedades Indígenas*' full length. The provisions would complement environmental and mining regulations in force or to be enacted - which could potentially weaken the core complementary legislation regarding indigenous rights to be enacted. The constitutional mandate of the *Congresso Nacional* regarding all decision-making power over the exploitation of natural resources in indigenous lands is reinforced in the bill⁷¹⁸ and consultation rights of the communities affected are limited to a brief provision stating that "communities shall be heard".⁷¹⁹ Concessions for prospecting and mining are granted by the *Congresso Nacional* to legally constituted companies⁷²⁰ and communities affected have "assured participation in the results";⁷²¹ while small-scale mining is exclusive to indigenous peoples.⁷²² The statute extensively regulates procedures for requesting and acquiring concession rights for the exploitation of mineral resources on indigenous lands – a subject-matter more suited to an addendum to the general mining legislation in force.

The micromanagement of external interests leaves little space for the provisions that directly affect indigenous peoples and their land rights, *e.g.*, the sole article stating that the "federal indigenist agency" shall hear the communities affected by exploitation activities in their lands.⁷²³ Additionally to the micromanagement of rights that does not include or specify indigenous peoples rights to the exploitation of natural resources in the lands they traditionally occupy, the proposal advances circular argumentation such as the duty of the federal

⁷¹⁸ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 80.

⁷¹⁹ *Ibid.* [translated by author].

⁷²⁰ *Ibid.* at art. 81.

⁷²¹ *Ibid.* at art. 80 [translated by author].

⁷²² *Ibid.* at art. 81.

⁷²³ *Ibid.* at art. 88 [translated by author].

government and not the communities affected, to determine the “affected indigenous communities’ social organization and cultural peculiarities” before making decisions on concession rights.⁷²⁴ The exclusion of indigenous peoples from decision-making processes and the lack of regulation for indigenous peoples to either directly participate in the mining activities or determine the boundaries of participation by third parties is a demonstration of the hegemonic discourse formulation of the proposal that directly or indirectly seeks to diminish the notion of indigenous agency and perpetuate the *status quo*.⁷²⁵

The criteria established for hydric resources exploitation is similar, as it describes a detailed process directed more at government and private parties than at indigenous peoples. The proposal is filled with bureaucratic and numerical standards attempting to establish a clear national policy that does not take into account the variety of ecosystems and geographical size of indigenous lands throughout the country. The micromanagement is so centred in external stakeholders that it states that guidelines regarding logging established in the *Estatuto das Sociedades Indígenas* are not applicable to “logging for subsistence purposes on indigenous lands”.⁷²⁶ It is puzzling to inquire where the regulation for logging for the exclusive use of indigenous communities could be found if not in the complementary legislation that grants full efficacy to indigenous rights. A possible answer could be that these matters should be dealt with by the community’s internal self-determining realm – although it is hard to imagine that such a solution would complement a piece of legislation so distanced from legal and political pluralism ideals.

Both proposed statutes clearly impose the dominant society’s models of governance. The micromanaging trend accompanied by a hegemonic discourse that establishes a pejorative

⁷²⁴ *Ibid.* at art. 89 [translated by author].

⁷²⁵ Micromanagement features have been added throughout the revision processes of *Projeto de Lei n. 2.057/91*, *supra* note 48 in order to include responses to concrete challenges or conflicts. Art. 90 grants the federal government full policing power to ensure that indigenous peoples will not attempt against the safety of the crew in charge of exploitation or the concessionaire’s property. The use of double standards is clear – the constitutionality of provisions that expand the rights of art. 231 in favour of indigenous peoples are severely questioned as seen above in the adversarial agendas analysis; on the other hand, the State may stretch its mandate while officially regulating the enforcement of art. 231 and no issues of constitutionality arise.

⁷²⁶ *Ibid.* at art. 104, §8 [translated by author].

version of indigenous agency leaves little room and often blatantly hinders any effort that could encourage the enjoyment of internal self-determination rights. This perspective is also evidenced by the phenomena designated here as oppressive epistemology and agency discourse.

Oppressive epistemology is an axis of analysis inspired in Santos' post-abyssal theory. Santos contends that we live in a period in which "societies are politically democratic and socially fascistic" where abyssal lines are drawn to structure modern knowledge and law and "the creation and the negation of the other side of the line is constitutive of hegemonic principles and practices". Santos maintains that from colonial times to the present the "impossibility of copresence between the two sides of the line reigns supreme" as "the legal and political civility of this side of the line is premised upon the existence of utter incivility on the other side of the line".⁷²⁷ As a consequence, the regulation undertaken on the dominant society's side of the line exists on the basis of "legal and epistemological abyssal conceptions"; in other words, is developed upon oppressive epistemologies of appropriation and violence.

Within Santos' proposed framework "violence involves physical, material, cultural and human destruction"- a common feature in the segregationist, assimilationist and sometimes the integrationist periods. The pluralist model, even in its current weak form, does not allow for State measures that foster violence. However, Santos highlights that "it goes without saying that appropriation and violence are deeply intertwined".⁷²⁸ Appropriation is a constant in legislative and judicial decision-making and Santos' appropriation concept encompasses "incorporation and cooptation"⁷²⁹ – a trend that can be observed in several legal documents analysed above and that most definitely set the tone for rights recognition in the *Estatuto das Sociedades Indígenas*.

⁷²⁷ Santos, "Beyond Abyssal Thinking", *supra* note 13 at 61; 53.

⁷²⁸ *Ibid.* at 51.

⁷²⁹ *Ibid.*

In addition to the somehow limiting language employed in the statute's first articles, the oppressive epistemology discourse is also undeniable. It is systematically phrased to convey the message that while law and constitutionally derived rights are granted and managed by the State; indigenous legal and political structures are envisioned to be below the law, relegated to the status of uses, customs and traditions.⁷³⁰ On the basis of the current interpretation of constitutionally recognized indigenous peoples' rights by the State; the bill enables a weak form of traditional legal pluralism while bolder incursions into a critical legal pluralism approach towards the enforcement of indigenous peoples' rights are hegemonically dismissed.⁷³¹

The *Estatuto das Sociedades Indígenas* is developed upon the phenomenon described by Santos as metonymic reasoning which expresses an obsession of totality through order and the presupposition of existence of only one logic order that governs the behaviour of the totality and all its parts.⁷³² The proposed bill's metonymic reasoning is expressed through the referential use of the knowledge and social structure of the dominant society, or Brazilian society, as it is defined in the statute.⁷³³ The lack of indigenous consultation or participation mechanisms in decision-making processes or the enforcement of rights or agreements for the use of indigenous lands evidences the metonymic reasoning premise that only the dominant society has the know-how to guarantee rights and properly implement policies.⁷³⁴

⁷³⁰ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art.1-3.

⁷³¹ Traditional legal pluralism is understood here as the State law's recognition of parallel although subordinate legal systems applicable to defined rights' holders. Examples of politically established models employing traditional legal pluralism are described in Moana Jackson, "Justice and political power: Reasserting the Maori legal process" in Hazlehurst, *supra* note 490, 243; and, Yrigoyén Fajardo, "Special Jurisdiction", *supra* note 43. Critical legal pluralism presupposes a much deeper post-abyssal structural change in which diverse legal systems are intertwined into one legal framework of reference composed of parts granted equal worth. This approach presupposes a rupture with the model that equates valid law with State-sponsored official law and is based on the theoretical approaches in Kleinhans & Macdonald, *supra* note 12; Macdonald & Sandomiersky, *supra* note 12 and Macdonald, "Metaphors", *supra* note 12.

⁷³² Santos, *Gramática*, *supra* note 13 at 97.

⁷³³ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art.4, II.

⁷³⁴ This flaw is partially remedied in the *Estatuto das Sociedades Indígenas proposto pela CNPI*, *supra* note 315 at arts.79-83 detailing guidelines for the *previous, free and informed consent* of indigenous peoples. Despite representing a stronger acknowledgement of the right to consultation in comparison to the *Estatuto das Sociedades Indígenas*, the provisions are somehow restricted in relation to the internationally recognized parameters in ILO 169, *supra* note 212 at art. 6 and the *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17 at arts. 18-19.

Metonymic reasoning is also evidenced in the context of environmental protection regulation. Art. 107 promotes initiatives of environmental education on indigenous lands where government representatives assume the role of educators and indigenous peoples assume the role of students.⁷³⁵ Such claim is utterly paradoxical considering some of the core aspects of indigenous socio-ethnic distinctiveness. This scenario demonstrates the provision's circular argumentation and lack of value attributed to indigenous knowledge. It could be speculated that if indeed environmental education actions are required, they should be undertaken in partnership with indigenous peoples and perhaps expanded for initiatives of this sort outside indigenous lands.

The premise is also highlighted within means stated as valid for proof of authorship of intellectual property claims involving indigenous peoples' knowledge or creations. Proof is limited to evidence found within "publications, photographs, recordings or catalogued registries of public institutions, private collections or universities",⁷³⁶ and blatantly ignores any other type of evidence provided by indigenous methodologies. The use of this modality of metonymic reasoning, however, may bring eventual guarantees to indigenous peoples, for instance, through the provision that ensures that intellectual work and spiritual creations of indigenous societies shall not become public domain even if transmitted orally and regardless of its temporal origin.⁷³⁷

Patterns of protection of external stakeholders within the proposed legislation are found within the intellectual property realm as well and are similarly embedded in the metonymic and oppressive epistemological discourse described above. Art. 40 states that there is no infringement of intellectual property rights when "indigenous works are reproduced or cited in books, newspapers, periodicals, articles, theses, academic monographs and exhibitions with didactic and scientific study objectives, including studies of anthropological, analytical, critical and polemic nature".⁷³⁸ The article aptly reinforces rules applicable to intellectual property

⁷³⁵ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 107, IV.

⁷³⁶ *Ibid.* at art. 35 [translated by author].

⁷³⁷ *Ibid.* at art. 36.

⁷³⁸ *Ibid.* at art. 40 [translated by author].

generally; nevertheless, the peculiar phrasing proposed for its inclusion in the core complementary legislation is dubious. The provision rightly establishes that the knowledge should not be shielded from the dominant society; however, the socio-ethnic distinctiveness of indigenous peoples should at least in principle be protected from the dominant society's hegemonic discourse that would prevail even if a truly pluralist discourse was implemented by State-sponsored legislation. In this regard, it is relevant to highlight that aspects of the socio-ethnic distinctiveness of certain indigenous groups may frontally clash with values deeply entrenched in the dominant society's collective paradigmatic existence such as abortion, polygamy and polytheism.

On the same metonymic reasoning path that does not allow for a self-determining enjoyment of civil and political rights, art. 56 states the competence of federal judges to examine disputes regarding indigenous rights, crimes practiced against indigenous peoples, their communities, lands and property and crimes committed by indigenous persons. Moreover, art. 50 grants policing power on indigenous lands to the federal indigenist authority⁷³⁹ and ensures indigenous peoples the right to use their mother languages in court through a translator appointed by the judicial authorities.⁷⁴⁰ The oppressive epistemology discourse found in these provisions, in addition to leaving virtually no room for self-determining manifestations of legal and political pluralism, presupposes unlimited knowledge by dominant society government agents to enforce indigenous peoples' rights. Even the provisions that potentially enhance indigenous peoples' rights are overshadowed by the prospect of a metonymical application. The absence of a suitable translator may delay sentencing processes; furthermore, the absence of an appropriate structure that guarantees translation impartiality could also hinder due process rights.⁷⁴¹

⁷³⁹ It is relevant to note that the bill cohesively refers to a *federal indigenist authority* rather than making a direct reference to FUNAI. Although FUNAI is currently the executive agency with such role; the bill seems to open the possibility for the restructuration and renaming of the agency or even its extinction and the creation of a new agency with a revisited mandate.

⁷⁴⁰ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art.56; 50, §4.

⁷⁴¹ The concern over translation impartiality works both ways. While translation provided by the State may hinder the proficient interpretation and expedited sentencing over indigenous peoples' rights; the vast amount of indigenous languages spoken in Brazil may result in the availability of translators with conflicts of interest considering dominant society persons with an interest in indigenous languages are usually religious missionaries or indigenist-prone nongovernmental organizations.

The critique of oppressive epistemology in the description of education rights is two-fold: because the effects of the use of hegemonic metonymic reasoning towards the perpetuation of the *circular argument*, and more specifically, due to the implications of the control by the State of indigenous knowledge dissemination. The objectives of indigenous education are listed in art. 134 as follows: “guarantee indigenous peoples access to the knowledge of *the society*, domain of its functioning methods, in order to enable their participation *in the national life* in equal conditions considering their socio-ethnic differentiated status” and “respect to the indigenous communities’ educational and transmission of knowledge processes”.⁷⁴² Further on, the bill proposes that the *Comissão Nacional de Educação Escolar Indígena*, a branch of the Ministry of Education, shall create support mechanisms in order to “register and systematize knowledge and cognitive processes of transmission of indigenous knowledge”.⁷⁴³

In spite of the attempt to establish a mechanism that is based upon equality and does not presuppose assimilation or integration into the dominant society, the indigenous education objectives demonstrate their hegemonic vocation by referring to dominant society as *the society* and by placing the right of equal inclusion in the dominant society before the right to use of socio-ethnically differentiated educational methods. It could be argued that both approaches suggest a filtering process of indigenous knowledge through dominant society’s standards. The *Estatuto dos Povos Indígenas* contains a brave attempt of rupture with some of these trends by proposing “support mechanisms of transmission of traditional knowledge to indigenous children and young people to foster the maintenance and revitalization of ethnic, cultural, traditional, political and ancestral practices in order to achieve the formation of new references”.⁷⁴⁴ Although phrased on the basis of dominant society cultural standards, it recognizes indigenous peoples’ ownership of their knowledge and its transmission, and acknowledges the self-determining impact of education of younger generations.

⁷⁴² *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 134, I-II [translated by author] [emphasis added].

⁷⁴³ *Ibid.* at art. 140, II [translated by author].

⁷⁴⁴ *Estatuto dos Povos Indígenas proposto pela CNPI*, *supra* note 315 at art. 26, X [translated by author].

Breaking with the self-referent intonation of the hegemonic discourse, the proposed *Estatuto das Sociedades Indígenas* innovates by declaring as a strongly punishable crime the “intentional removal of indigenous peoples from their lands or the forcible assimilation of indigenous peoples into the uses, customs and traditions of another distinct society”.⁷⁴⁵ The criminalization of assimilation seems extreme but interesting in the scenario towards the consolidation of a pluralist order. However, taking into account the critique developed throughout this study, the interpretation of this provision seems more plausible if the reference is merely to assimilation into other socio-ethnically distinct societies rather than into the dominant society.

Finally, an agency axis is relevant to the critique considering that upon its potential approval the bill will be a fairly permanent and stable instrument on the enforcement and consolidation of indigenous peoples’ rights; consequently, the bar set for the core complementary legislation proposal should be the highest possible. Full agency and fair conditions of interaction in pluralist terms should be regarded as permanent. Santos highlights that the formation of the abyssal lines between the dominant and other societies implied the radical denial of copresence and affirmation of a radical difference that supposedly separates true and false and “comprises a vast set of discarded experiences, made invisible both as agencies and as agents”.⁷⁴⁶

The lack of agency approach is often expressed in relation to hegemonic patterns of autonomy in legislation, policy and court decisions, thus serving as a cornerstone for the existence and perpetuation of the *circular argument*. A critique built on the basis of Santos’ post-abyssal theory indicates that notions of agency created on the other side of the line are made invisible by being reconceptualised as the irreversible past when transferred to the dominant society’s side of the line.⁷⁴⁷ Moreover, if the concept of agency refers to indigenous peoples’ cognitive autonomy to interact and proactively participate within the dominant society’s legal and political framework, the effect of internal colonization and involuntary incorporation systematically imposed through the segregationist, assimilationist and integrationist models of

⁷⁴⁵ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 155 [translated by author].

⁷⁴⁶ Santos, “Beyond Abyssal Thinking”, *supra* note 13 at 48.

⁷⁴⁷ *Ibid.* at 50.

governance must be factored in. Nevertheless, it cannot serve as an excuse to adopt paternalistic models of interaction and enforcement of rights or for the delay in the effective recognition of rights guaranteed through the 1988 Constitution and international legislation.

The *Estatuto das Sociedades Indígenas* is filled with examples of provisions that presume a *status quo* of inexistent or of partial agency of indigenous peoples regarding the dominant society's social, legal and political systems, which, incidentally are the only systems truly acknowledged in the proposed statute. For instance, the federal indigenist organ is responsible for the management of indigenous lands but shall facilitate and provide tools for effective management by indigenous communities.⁷⁴⁸ The same formula is retained by the *Estatuto dos Povos Indígenas*,⁷⁴⁹ but in other stances, the 2009 proposal offers more opportunities for shared responsibility with regards to the protection of the lands against intrusion.⁷⁵⁰ Nevertheless, it should be observed that protection of lands has been a long-term challenge that the federal government has not appropriately addressed resulting in one of the most prominent issues in the agenda whenever indigenous peoples' rights are discussed. The sharing of responsibility is fair but it is also proselytistic that a mild self-determining measure is proposed to address an issue that the federal authority has been mandated with but has never appropriately addressed for lack of resources or political strategy.

On the other side of the spectrum, full agency is acknowledged within the intellectual property regulations. Art. 38, §3 of the *Estatuto das Sociedades Indígenas* determines that the management of profit resulting from intellectual property rights is of exclusive responsibility of indigenous peoples.⁷⁵¹ This represents a truly self-determining provision and the delegation of management responsibility to any other stakeholder but the indigenous peoples concerned would be inconceivable within the pluralist constitutional context. However, the provision lacks a fair support structure that, if required, considers the effects of oppressive models of internal colonization and non pluralistic approaches to governance on indigenous agency.

⁷⁴⁸ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 15-17.

⁷⁴⁹ *Estatuto dos Povos Indígenas proposto pela CNPI*, *supra* note 315 at arts.16-18.

⁷⁵⁰ *Ibid.* at art. 33, §2.

⁷⁵¹ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 38, §3.

The *Estatuto das Sociedades Indígenas* mirrors the *Estatuto do Índio* by declaring void all legal acts between indigenous peoples and third parties undertaken with the intent of taking advantage of indigenous peoples' partial agency within the dominant society legal framework. Similarly to its predecessor, the proposed statute does not foresee measures to avoid this type of unfair practice but it innovates stating that the federal government shall be responsible for financial damage caused to indigenous peoples.⁷⁵² It is a step forward to the extent that it acknowledges partial agency and its consequences, but it could hinder approval of the bill amid concerns of unnecessary spending blamed on indigenous peoples' lack of agency, thus recreating a *circular argument* pattern.

Further on, the proposed statute repeats the idea of the federal government as the guardian or mediator of issues concerning indigenous peoples' agency in art. 88. In this context, the provision refers to consultation for the concession of exploitation of natural resources in indigenous lands. The federal indigenist agency shall hear communities affected and the Office of the Public Prosecutor shall attest to the legitimacy of the "manifestation of the will of indigenous peoples".⁷⁵³ Furthermore, this perceived mediator role extends to measures that do not necessarily involve third parties or economic profit. The proposed statute grants "special assistance to indigenous peoples towards health, education and support of productive activities' initiatives" and encourages the federal government to "promote scientific research about the indians, their communities and societies in all fields of knowledge, especially the cataloguing of technology in order to provide support to the indigenist action".⁷⁵⁴ This approach to indigenous agency, however, can be clearly placed within the oppressive epistemology boundaries as it does not foresee a prominent role for indigenous peoples in these processes and can lead to an easy-to-implement paternalistic approach to inclusion.

⁷⁵² *Ibid.* at art. 42, §2.

⁷⁵³ *Ibid.* at art.88 [translated by author].

⁷⁵⁴ *Ibid.* at arts. 117; 173 [translated by author].

The terms of coexistence of indigenous peoples with the dominant society do not consider autonomous agency within a pluralist environment composed by socio-ethnic distinct frameworks. Moreover, it does not consider the negative impact on the fulfilment of the dominant society's standards of autonomous agency caused by the historical implementation of non pluralist models of governance. The agency axis represents the core of the *circular argument* critique, not only with regards to the complementary legislation but any other critical analysis presented here; therefore, evidencing the need for potential solutions for the rupture of the *status quo*.

3.3 *Terra Indígena Raposa Serra do Sol*: A Circular Argument Textbook Case

A textbook is a “standard work for the study of a particular subject” that could imply in a derogatory sense the “mechanical adherence to a stereotype”.⁷⁵⁵ The *Terra Indígena Raposa Serra do Sol* case, hereby referred to as *Raposa Serra do Sol* is a textbook case for two reasons: for the multiplicity of issues it encompasses, defined by the UN *Report on the Situation of Indigenous Peoples in Brazil* as “emblematic of the various elements of controversy over indigenous rights”; and, for its mechanical adherence to the *circular argument* fallacy. The Supreme Court decision was rendered in favour of indigenous peoples but the hermeneutical path that led to the sentence is so circular and filled with hegemonic argumentation that its positive outcome is dubious.

Information released by the Supreme Court in 2008 states that the *Raposa Serra do Sol* lands encompass nearly 19.000 inhabitants from five different ethnic groups – the Ingarikó, Makuxi, Patamona, Taurepang and Wapixana. The area comprises 194 communities, dispersed within the limits of three municipalities and fully located in the federated state of Roraima. The lands include border areas with Venezuela and Guyana. It is fully located within the Amazon Bioma and encompasses several units of environmental conservation. Economic activities in the lands include agriculture, logging and mining.⁷⁵⁶ The indigenous presence in the area was first

⁷⁵⁵ *The Oxford English Dictionary Online*, March 2010, s.v. “textbook”.

⁷⁵⁶ “Raposa Serra do Sol: entenda o caso” *Notícias STF*, (27 August 2008), online: <www.stf.jus.br>.

documented by SPI in 1919, and, in 1977, FUNAI began efforts towards the demarcation of the lands without conclusive results.⁷⁵⁷

The process for the identification of the area as traditionally occupied by indigenous peoples within the 1988 constitutional framework began in 1992 and an ordinance was issued by the Ministry of Justice in 1998 demarcating the lands.⁷⁵⁸ The ordinance was challenged by the state of Roraima before a federal court claiming irregularities in the administrative process of demarcation as well as considerable loss of territory for the federated state taking into account that 46% of the total geographical area of Roraima had been already declared and homologated as traditionally occupied by indigenous peoples.⁷⁵⁹ The 1998 ordinance was revoked and substantially altered in 2005 by a new ordinance, *Portaria do Ministério da Justiça n. 534*.⁷⁶⁰ The new ordinance became effective before the court's decision, thus extinguishing the claim.

Portaria n. 534 was homologated two days after its enactment,⁷⁶¹ determining that the 1,7 million hectares that form the area be demarcated in a contiguous manner.⁷⁶² It also underscores that parts of the land are border areas and therefore, of *double attribution*, and consequently considered of utmost importance for national defence.⁷⁶³ Moreover, the ordinance excludes from indigenous possession the energy transmission lines, the federal roads, public buildings, the urban perimeter of the Uiramutã municipality; and, the headquarters of the Armed Forces border patrol unit within the demarcated area.⁷⁶⁴ The ordinance forbids the entrance, transit or permanence of non-indigenous persons or groups without authorization with the exception of federal authorities. It also states that non-

⁷⁵⁷ "Understand what is happening at Roraima's Raposa-Serra do Sol Indigenous Land", *Instituto Socioambiental* (8 January 2004), online: <www.socioambiental.org>.

⁷⁵⁸ *Portaria do Ministério da Justiça n. 820*, 11 December 1998.

⁷⁵⁹ See "Raposa Serra do Sol: entenda o caso", *supra* note 756; "Supremo recebeu mais de 70 ações envolvendo a Raposa Serra do Sol", *Notícias STF*, (27 August 2008), online: <www.stf.jus.br/portal> .

⁷⁶⁰ *Portaria do Ministério da Justiça n. 534*, 13 April 2005.

⁷⁶¹ *Decreto de 15 de abril de 2005*, 15 April 2005.

⁷⁶² *Portaria do Ministério da Justiça n. 534*, *supra* note 760 at arts. 1-2.

⁷⁶³ *Ibid.* at art. 3.

⁷⁶⁴ *Ibid.* at art. 4.

indigenous persons shall be removed from the area following the adequate administrative procedures.⁷⁶⁵

The ordinance and presidential decree that homologated it were challenged almost immediately after their enactment through an *Ação Popular*. *Petição 3.388* was filed by two of the three representatives of the federated state of Roraima in the Senate.⁷⁶⁶ The claim is characterized as a conflict between federal entities: a federated state and the federal government, therefore, it was filed directly before the *Supremo Tribunal Federal*,⁷⁶⁷ hereby referred to as the Court. The proponents request the annulment of the ordinance and the presidential decree that homologated it maintaining that the demarcation of the lands as a continuous area challenge the constitutional principles of legality, due process, proportionality and the principle of federalism.⁷⁶⁸ Moreover, the proponents claim the existence of several procedural and substantive flaws⁷⁶⁹ that would irremediably compromise the impartiality and fairness of the demarcation process. The Court dismissed some of the claims; and others were acknowledged but deemed insufficient to alter the outcome of the case.⁷⁷⁰ Claims related to insufficient consultation were addressed within the one dissenting opinion.⁷⁷¹

⁷⁶⁵ *Ibid.* at art. 5.

⁷⁶⁶ *Constituição*, 1988, *supra* note 23 at art. 5, LXXII determines that any citizen can file an *ação popular* in order to render void any act that is prejudicial or harmful to, among other criteria, public assets or institutions. *Petição 3.388*, 15 April 2005, Sen. Augusto Affonso Botelho Neto; Assist. Sen. Francisco Mozarildo de Melo Cavalcanti, online: <www.stf.jus.br/portal/processos>.

⁷⁶⁷ *Constituição*, 1988, *supra* note 23 at art. 102, I, f.

⁷⁶⁸ See *e.g.* “Conheça os argumentos da ação em julgamento pelo Plenário do STF sobre Raposa Serra do Sol” *Notícias STF*, (27 August 2008), online: <www.stf.jus.br/portal>. The claim maintains that the continuous demarcation of the lands would cause the displacement of rural workers to the outskirts of the capital city and the disruption of the profitable rice farms that were established in the region in the early 1970s. In addition to challenging the ordinance and the decree that homologated it, the claimants also sought an injunction against the removal of the rice farmers from the area. The conflict with the interests of the rice farmers, and ultimately, the ruralist lobby was highlighted in Anaya, *Brazil Report*, *supra* note 3 at §33.

⁷⁶⁹ See *e.g.* “Conheça os argumentos da ação em julgamento pelo Plenário do STF sobre Raposa Serra do Sol”, *supra* note 768. Procedural flaws pinpointed by the claimants include the lack of consultation and insufficient participation of the federated state of Roraima in the demarcation process; the lack of consultation of indigenous communities, most notably those that oppose the continuous demarcation of the lands; the anthropological report was signed by only one consultant and does not consider national security concerns related to border defence and natural resources exploitation. Among the substantive flaws, the claimants argue that the indigenous peoples are ‘fully integrated into society’ and will be disadvantaged by the prohibition of ‘transit or permanence of non-indigenous persons or groups’ in the area if it is demarcated according to the continuous territory formula.

⁷⁷⁰ Supremo Tribunal Federal, PET 3388, Ementa, 1 July 2010 [PET 3388, Ementa].

⁷⁷¹ PET 3388, Farias Mello, *supra* note 337 at 19-36.

The case was brought before a Court's Plenary session, formed by the eleven Justices that form the Court on three occasions. On August 27, 2008, the joint debates were halted by the request of Justice Menezes Direito to further examine the process and issue a separate opinion. On the same date, the federated state of Roraima, FUNAI and several indigenous organizations were admitted as legitimate parts in the proceedings.⁷⁷² On December 10, 2008 the Court's Plenary convened once more for the oral presentation of the separate opinion of Justice Menezes Direito as well as the oral votes of the other Justices concurring or dissenting from the written opinion on behalf of the Court drafted by Justice Ayres Britto prior to the August session. Six Justices cast their votes concurring with Justice Ayres Britto and favourable to the inclusion in the opinion on behalf of the Court of amendments proposed by Justice Menezes Direito in his separate but concurring opinion. The debates were halted one more time by a request of Justice Farias Mello to further examine the case and issue a separate opinion considering the hermeneutical path proposed by the amended text. The Court's Plenary reconvened on March 19, 2009 and Justice Farias Mello read his dissenting opinion followed by the agreement by the two remaining Justices with the amended opinion issued on behalf of the Court.

The analysis proposed here is based on the written opinion on behalf of the Court delivered by Justice Ayres Britto,⁷⁷³ the concurring separate opinion by Justice Menezes Direito,⁷⁷⁴ delivered orally, as well as the six oral arguments presented on December 10, 2008 by Justices Northfleet, Peluso, Barbosa Gomes, Grau, Lewandowski and Antunes Rocha,⁷⁷⁵ as well as the written dissenting opinion by Justice Farias Mello delivered on March 19, 2009,⁷⁷⁶ and the

⁷⁷² Supremo Tribunal Federal, PET 3388, Decisão, Plenário, 27 August 2008.

⁷⁷³ PET 3388, Ayres Britto, *supra* note 532.

⁷⁷⁴ PET 3388, Menezes Direito, *supra* note 167.

⁷⁷⁵ Supremo Tribunal Federal, PET 3388, Min. Northfleet, Voto Oral, 10 December 2008, STF Podcast n. 18-32-11 Parte 5 Tarde, online: <radiojustica.jus.br> [PET 3388, Northfleet]; PET 3388, Peluso, *supra* note 167; Supremo Tribunal Federal, PET 3388, Min. Barbosa Gomes, Voto Oral, 10 December 2008, STF Podcast n.18-32-11 Parte 5 Tarde, online: <radiojustica.jus.br> [PET 3388, Barbosa Gomes]; Supremo Tribunal Federal, PET 3388, Min. Grau, Voto Oral, 10 December 2008, STF Podcast n.18-32-11 Parte 5 Tarde, online: <radiojustica.jus.br> [PET 3388, Grau]; Supremo Tribunal Federal, PET 3388, Min. Lewandowski, Voto Oral, 10 December 2008, STF Podcast n. 16-56-44 Parte 4 Tarde, online: <radiojustica.jus.br> [PET 3388, Lewandowski]; Supremo Tribunal Federal, PET 3388, Min. Antunes Rocha, Voto Oral, 10 December 2008, STF Podcast n. 16-41-20 Parte 3 Tarde, online: <radiojustica.jus.br> [PET 3388, Antunes Rocha].

⁷⁷⁶ PET 3388, Farias Mello, *supra* note 337.

official sentence published by the Court on 1 July 2010.⁷⁷⁷ The study was complemented with the Court's press releases on general aspects of both sessions and the remaining votes cast orally by Justices Celso de Mello and Mendes.⁷⁷⁸

More than seventy lawsuits regarding the *Raposa Serra do Sol* area have been proposed before the Supreme Court or have reached it in appeals from decisions issued by lower courts since 1977. However, the *Petição 3.388* decision is of extreme importance because it vouches for the legitimacy of the ordinance that demarcated the land and the presidential decree that homologated it, therefore, serving as a precedent and landmark to all other cases concerning the area.⁷⁷⁹ As mentioned above, the Court has decided to go even further and seized this highly publicized opportunity to clearly define and consolidate the judiciary power's opinion on the constitutional rights of indigenous peoples. The outreach of the decision went above and beyond the object in question. In addition to refusing the external stakeholders' claims and settling the legitimacy of the demarcation process, the Court imposed nineteen conditions to the effective demarcation of the lands and issuance of the land title; explicitly defining that these conditions establish a precedent for any cases pending decision or new cases brought before the Court regarding any territory traditionally occupied by indigenous peoples.

The majority decision established on December 10, 2008 and confirmed on March 19, 2009 upheld the demarcated lands as a continuous territory. As highlighted by the UN Special

⁷⁷⁷ PET 3388, Ementa, *supra* note 770. The Court's sessions are public but no written records are usually made available before the final decision is published through a summarized official sentence. The importance given to the case by the media and the political and private stakeholders involved caused some changes in the Court's common practice of distribution of information to the public. The Court's website has a specific and permanent link to the case, offering in house media coverage and references to external media sources, downloadable versions of the written votes made available by Justices Ayres Britto, *supra* note 532 and Farias Mello, *supra* note 337; and, the approximately six hours of audio recordings of the December 10, 2008 session in which the oral votes were cast and the case was most extensively debated. The audio recordings added an interesting nuance to the analysis, usually limited to substantive contents of written texts. It was also possible to capture and analyse linguistic inflections and the tone of voice of all Justices during the debates and the reading of their own votes by seven out of the eleven Justices.

⁷⁷⁸ "Ministro Celso de Mello vota pela demarcação contínua da Raposa Serra do Sol" *Notícias STF* (18 March 2009), online: <www.stf.jus.br/portal> [Notícias STF, Celso de Mello]; "Ministro Gilmar Mendes segue maioria pela demarcação contínua da Raposa Serra do Sol" *Notícias STF* (19 March 2009), online: <www.stf.jus.br/portal> [Notícias STF, Mendes].

⁷⁷⁹ "Supremo recebeu mais de 70 ações envolvendo a Raposa Serra do Sol", *supra* note 759.

Rapporteur, “the court’s decision was undoubtedly a victory of the indigenous communities of the territory and the country, confirming the essential legality of the demarcation model that has been replicated throughout the Amazon region and other parts of Brazil”.⁷⁸⁰ The decision is defined by the Justices as a groundbreaking effort in the consolidation of indigenous peoples’ rights, most notably to title rights to the lands they traditionally occupy.⁷⁸¹ The outcome of the decision is considered to be very positive by public opinion and even by indigenous organizations and movements that advocate on their behalf. Even Justice Farias Mello’s dissenting vote, which proposed the annulment of the demarcation process, does so not against or in contrast with indigenous peoples’ rights, but due to a deep void in the duty to consult all stakeholders, including indigenous peoples.⁷⁸²

Indeed, this was the first case concerning indigenous peoples’ rights decided after Brazil’s public vote in favour of the *United Nations Declaration on the Rights of Indigenous Peoples*; nevertheless, it demonstrated, just as many other cases before it, how legal formalism and the active hermeneutics safeguarding the legal and political *status quo* take preponderance over judicial activism towards the enforcement of fundamental rights. The UN Special Rapporteur maintains that the nineteen conditions imposed through the decision “go far beyond the specific wording of the Constitution or of any applicable legislation” and have been considered “a questionable exercise of the court’s authority” as a judicial rather than a legislative organ.⁷⁸³

It could be speculated that specific challenges targeting the administrative procedure for the demarcation of indigenous lands such as the *Raposa Serra do Sol* case have triggered an action-reaction measure from both the legislative and executive powers that attempts to avoid the possibility of claims before courts against legal acts that result from the indigenous lands’ demarcation and homologation processes. The text proposed by the legislative power as the *Estatuto das Sociedades Indígenas* and the *Estatuto dos Povos Indígenas*, proposed by the executive,

⁷⁸⁰ Anaya, *Brazil Report*, *supra* note 3 at §35.

⁷⁸¹ PET 3388, Antunes Rocha, *supra* note 775; PET 3388, Menezes Direito, *supra* note 167; PET 3388, Northfleet; *supra* note 775; PET 3388, Peluso, *supra* note 167; PET 3388, Lewandowski, *supra* note 775; *Notícias, STF*, Mendes, *supra* note 778.

⁷⁸² PET 3388, Farias Mello, *supra* note 337 at 119-120.

⁷⁸³ Anaya, *Brazil Report*, *supra* note 3 at §39.

contain a provision specifically stating the prohibition of property rights' injunction claims before courts challenging the procedure for the demarcation and homologation of lands traditionally occupied by indigenous peoples.⁷⁸⁴ If either proposal is approved with such provision, its enforcement would remove from the indigenous land title scenario one the factors that cause most delays in the demarcation and homologation processes. Moreover, it would address concerns by both the legislative and, most notably the executive branch that its autonomy regarding the enforcement of indigenous rights be constantly challenged and revised by the judicial power. As seen above, the existence of such concerns and the disputes over the matter between the three branches of government is another factor that hinders efforts towards the consolidation of indigenous peoples' rights. Nevertheless, it could be argued that in spite of the current widespread misuse of injunction claims within the indigenous lands rights' scenario, the provision would place an undue burden and due process restrictions to non-indigenous land owners in potentially demarcated areas.

3.3.1 The Nineteen Conditions of a Circular Precedent

The conditions imposed by the Court as the criteria for the demarcation of the *Raposa Serra do Sol* lands as well as any other land rights case to be tried afterwards have been labelled by the UN Special Rapporteur as conditions that “limit constitutional protections by specifying State powers over indigenous lands on the assumption of ultimate State ownership”.⁷⁸⁵ Furthermore, the UN Special Rapporteur highlights that while some conditions “confirm protections for indigenous lands, for example, exemption from taxation and prohibition of non-indigenous hunting, fishing and gathering activities”; others “affirm the authority of the federal Union, through its competent organs, to control natural resources extraction on indigenous lands”, “install public works projects”, and establish police or military presence “without having to consult the indigenous groups concerned”.⁷⁸⁶ The UN Report also informs that some conditions “authorize specific government institutions to exercise certain monitoring powers

⁷⁸⁴ *Projeto de Lei n. 2.057/91*, *supra* note 48 at art. 76; and *Estatuto dos Povos Indígenas proposto pela CNPI*, *supra* note 315 at art. 46, §2.

⁷⁸⁵ Anaya, *Brazil Report*, *supra* note 3 at §39.

⁷⁸⁶ *Ibid.*

over indigenous lands, in particular for conservation purposes and to regulate entry by non-indigenous individuals”.⁷⁸⁷

The role of government branches to determine the boundaries of the enforcement of indigenous and also other socio-ethnically distinct peoples’ rights is an authority that has been self-attributed and has served to justify its own continuation over time. Opinions regarding indigenous peoples’ rights issued by the Supreme Court have evolved with the times; the current support of a pluralist model that encourages redress of historical wrongs, some forms of diversity, and sustainable development is clearly perceived through the public statements of the Justices about the case and the decision’s outcome. Nevertheless, the self-righteous and unquestionable authority to determine under which terms historical wrongs shall be addressed, diversity shall be expressed and sustainable development initiatives shall take place nearly undermines decisions that are, at least in principle, favourable to the indigenous peoples cause.

Borrows’ critique towards current Canadian case law regarding indigenous peoples’ rights illustrates this scenario and the conditions established in the *Raposa Serra do Sol* decision with precision. Borrows maintains that it is possible to catalogue how the same decisions that protect indigenous rights “simultaneously hide currents that threaten their erosion” or allow justifiable infringements of indigenous rights “where the interests (*not* the Constitutional rights)” of others might be affected.⁷⁸⁸ Borrows highlights that “the *Delgamuukw* Court suggested that a broad range of governmental objectives could justifiably infringe Aboriginal rights” and that “the list of objectives that could wash away constitutionally recognized Indigenous rights was sweeping” threatening “the very core of Aboriginal rights as constitutional rights if they could be overridden by the non-constitutional interests of other Canadians”.⁷⁸⁹ The critique Borrows directs at the *Delgamuukw* decision could also be aimed, unaltered, at the conjecture established by the Brazilian Supreme Court and the list of nineteen conditions it established for this and further decisions. Interestingly, the only foreign case cited

⁷⁸⁷ *Ibid.*

⁷⁸⁸ Borrows, “Agency”, *supra* note 578 at 262 [emphasis in the original].

⁷⁸⁹ *Ibid.* at 262-263.

throughout the *Raposa Serra do Sol* proceedings, was none other than that the *Delgamuukw* decision by the Supreme Court of Canada.⁷⁹⁰

It could be argued that all nineteen conditions are formulated upon the premise that the State shall regulate all aspects of economic development and unilaterally dictate the conditions of encounters between indigenous and non-indigenous peoples within indigenous lands. The notion of State is interpreted on the basis of weak pluralist standards referring to the executive, legislative and judicial branches of government without foreseeing any form of consultation or participation of indigenous peoples. Moreover, the conditions and their inclusion in the decision are a textbook example of how the *circular argument* discourse permeates the high-levels of judicial decision-making. They simultaneously guarantee the perpetuation of the *status quo* ensuring State management of economic activities in indigenous lands and they do so through the underlying discourse that indigenous peoples lack the agency or have partial knowledge of the dominant society's public and private domains.

The conditions perpetuate the *status quo* through a formula very similar to the one Borrows' described in his critique: the justifiable infringement of constitutional rights of indigenous peoples if interests of the State or dominant society could be affected. Furthermore, Borrows' critique includes stances when such justifiable infringements are so overwhelming that they threaten the core of indigenous rights as constitutional rights. For instance, two of the conditions imposed in the *Raposa Serra do Sol* decision take aim at solving the apparent conflict of constitutional norms between national defence and indigenous rights by stating that the former always take precedence over the latter. The 'solutions' proposed through the conditions, simultaneously disregard the need to harmonize apparent conflicts of norms of constitutional status and clash with international provisions adopted or supported by Brazil.⁷⁹¹

⁷⁹⁰ The reference to the 1997 *Delgamuukw v. British Columbia* decision refers to the scope of the State's duty to consult indigenous peoples in an attempt to support Justice Farias Mello dissenting opinion that the demarcation and homologation of the lands should be annulled on the basis of lack of consultation of several stakeholders, including the indigenous communities affected. PET 3388, Farias Mello, *supra* note 337 at 63.

⁷⁹¹ See e.g. Anaya, *Brazil Report*, *supra* note 3 at §40.

All conditions address issues that transcend the *Raposa Serra do Sol* geographical area and as highlighted in the analysis developed thus far, all the issues are an integral part of the post-1988 context of enforcement of constitutionally recognized indigenous peoples' rights. It could be argued that by establishing conditions that often narrow the possibilities of interpretation of constitutional rights and expressly stating that the decision constitutes a precedent for current and future cases regarding indigenous land rights, the Court was determined to permanently settle all issues regarding the constitutionally recognized indigenous peoples' rights.

The first condition states that “the usufruct of the resources from the lands, rivers or lakes within indigenous lands shall always be established in relation to public interest of the federal Union as defined by complementary legislation”.⁷⁹² The statement seems to be an attempt to harmonize the provisions in art. 231, §2 and art. 231, §6 of the Constitution: while the first provision grants the exclusive usufruct of resources from the lands, rivers and lakes of traditionally occupied lands to indigenous peoples; the second restricts the usufruct in case of relevant public interest of the federal Union defined by complementary legislation.⁷⁹³ As analysed in the previous section, although two bills have been proposed in this regard, no legislation has been enacted specifically defining relevant public interest.⁷⁹⁴

The second and third conditions rephrase constitutional rights with the clear intent of narrowing or limiting their interpretation. Art. 231, §3 of the Constitution states that “the exploitation of hydric resources and energetic potential can only take place upon authorization of the *Congresso Nacional*”.⁷⁹⁵ The scope of this norm is narrowed by the second condition which states that the usufruct of the lands “does not include hydric resources and energetic potential which can only take place by authorization of the *Congresso Nacional*”.⁷⁹⁶ Constitutional art. 231, §3 extends the same formula of exploitation upon authorization of the *Congresso Nacional* to

⁷⁹² “STF impõe 19 condições para demarcação de terras indígenas”, *Notícias STF* (19 March 2009), online: <www.stf.jus.br> [translated by author] [*Notícias STF*, “19 condições”].

⁷⁹³ *Constituição*, 1988, *supra* note 23 at art. 231, §§ 2, 6.

⁷⁹⁴ See text accompanying notes 663-664.

⁷⁹⁵ *Constituição*, 1988, *supra* note 23 at art. 231, §3.

⁷⁹⁶ *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

mineral resources and guarantees profit participation for indigenous peoples.⁷⁹⁷ The third condition repeats the constitutional formula on profit participation but follows the same formulation of the second condition,⁷⁹⁸ thus fully narrowing the interpretation of art. 231, §3.

The fourth condition follows the same path, by determining that the usufruct of the lands does not encompass processes of small-scale prospection of precious minerals known as *garimpagem*⁷⁹⁹ but authorization may be obtained for its practice. This fourth condition somehow clarifies an existing grey area that may work on the advantage of indigenous peoples. As seen above, the practice of *garimpagem* is regulated in art. 174 of the Constitution and excludes the possibility of its practice on indigenous lands.⁸⁰⁰ While the existing constitutional provision may avoid or penalize incursions by non-indigenous *garimpeiros* in traditionally occupied lands it also deters indigenous peoples from small-scale mining on their lands. The fourth condition could be interpreted to include the possibility of indigenous peoples to apply for a permit but it also allows for the interpretation that non-indigenous persons could have a permit for *garimpagem* on indigenous lands as well.

The repetition of constitutional provisions within the conditions for indigenous land demarcation reaches complete redundancy when art. 231, §4 of the Constitution is fully transcribed into the eighteenth condition stating that the lands demarcated are “inalienable, unavailable and the rights over them are imprescriptible”.⁸⁰¹

The fifth and sixth conditions address the multiple attribution of lands traditionally occupied by indigenous peoples and lands that are instrumental to national defence. The fifth condition determines that “the usufruct of the indigenous peoples shall not be superimposed to the

⁷⁹⁷ *Constituição*, 1988, *supra* note 23 at art. 231, §3.

⁷⁹⁸ *Notícias STF*, “19 condições”, *supra* note 792 (the usufruct of the lands does not entail exploitation of mineral resources which can only take place upon authorization of the *Congresso Nacional*).

⁷⁹⁹ *Ibid.* See *supra* note 256 for a complete definition of the *garimpagem* technique.

⁸⁰⁰ *Constituição*, 1988, *supra* note 23 at art. 174. See also text accompanying notes 256-258.

⁸⁰¹ *Constituição*, *supra* note 23 at art. 231, §4; *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

interest of the National Defence Policy”.⁸⁰² Furthermore, it determines that the installation of military bases, units and outposts as well as other types of military interventions, the strategic expansion of roads; the exploitation of energetic alternatives of strategic nature and the safeguard of resources of strategic value shall be implemented regardless of consultation to the indigenous communities affected or FUNAI. The fifth condition also states that the definition of strategic nature and value shall be defined by the competent authorities which it determines to be the Ministry of Defence and National Defence Council.⁸⁰³ The sixth condition determines that “the actions of the Armed Forces and the Federal Police in the fulfillment of their respective duties on indigenous areas are guaranteed and shall take place regardless of consultation to indigenous communities or FUNAI”.⁸⁰⁴

The *Raposa Serra do Sol* land as homologated in 2005 overlap with areas previously recognized as units of environmental conservation.⁸⁰⁵ The double attribution of the lands as indigenous and environmentally protected areas generated less discussion and lobbying than the double attribution regarding border areas. The vote issued on behalf of the Court by Justice Ayres Britto on August 27, 2008 praises the case as “the ideal opportunity to highlight the compatibility between the environment and indigenous lands even if such areas involve conservation or preservation efforts”.⁸⁰⁶

Although the commensurability of environmentally protected and indigenous lands has been established, the eighth, ninth and tenth conditions are directly related to the external monitoring of the usufruct of lands of double attribution. Condition number eight establishes that the usufruct of indigenous peoples in areas where conservation units have been

⁸⁰² *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

⁸⁰³ *Ibid.*

⁸⁰⁴ *Ibid.* Furthermore, Justice Ayres Britto, in his vote on behalf of the Court, *supra* note 532 at §55; 80, develops a lengthy argumentation over the status of indigenous lands as an integral part of the national territory and of the indigenous identity as indivisible from the Brazilian identity. Similar arguments were expressed orally by PET 3388, Lewandowski, *supra* note 775; PET 3388, Grau, *supra* note 775 and PET, Northfleet, *supra* note 775.

⁸⁰⁵ The *Sistema Nacional de Unidades de Conservação* was established in 2000 as a result of the enactment of *Lei n. 9.985*, 18 July 2000 which describes the criteria for the creation and management of *Unidades de Conservação* throughout the national territory. There are two types of conservation units or UCs for the acronym in Portuguese: UCs of integral protection and UCs of sustainable use. The *Raposa Serra do Sol* area comprises both types.

⁸⁰⁶ PET 3388, Ayres Britto, *supra* note 532 at §86 [translated by author].

established shall be under the direct responsibility of the *Instituto Chico Mendes de Conservação da Biodiversidade*.⁸⁰⁷ The ninth condition states that the *Instituto* shall promote the participation of indigenous communities in management of the conservation units and that the communities' uses, customs and traditions shall be taken into account.⁸⁰⁸ Despite the delegation of the management of the lands to a State organ and not to the indigenous communities that traditionally occupy them; the co-management of the lands under the responsibility of *Instituto Chico Mendes* with the caveat that it should take into account indigenous uses, customs and traditions is a promising measure towards a pluralist enforcement of indigenous peoples' rights. The institute is a brand new institution, formed fully within the 1988 constitutional framework. Named after a world renowned rubber-tapper,⁸⁰⁹ the institute's objectives reflect an institutional compromise with ideals of sustainability and renewability of natural resources that is very much in harmony with indigenous and other socio-ethnic distinct peoples' lifestyles and economic structures.

The Court, however, has not distanced itself from the *circular argument* discourse even as it determines such a promising practice. Condition nine states that for the purpose of incorporating indigenous peoples' uses, customs and traditions in the management of areas of double attribution, the Institute should consult with FUNAI.⁸¹⁰ The tenth condition determines that "transit of non-indigenous visitors and researchers shall be allowed in the areas defined as conservation units respecting the conditions and time limitations provided by the *Instituto Chico Mendes*?"⁸¹¹

⁸⁰⁷ *Lei n. 11.516*, 28 August 2007 created the *Instituto Chico Mendes de Conservação da Biodiversidade*. The institute is a result of an administrative reform of IBAMA, the National Environment and Renewable Resources Institute. The mandate of *Instituto Chico Mendes* is to manage federal conservation units and develop and fund biodiversity conservation-related research initiatives.

⁸⁰⁸ *Notícias STF*, "19 condições", *supra* note 792.

⁸⁰⁹ Chico Mendes was born in 1944 in the state of Acre to a family of rubber-tappers. Working in the *seringais* since childhood, in his youth and adulthood he became an advocate for the creation of the extractivist reserves in the Amazon Region. The end of the rubber-boom in the 1960s caused many of the lands where the *seringueira* trees are located to be sold to cattle ranchers and this sudden change in economic exploitation objectives severely disrupted the subsistence activities of thousands of rubber-tappers whose social and economic sustainability were deeply intertwined with the specific lands where they traditionally lived and worked. Mendes was assassinated by cattle ranchers in 1988 but his efforts have received much recognition before and after his death. In 1987 he was one of the first laureates of the United Nations Environmental Programme, UNEP, Global 500 Roll of Honour for Environmental Achievement; online: <www.unep.org/global500>.

⁸¹⁰ *Notícias STF*, "19 condições" *supra* note 792.

⁸¹¹ *Ibid.*

By omitting the direct consultation with the indigenous peoples about their uses, customs and traditions as well as their input regarding non-indigenous presence in the areas, it could be speculated that the Court is implying, with or without the intention to do so, that it does not conceive the possibility of a direct consultation or negotiation between the indigenous communities and the *Instituto Chico Mendes* - the organ mandated with the management of the lands. This possible scenario illustrates the perpetuation of the *circular argument* through the positioning of FUNAI as the organ that filters all information regarding indigenous peoples and translates it to the dominant society. This perspective evidences vestiges of the integrationist paradigm and an underlying premise, promoted by the Court, that indigenous peoples may lack the agency to engage in management partnerships in their own terms.

In addition to the conditions that address the multiple attribution of lands and the conditions that attempt to clarify the interpretation of constitutional norms that refer to indigenous land rights; conditions seven, eleven, twelve, thirteen and fourteen take aim at solving an existing conflict of interests that has previously been addressed by the legislative power. The controversy involves the use of infra-structure installations located on indigenous lands by the entire population who reside in the areas affected by the land demarcation.⁸¹²

Projeto de Lei Complementar n. 273/08, one of the two bills mentioned above in relation to the first condition, proposes to define relevant public interest as established in art. 231, §6 of the Constitution.⁸¹³ It offers a definition that is similar to the text of the Court's seventh condition, demonstrating a coordinated approach towards a pre-existing concern. While the proposed bill defines that "roads, railroads and rivers used for transportation located on indigenous lands are of relevant public interest",⁸¹⁴ the seventh condition maintains that the usufruct of the indigenous peoples "shall not obstruct the installation of public equipment, communication

⁸¹² See text accompanying note 667.

⁸¹³ *Projeto de Lei Complementar n. 273/08*, *supra* note 614.

⁸¹⁴ *Ibid.* at art. 1.

networks, roads and other transportation routes, as well as buildings used to provide public services, especially those related to health and education”.⁸¹⁵

The eleventh condition determines that in areas not subjected to double attribution, the “entrance, transit and permanence of non-indigenous persons shall follow criteria established by FUNAI”.⁸¹⁶ Furthermore, the twelfth condition states that “entrance, transit and permanence of non-indigenous persons on indigenous lands shall not be the object of rate or fare charges by the indigenous communities”.⁸¹⁷ The thirteenth condition extends the prohibition of indigenous persons or communities to charge fares for the use of roads, power lines or any other public equipment or installations regardless of their express exclusion from the homologation decree”.⁸¹⁸

The fourteenth condition follows the same path as it attempts to address a common violation of art. 231, §4.⁸¹⁹ The eighteenth condition already provides reinforcement to the constitutional norm regarding the unavailable and unalienable status of the lands,⁸²⁰ condition fourteen; however, specifically describe scenarios that constitute violations of the constitutional norm. It determines that it is forbidden to “lease or transfer the lands under any other type of legal act that restricts the full usufruct and direct possession of the lands by the indigenous community”.⁸²¹

The fifteenth and sixteenth conditions are, in essence, positive measures towards the effective protection of constitutionally recognized rights.⁸²² Condition number fifteen forbids “hunting, fishing or gathering” and practicing any “cattle or agriculture extractivist activity on indigenous

⁸¹⁵ *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

⁸¹⁶ *Ibid.*

⁸¹⁷ *Ibid.*

⁸¹⁸ *Ibid.*

⁸¹⁹ *Constituição*, 1988, *supra* note 23 at art. 214, §4.

⁸²⁰ See, *supra* text accompanying note 801.

⁸²¹ *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

⁸²² As highlighted above, the UN Special Rapporteur has acknowledged that although most conditions are detrimental for the enforcement of constitutional guarantees, some of them confirm protections for indigenous lands. See *supra* text accompanying note 786.

lands”.⁸²³ The phrasing of the condition, however, raises several possibilities of interpretation as the prohibition is directed only at “persons unknown to the indigenous communities”.⁸²⁴ The decision’s text does not clarify this particular word choice, therefore, it is difficult to ascertain if the provision attempts to protect rural workers, some of which socio-ethnic distinct peoples, that traditionally work alongside indigenous peoples in extractivist enterprises or if the intention is to open possibilities of exploitation of the lands through contract with larger-scale non-indigenous persons or companies. In any case, the prohibition could be interpreted restrictively toward any non-indigenous person or encompassing any of the possibilities speculated above. If a restrictive interpretation is enforced, forbidding any person or only allowing small-scale partnerships, the approach clashes with bills proposed by the legislative branch that aim at regulating medium and large scale partnerships with private entities for the exploitation of indigenous lands.⁸²⁵

The sixteenth condition determines indigenous peoples’ full tributary exemption for “the exclusive usufruct of natural resources on indigenous lands respecting the limits imposed by arts. 231, §3 and 49, XVI of the 1988 Constitution”.⁸²⁶ Both provisions refer to the exploitation of natural resources remounting to conditions one to four – art. 231, §3 refers to mining and resources from land, rivers and lakes; while both articles refer to exploitation of hydric resources and energetic potential.⁸²⁷

Considering the scope of the *Raposa Serra do Sol* case and the main complaints voiced by the federated state of Roraima where the lands are located – it is evident that the seventeenth condition specifically addresses concerns of the state of Roraima as well as other federated states involved in present and future indigenous lands demarcation cases. The condition prohibits the “amplification of demarcated indigenous lands”.⁸²⁸ The UN Special Rapporteur

⁸²³ *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

⁸²⁴ *Ibid.*

⁸²⁵ See *Projeto de Lei n. 2002/03*, *supra* note 675 and *Projeto de Lei do Senado n. 115/08*, *supra* note 678. See also text accompanying notes 675-679.

⁸²⁶ *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

⁸²⁷ *Constituição*, 1988, *supra* note 23 at arts. 49, XVI; art. 231, §3.

⁸²⁸ *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

specifically identifies this condition as an “impediment to ongoing efforts to secure adequate land areas for indigenous communities that were provided with relatively small parcels of land prior to the current demarcation regime”.⁸²⁹ Furthermore, the condition may also affect communities that have grown exponentially since the demarcation processes of their lands, which may date back to at least fifteen years. The amplification of lands had been common practice before the decision and often occurred in order to address the constitutional provision that the demarcated areas are based on their indispensability to the preservation of natural resources necessary to the well-being of indigenous peoples as well as their physical and cultural reproduction according to their uses, customs and traditions.⁸³⁰ It is clear that the decision addresses previously expressed concerns made by representatives of federated states and land owners of areas surrounding indigenous lands. As observed within the analysis of the adversarial agendas developed above, two legislative decree bills have been proposed seeking the suspension of Ministry of Justice ordinances that declare the amplification of the limits of certain indigenous lands.⁸³¹

Lastly, the nineteenth condition emerges to determine the role of all federated entities in the constitutional framework of indigenous land rights. While the decision reinforces the competence of the federal Union, specifically, of the executive branch of government to demarcate indigenous lands,⁸³² the nineteenth condition “ensures effective participation in all stages of the process of federated entities affected by demarcations”.⁸³³ It should be noted that municipalities are also considered part of the federation in Brazil;⁸³⁴ consequently, the condition’s application is extended to municipalities as well as federated states and the federal district.

The text of the nineteenth condition seems to be a compromise amongst diverging opinions expressed by the Justices during the debates. Justice Mendes argued that the accumulation of

⁸²⁹ Anaya, *Brazil Report*, *supra* note 3 at §45.

⁸³⁰ *Constituição*, 1988, *supra* note 23 at art. 231, §1.

⁸³¹ *Projeto de Decreto Legislativo n. 47/07 and 49/07*, *supra* note 526.

⁸³² PET 3388, Ementa, *supra* note 770 at §8.

⁸³³ *Notícias STF*, “19 condições”, *supra* note 792 [translated by author].

⁸³⁴ *Constituição*, 1988, *supra* note 23 at art.1.

lands demarcated within the same federated state may affect the state's political autonomy;⁸³⁵ and Justice Barbosa Gomes maintains that the role of the Court does not encompass opinions regarding potential imbalances in the federative principle because the demarcation is a discretionary act of the Union on the basis of a technical report.⁸³⁶ On the other side of the spectrum, Justice Ayres Britto defends that the federal government should be the main entity responsible for the demarcation of the lands because federated states and municipalities will always be opposed to the transfer of territories to the federal realm.⁸³⁷ Moreover, Justice Antunes Rocha makes the bold statement that the indigenous land title precedes the creation of federated states and municipalities and should, therefore, be protected by the federal Union within this framework of reference.⁸³⁸ It could be argued that the existence of a condition of this scope signifies an attempt of the majority to respond to criticism voiced in Justice Farias Mello's dissenting opinion.

Justice Farias Mello dissents from the decision of upholding the normative acts that enabled the continuous demarcation and homologation of the *Raposa Serra do Sol* area considering that several interested stakeholders were not heard or that consultation did not follow adequate and transparent procedures.⁸³⁹ It is interesting to note that from all the stakeholders cited in Justice Farias Mello's dissenting opinion – indigenous communities; private parties; the National Defence Council; and the federated state and municipalities⁸⁴⁰ – only the participation rights of the latter were acknowledged within the framework proposed in the final decision.

3.3.2 Multiple Interests and the Circular Delivery of Justice

The considerable amount of interests of non-indigenous peoples at stake within the *Raposa Serra do Sol* case is striking. Private stakeholders, indigenous rights advocates and all three

⁸³⁵ *Notícias STF*, Mendes, *supra* note 778.

⁸³⁶ PET 3388, Barbosa Gomes, *supra* note 775.

⁸³⁷ PET 3388, Ayres Britto, *supra* note 532 at §61-63.

⁸³⁸ PET 3388, Antunes Rocha, *supra* note 775.

⁸³⁹ PET 3388, Farias Mello, *supra* note 337 at 120.

⁸⁴⁰ *Ibid.*

branches of government have influenced in different ways and extents the public opinion regarding the case and perhaps even its outcome.

The Ministry of Justice's 2005 *Portaria n. 534*, challenged in the proceedings, determines which areas were to be excluded from the demarcation of the *Raposa Serra do Sol* indigenous lands.⁸⁴¹ An analysis of the areas excluded by the ordinance in 2005 demonstrates that the Court went beyond the scope of the challenge it received when establishing the conditions for this and future demarcations. It could be argued that the Court took advantage of such a highly publicized decision to outline its own understanding of the interpretation (often restrictive) of constitutionally recognized land rights. This perspective is in absolute contrast with the discourse of the Court painting the decision as a watershed in the protection of indigenous peoples' rights.

It is interesting to observe how direct references to the lack of agency of indigenous peoples were raised to justify the conditions' imposition. Additionally to issuing parameters for the interpretation of constitutional rights and within this conjecture, the Court has expressed its opinion about the conceptualization of the word indigenous for constitutional rights purposes through a three-part paragraph in the summarized decision of the case. In the first part, it affirms that the term should always be used in its plural form in order to encompass all the ethnic groups that form the Brazilian indigenous populations and to reflect inter- and intra-ethnic diversity.⁸⁴² This jurisprudential approach represents a significant step forward in the implementation of a pluralist model of constitutional interpretation.

The second half of the paragraph, however, is embedded in a culturally self-referent manifestation of the 'lack of agency' discourse. The Court declares that "indigenous persons in the process of acculturation shall always be considered indigenous for the purpose of

⁸⁴¹ *Portaria do Ministério da Justiça n. 534*, *supra* note 760 at art. 4. See also text accompanying note 764.

⁸⁴² PET 3388, Ementa, *supra* note 770 at §4.

constitutional protection”.⁸⁴³ It could be speculated that within the context of this case, in which non-indigenous stakeholders claimed that indigenous rights should not be upheld considering that the majority of the indigenous peoples in the area were fully integrated into the dominant society,⁸⁴⁴ the Court has decided to clarify the paradigmatic shift between the integrationist and pluralist models to avoid future claims of this nature. It could be argued, however, that the Court’s approach does not clarify the pluralist paradigmatic shift but instead perpetuates integrationist ideals and ultimately, the *circular argument*.⁸⁴⁵

Furthermore, the third part of the paragraph could be interpreted as an attempt to create a new legal category within the realm of indigenous peoples’ rights. The Court states that constitutional protection is not limited to the *silvícolas*, a term defined in the summarized decision as the indigenous peoples who are ‘primitive forest-dwellers’. As seen above, the term *silvicola* or forest-dweller has been used in Brazilian legislation, mostly prior to 1988, as a synonym of ‘indian’ or indigenous.⁸⁴⁶ The assertion seems so out of context within the decision and out of sync with post-1988 legislation and policy that it is difficult to speculate if it aims at fulfilling any specific objectives – perhaps, as speculated above, a paradoxical attempt by the Court to limit claims by the dominant society that seek a restrictive permafrost interpretations of indigeneity and indigenous peoples’ rights. Regardless of the reasoning that motivated the inclusion of such a phrase in the decision’s text, its role in the perpetuation of the *circular argument* is quite obvious.

It is also relevant to note that besides the politically-loaded nature of the decision and the restrictive proposals for the interpretation of the already limited constitutionally-recognized indigenous peoples’ rights, the sweeping majority of the Justices’ opinions highlight their opposition to the role of international provisions as guidelines for the interpretation of constitutional provisions or enforceable legislation even if Brazil has committed to the

⁸⁴³ *Ibid.*

⁸⁴⁴ PET 3388, Ayres Britto, *supra* note 532 at §77-79.

⁸⁴⁵ See e.g. PET 3388, Farias Mello, *supra* note 337 at 83-85.

⁸⁴⁶ See text accompanying notes 166-167.

conventions and declarations that outline them.⁸⁴⁷ This tendency is observed with most intensity regarding the *United Nations Declaration on the Rights of Indigenous Peoples*, notably, art. 3, which refers to the right of self-determination;⁸⁴⁸ as well as the declaration's arts. 18 and 19; and, art. 6 of ILO 169, regarding the duty to consult indigenous communities.⁸⁴⁹ While certain Justices do not contribute to the discussions in this regard, Justice Lewandowski should be praised for his adoption of a pluralistic approach towards the enforcement and interpretation of constitutionally and internationally recognized indigenous peoples' rights and for promoting the positive potential of the enforcement of the *United Nations Declaration on the Rights of Indigenous Peoples* in Brazil, including the right to self-determination.⁸⁵⁰

The UN Special Rapporteur criticizes the lack of commitment of the Court to the international framework on the interpretation of indigenous peoples' rights. A direct critique is aimed at some of the conditions by suggesting that "Brazil's progressive constitutional provisions on indigenous peoples should be interpreted to conform to relevant international standards".⁸⁵¹ Moreover, the UN Special Rapporteur notes that "whatever the validity or ultimate disposition of the 19 conditions" articulated by the Court, "the administrative, legislative and military authorities" should exercise their powers in consistency with international norms; additionally suggesting the need for the enactment of domestic legislation or administrative regulation to implement the international standards.⁸⁵²

As suggested throughout this study, it is precisely within this path of implementation of international human rights standards that a renewed and truly pluralist approach to the interpretation and enforcement of constitutionally recognized rights can occur. The following chapter complements the *circular argument* critique developed thus far, by providing possible

⁸⁴⁷ PET 3388, Peluso, *supra* note 167; PET 3388, Ayres Britto, *supra* note 532; PET 3388, Menezes Direito, *supra* note 167; PET 3388, Farias Mello, *supra* note 337; PET 3388, Antunes Rocha, *supra* note 775; PET 3388, Grau, *supra* note 775.

⁸⁴⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17 at art. 3 (indigenous peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development).

⁸⁴⁹ *Ibid.* at arts. 18-19; ILO 169, *supra* note 212 at art. 6.

⁸⁵⁰ PET 3388, Lewandowski, *supra* note 775.

⁸⁵¹ Anaya, *Brazil Report*, *supra* note 3 at §40.

⁸⁵² *Ibid.*

alternatives for breaking the *circular argument* and enabling a self-determining approach to the implementation of the rights of indigenous and other socio-ethnic distinct peoples in Brazil to take place.

CHAPTER 4

Multi-Shaped Pathways: Breaking the *Circular Argument*

*“Cada uno da lo que recibe y luego recibe lo que da, nada es más simple, no hay otra norma: nada se pierde, todo se transforma”.*⁸⁵³

This study addresses the constitutional and overall legal status of socio-ethnic and culturally differentiated groups that require legal, social and cultural reinterpretation of existing structures to reach their potential individually and collectively and claim the full effectiveness of the pluralist and diverse society constitutional premise. In the previous chapters, the shortcomings and little advancement towards the rupture with paradigms of segregation, assimilation and integration in force before the enactment of the 1988 Constitution have been analysed. Furthermore, current practices that are deeply embedded in a dominant society’s self-referent⁸⁵⁴ and hegemonic discourses were identified as factors that contribute to the perpetuation of the *circular argument* despite the pluralist compromise of multi-ethnic recognition and non-discrimination brought by the 1988 constitutional text.

The primordial contribution sought to break the *circular argument* is the promotion of instrumental change in the process of constitutional reasoning – and consequently legal reasoning in general - in relation to the rights of indigenous and other socio-ethnic distinct peoples in Brazil. Such constitutional reasoning process encompasses the interpretation of constitutional norms by the executive, legislative and judicial powers; and, the motivation, ethics and coordinated efforts to enact and implement constitutionally recognized rights.

The *circular argument* has been constructed upon and perpetuates what Santos defines as the superimposition of the regulation paradigm over the emancipation paradigm. Santos maintains

⁸⁵³ Jorge Drexler, *Todo se Transforma*, CD Eco2, 2005. “Each person gives what they receive and then receives what they have given, nothing is simpler, there is no other norm: nothing is lost, everything is transformed” [translated by author].

⁸⁵⁴ The concept is taken from Marés, *Renacer*, *supra* note 6 at 161. See also, *supra* note 6.

that society is ruled by two paradigms that refer to two types of ignorance and knowledge: the paradigms of regulation and emancipation. In the regulation paradigm the ignorance point is chaos and the knowledge point is order. In the emancipation paradigm, on the other hand, the ignorance point is colonialism, in a broad perception; and, the knowledge point is solidarity. Ideally, the two paradigms should be in equilibrium. Nevertheless, according to Santos, within the context of the crisis of modernity the regulation paradigm has superimposed itself to the emancipation paradigm through the progressive encroachment of the dominant society's logics of economic development over any other type of knowledge, resulting in the current supremacy of the regulation paradigm. This preponderant role of the regulation paradigm in the social, legal and political realms has enabled it to recodify the emancipation paradigm in regulatory terms, perpetuating 'colonialism through order'⁸⁵⁵ – a suitable definition of the efforts towards the perpetuation of the *circular argument*. The ideal normative scenario, with both paradigms in equilibrium is one that promotes 'order through solidarity' instead.⁸⁵⁶

Santos' propositions point to the pluralist potential of the emancipation paradigm in the context of State reform and its crisis, and their impact in the developing world. Within the context of reinterpretation of 'order through solidarity', three theories proposed by Santos are particularly emphasised here: *ecology of knowledges*, *post-abyssal thinking* and *diatopical hermeneutics*.⁸⁵⁷

The *circular argument* should be situated not only as an epithet of the superimposition of the regulation paradigm over the emancipation paradigm but also in connection with the crisis of the State; considering the outdated structures, and, mindset of legal and political operators may serve as perpetuators of the *circular argument* as discussed in the previous chapters. For Santos, the crises of the State and State reform are a crisis in the modern social contract.⁸⁵⁸ The modern social contract is analysed here as the State-sponsored dominant society's socio-political and legal systems.

⁸⁵⁵ Santos, *Gramática*, *supra* note 13 at 32.

⁸⁵⁶ Santos, *Crítica da Razão Indolente*, *supra* note 13 at 33.

⁸⁵⁷ See Santos, *New Common Sense*, *supra* note 5; *Crítica da Razão Indolente*, *supra* note 13; *New Legal Common Sense*, *supra* note 13; *Gramática*, *supra* note 13; "Epistemology", *supra* note 13; and "Beyond Abyssal Thinking", *supra* note 13.

⁸⁵⁸ Santos, *Gramática*, *supra* note 13 at 317-340.

This social contract is built upon the idea that its criteria of inclusion simultaneously operate as criteria of exclusion. Santos proposes that the State and the State reform crises accentuate pre-existing exclusionary processes in two ways: pre-contractual and post-contractual. Post-contractualism is the process by which groups and social interests previously included in the social contract are excluded from it without any possibility of return. The pre-contractual process consists in denying access to socio-political citizenship to groups that were considered strong candidates to it and had valid expectations to achieve it.⁸⁵⁹

It could be argued that the *circular argument* enables the existence of pre-contractual and post-contractual processes. It generates pre-contractual processes to the extent that it promotes mechanisms of inclusion that are operationally exclusionary. It also enables post-contractual processes that degenerate the paradigm upon which it was established. In other words, the constitutional discourse and interpretation processes are culturally self-referent to the dominant society and, therefore, exclude legal and political pluralism on the basis of differentiated notions of citizenship and belonging.

The State and its reform crises also include the loss of what Santos defines as the ‘national time-space’. A loss motivated by the increased importance of the global and local time-spaces which results in the growth in relevance of temporalities that are incompatible with the current State-endorsed temporalities such as the *instantaneous time* of cyber-space and globalized communications; and, the *glacial time* exemplified by environmental and biodiversity concerns and the indigenous cause.⁸⁶⁰

The *circular argument* location fully within the ‘State time-space’ is obvious. Since the first interactions between the dominant society and the indigenous and other socio-ethnic distinct peoples, the ‘State time-space’ has been the equivalent of an *hegemonic time-space*. According to

⁸⁵⁹ *Ibid.* at 328.

⁸⁶⁰ *Ibid.* at 326.

Santos, this is partially motivated by the understanding that the *glacial time* is considered too slow and too dense to be fully compatible with any State time-space temporality, exemplifying, furthermore, that recent approximations between the State and the glacial time have often been meagre attempts of the State temporality to cannibalize and degenerate the glacial time⁸⁶¹ - a description too similar to the hegemonic discourses that support the *circular argument* to be ignored.

The solution proposed by Santos to resolve this matter is the reconstruction of a State time-space of democratic deliberation that includes a renewed type of social contract built upon presuppositions that are very different from those that supported the modern social contract. This much more inclusive contract should encompass not only human beings and social groups but also nature; it should be an intercultural contract because the inclusion is consequential of equality and difference criteria. Moreover, the contract should not be confined to the national, State-oriented time-space but include, in equal measure the local, regional and global time-spaces. This new social contract should be construed upon flexible distinctions between the State and civil society; economy, politics and culture; and the public and private realms – for Santos, democratic deliberation has an intrinsic cosmopolitan existence, and, therefore, cannot be contained by a single time-space or institutional materiality.⁸⁶²

The descriptions regarding the superimposition of the regulation paradigm over the emancipation paradigm as well as the need to replace the modern social contract with one that is more inclusive and promotes a truly democratic deliberation framework assist in the identification of the *circular argument* as an attempt to unilaterally impose hegemonic order making use of a pluri-ethnic and multicultural constitutional façade.

⁸⁶¹ *Ibid.*

⁸⁶² *Ibid.* at 339-340.

The reconstruction of constitutional reasoning must enable democratic deliberation and include the global and local spheres. The processes of reinterpretation should, therefore, interrelate: the inclusive social contract on the basis of *diatopical hermeneutics*, *ecology of knowledges* and *post-abyssal thinking*; and, the inclusion of the global and local spheres through a context that reverberates the globally established right of self-determination with its localized existence.

These two aspects of the reconstruction/reinterpretation process play a double role in the analysis: while they represent tools that break the *circular argument*, they are also instrumental in the implementation of a system of checks and balances that ensures the openness of the process of constitutional reasoning to re-evaluation of practices that might emerge after the rupture of the *circular argument* and the implementation of the renewed citizenship ideals.

4.1 Reinterpreting the Inclusiveness of Legal and Judicial Parameters

Within Santos' theoretical framework, the regulation paradigm is entrenched with indolent reasoning while the emancipation paradigm represents a cosmopolitan form of reasoning.⁸⁶³ It could be deduced from the analysis undertaken thus far, that the Brazilian legal and judicial realms, and more specifically the constitutional order, could be placed within the current scenario of superimposition of the regulation paradigm over the emancipatory paradigm. Consequently, the reasoning underlying the decision-making processes is connected to an indolent form of reasoning to a much higher extent than to a cosmopolitan form of reasoning. According to Santos, indolent reasoning can occur in four different forms: impotent, arrogant, metonymic and proleptic⁸⁶⁴ and it is possible to notice traces of all of them in *circular argument* manifestations.

The strongest co-relation between the current legal scenario and the different forms of indolent reasoning is perhaps with the impotent mode. It blocks diverse realities from global and local time-spaces from reasoning processes by not acknowledging their existence or

⁸⁶³ *Ibid.* at 94.

⁸⁶⁴ *Ibid.* at 95.

legitimacy.⁸⁶⁵ Consequently, the impotent mode of reasoning does not open itself to contributions outside of the dominant society's pre-established framework of legality and legitimacy. The impotent mode of reasoning is justified by the arrogant mode, which determines that a given mode of reasoning, in this case the State indolent reasoning, is unconditionally free and may choose not to acknowledge other types of reasoning.⁸⁶⁶

These two modes are complemented by the metonymic and the proleptic modes of reasoning. The metonymic mode represents an obsession of totality through order and the presupposition of the existence of only one type of logics at a time capable of governing all behaviour.⁸⁶⁷ The proleptic mode of reasoning perpetuates the *status quo*, by operating under the premise that everything that there is to know about the future is already known; therefore conceiving the future as merely surpassing the present in a linear, automatic and infinite way.⁸⁶⁸

The pluralist model adopted by the 1988 Constitution demonstrates an incipient effort to surmount impotent and arrogant reasoning inertia. The perpetuation of the *circular argument* through non-cohesive or outright hegemonic approaches towards the enforcement and implementation of constitutionally recognized rights, however, demonstrate that these modes of indolent reasoning are still very much embedded within the system. Nevertheless, it could be argued that the biggest challenge towards the rupture of the *circular argument* is a reinterpretation of the constitutional formula that surpasses the currently consolidated metonymic and proleptic modes of indolent reasoning within the 1988 Constitution interpretation and enforcement discourses.

The metonymic reasoning process is described by Santos as the acknowledgment of only one type of logics at a time capable of governing all behaviour.⁸⁶⁹ The process of constitutional implementation and interpretation in force in Brazil with regards to indigenous and sometimes

⁸⁶⁵ *Ibid.*

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *Ibid.* at 95-97. See also, *supra* text accompanying notes 731-735.

⁸⁶⁸ *Ibid.* at 95-96.

⁸⁶⁹ *Ibid.* at 97.

also other socio-ethnic distinct peoples has, undoubtedly, a metonymic existence. The arrogant, in spite of impotent, mode of reasoning currently in use is understood by decision-makers as the only possible legal and political reasoning path. Moreover, any pluralistic contribution might become tolerated if it follows the axioms of decision-making that have been metonymically pre-established by the system. The proleptic mode of reasoning could be considered the existential reason of the *circular argument* as it exposes the problem of enforcement of rights as a reason for its lack of solution and, as a consequence, the problematic is linearly perpetuated into the future still as problem and still without a solution.

Indolent reasoning imposes a limited comprehension of the world and of occidental modernity itself,⁸⁷⁰ taking into consideration that modern thinking is often expressed through abyssal thinking.⁸⁷¹ This form of thinking “consists of a system of visible and invisible distinctions, the invisible ones being the foundation of the visible ones”.⁸⁷² Santos maintains that such invisible distinctions are “established through radical lines that divide social reality into two realms, the realm ‘on this side of the line’ and the realm of ‘the other side of the line’”⁸⁷³ and that “modern knowledge and modern law represent the most accomplished manifestations of abyssal thinking”.⁸⁷⁴

As proposed by Santos, abyssal thinking is characterized by “the impossibility of co- presence of the two sides of the line”,⁸⁷⁵ due to the metonymic reasoning employed which determines that “on the other side of the line, there is no real knowledge; there are beliefs, opinions, intuitive or subjective understandings, which, at the most, may become objects or raw materials for scientific inquiry”.⁸⁷⁶ As a consequence, “the other side of the line comprises a vast set of discarded experiences, made invisible both as agencies and as agents”.⁸⁷⁷ Santos

⁸⁷⁰ *Ibid.* at 98.

⁸⁷¹ Santos, “Beyond Abyssal Thinking”, *supra* note 13 at 45.

⁸⁷² *Ibid.*

⁸⁷³ *Ibid.*

⁸⁷⁴ *Ibid.* at 46.

⁸⁷⁵ *Ibid.* at 45.

⁸⁷⁶ *Ibid.* at 47.

⁸⁷⁷ *Ibid.* at 48.

identifies indigenous peoples as “the paradigmatic inhabitants of the other side of the line”,⁸⁷⁸ stating additionally that the more non-hegemonic understandings of the world are identified, “the more evident it becomes that there are still many others to be identified” and hybrid understandings mixing components of diverse types of reasoning “are virtually infinite”.⁸⁷⁹ The struggle for justice, thus becomes, “a struggle for cognitive justice as well” which requires a post-abyssal kind of thinking.⁸⁸⁰

Santos maintains that the metonymic indolent mode of reasoning flourish through *sociologies of absences*.⁸⁸¹ One of these absences is clearly identified in the *circular argument* - the monoculture of knowledge and knowledge strictness. The solution proposed when transforming the indolent reasoning into a post-abyssal one is to transform monocultures into ecologies, thus the monoculture of knowledge is transformed into an *ecology of knowledges*.⁸⁸² Contrary to what it may seem at first glance, the core aspect of the ecology of knowledges is not to attribute equal value to all types of knowledge. Its main goal is to promote pragmatic discussions that do not disqualify knowledges that are not endorsed by epistemological canons of the hegemonic monoculture of knowledge⁸⁸³ - precisely what the *circular argument* perpetuates. Confrontation and dialogue amongst knowledges enable a process through which practices diversely ignorant transform themselves into practices diversely wise.⁸⁸⁴

The ecology of knowledges approach demonstrates that ignorance is only one form of knowledge disqualification. All types of knowledge possess internal and external limitations. Santos highlights as a paramount characteristic of the hegemonic and monocultural types of knowledge to recognize only their own internal limits,⁸⁸⁵ thus creating phenomena such as the

⁸⁷⁸ *Ibid.* at 64.

⁸⁷⁹ *Ibid.* at 65.

⁸⁸⁰ *Ibid.* at 53.

⁸⁸¹ Santos, *Gramática*, *supra* note 13 at 102-105. Santos identifies five types of sociologies of absences: knowledge; linear time; social classification; dominant scale; and capitalist productivity. Although all forms can be related to the interrelations between indigenous and other socio-ethnic distinct peoples and the dominant society; only the first one is analysed for its closer relation to the critique developed.

⁸⁸² *Ibid.* at 105-106.

⁸⁸³ *Ibid.* at 108.

⁸⁸⁴ *Ibid.* at 106-107.

⁸⁸⁵ *Ibid.* at 107.

circular argument. The ecology of knowledges approach is put in practice through epistemological and democratic imagination. A diversification of perspectives is achieved through epistemological imagination while democratic imagination enables the recognition of diverse practices and social actors.⁸⁸⁶ Furthermore, both are relevant for the deconstruction and reconstruction of existing processes such as the interpretation of constitutionally recognized rights of indigenous and other socio-ethnic distinct peoples.

As evidenced throughout this study, the use of *circular argument* strategies towards the implementation of constitutionally recognized rights relentlessly attempts to stretch the future rendering the fulfilment of rights and pluralist approaches in the present difficult to enforce thus perpetuating the *status quo*. *Circular argument* strategies project definite pluralist solutions towards a long-term future when the perceived ‘lack of agency’ challenge and other obstacles will supposedly have been surmounted. The current solutions found, however, do not necessarily seek structural changes that will eventually make pluralist possibilities a reality. Ideally, breaking the *circular argument*, would enable realistic possibilities of a shorter-term future to emerge. While the proposed solution to fight the metonymic indolent reasoning of the *circular argument* is to transform monocultures in ecologies, the remedy to combat proleptic modes of indolent reasoning is to replace the emptiness of the future as defined by a linear timeframe with a plural *sociology of emergencies* that propose concrete possibilities that are simultaneously utopian and realistic.⁸⁸⁷ The proleptic mode of indolent reasoning amplifies expectations and consequently reduces the experiential field. The *sociology of emergencies* seeks a balanced relationship between experience and expectations. Rather than placing the emphasis in the minimization of expectations, the sociology of emergencies proposes a radical approach towards expectations of real capacities and possibilities.⁸⁸⁸

Taking all these perspectives into account, it should be noted, furthermore, that the reinterpretation proposed cannot be a project fully developed from the outset of its application. It must be an experiential process, using a ‘learning by doing’ method of

⁸⁸⁶ *Ibid.* at 115.

⁸⁸⁷ *Ibid.* at 116.

⁸⁸⁸ *Ibid.* at 119.

constitutional and legal reconstruction applied in the present but counting with a palpable future of further evaluation, improvement and innovation. For this purpose, Santos proposes *diatopical hermeneutics* mechanisms that promote permanent evaluation of intercultural dialogue and the intercultural construction of concepts of equality and difference.⁸⁸⁹

The *diatopical hermeneutics* approach is based upon the idea that each culture possesses universes of meaning that contain constellations of strong *topoi* or widely acknowledged rhetorical common senses. Such *topoi* work as argumentative premises, but they are not discussed within the culture they exist and naturally may become vulnerable and problematic when applied to a different culture that did not produce them.⁸⁹⁰ It could be argued that the values upheld by the *circular argument* are strong *topoi* within the constitutional culture and that they do not address intercultural and multicultural issues in depth because they belong to only one culture involved in the dialogue. The non-existence or lack of sense of widely acknowledged *topoi* within the hegemonic culture is perceived by the dominant society not as a flaw in the *topoi* or the dialogue but as an insufficiency of the non-hegemonic cultures. This perspective also demonstrates how the legal and judicial parameters of interpretation of norms are entrenched in abyssal thinking and cannot envisage ‘the other side of the line’ as legitimate and equal stakeholders in decision-making processes.

The potential of the contribution offered by a diatopical analysis resides in the idea that regardless of the strength of the *topoi* in each culture, they are as incomplete and evolving as the culture that formulated them.⁸⁹¹ Consequently, both cultures involved in the dialogue have to recognize the strengths and weaknesses of their own *topoi*; acknowledge their own cultural incompleteness; and, be willing to experientially learn with each other in equal measure. The process of *diatopical hermeneutics* requires not only diverse types of knowledge but also diverse processes of knowledge creation,⁸⁹² thus complementing the *ecology of knowledges* approach. It requires a collective, interactive and inter-subjective production of knowledge sought in full

⁸⁸⁹ *Ibid.* at 447.

⁸⁹⁰ *Ibid.*

⁸⁹¹ *Ibid.* at 448.

⁸⁹² *Ibid.* at 454.

awareness that there will always be grey areas and zones of incomprehension. Santos maintains that such set-backs should be relativized for the sake of common interests of social justice to avoid paralysis in the processes.⁸⁹³

Innovation that hints towards a post-abyssal approach that incipiently surmounts indolent modes of reasoning has emerged through international law. In the past decades indigenous and other socio-ethnic distinct peoples akin to them have acquired a remarkable space in the international arena. Significant paradigmatic changes have been observed through international conventions and institutions that safeguard the right to a socio-ethnic and culturally differentiated existence, encourage co-existence within pluralistic societies and address historical patterns of abuse and peripheral existence of indigenous and other socio-ethnic distinct peoples.

International law instruments and institutions have established a trailblazing path of recognition of the unique existence of indigenous peoples in the global order. The recognition of such unique existence is deeply associated with the acknowledgement of internal colonization and its consequences. This approach to the legal and political debates regarding indigenous peoples and other socio-ethnic distinct peoples akin to them has generated perspectives that imply the need for recognition of internal or State-based formulas that acknowledge the right of self-determination to indigenous peoples and, often, to other socio-ethnic distinct peoples akin to them. The objective of the following section is to establish the role of the right of peoples to self-determination within the context of the rupture of the *circular argument* as a catalyst towards the implementation of a pluralist theoretical model of interpretation of the constitutionally recognized rights described above.

⁸⁹³ *Ibid.*

4.2 Self-Determination of Peoples: Global Right and Local Reality

The legal and socio-political scenario in Brazil before, and to a certain extent after 1988, could be defined by the premise that “the liberal state, in its normal operation, abides by a principle of ‘benign neglect’ towards ethnocultural diversity”.⁸⁹⁴ Kymlicka maintains that liberal States that adopt such model are ‘civic nations’, which “define national membership purely in terms of adherence to certain principles of democracy and justice”.⁸⁹⁵ This approach has been challenged, amongst other factors by the emerging role indigenous peoples, and to some extent, other socio-ethnic distinct peoples akin to them have achieved in the international arena.

Barsh highlights that during the 1990s indigenous peoples have gained recognition of “legal personality as distinct societies with special collective rights” and a distinct role “in international decision-making”.⁸⁹⁶ Barsh speculates that the use of words such as ‘cooperation’ and ‘partnership’ in the ILO 169,⁸⁹⁷ decisions of the Rio Summit⁸⁹⁸ and the United Nations resolution proclaiming the Decade of the World’s Indigenous People⁸⁹⁹ as evidence of the shifting legal status of the relations between indigenous peoples and the State.⁹⁰⁰ This shift within international legal recognition can be understood as both cause and consequence of the increased proactive positioning of indigenous and other socio-ethnic distinct peoples within the international scene.

Hannum identifies the emergence of this pattern of participation in the late 1970s, when non-governmental organizations began to promote international gatherings of indigenous peoples’

⁸⁹⁴ Kymlicka, *Political Philosophy*, *supra* note 557 at 343.

⁸⁹⁵ *Ibid.* at 345.

⁸⁹⁶ Russel Lawrence Barsh, “Indigenous Peoples in the 1990s: From Object to Subject of International Law?”(1994) 7 Harv. Hum. Rts. J. 33 at 34.

⁸⁹⁷ ILO 169, *supra* note 212.

⁸⁹⁸ *Rio Declaration on Environment and Development*, chapter 26 (recognizing and strengthening the role of indigenous people and their communities), Rio Summit Agenda 21, UNDoc. A/CONF/151/26, 12 August 1992.

⁸⁹⁹ Barsh’s article, *supra* note 896, was published in 1994 and refers to the possibility of proclamation of the International Decade by the General Assembly. Since then the *International Decade of the World’s Indigenous People*, GARes.48/163, 47th Sess., UN Doc. A/RES/48/163 (1995) was proclaimed and another General Assembly Resolution proclaimed the *Second International Decade of the World’s Indigenous People*, GA Res.59/174, 59th Sess., UNDoc. A/RES/59/174 (2005).

⁹⁰⁰ *Ibid.* at 34.

representatives.⁹⁰¹ Ramos highlights the same phenomenon in the Latin American context, stating that one of the most striking features in the Region's contemporary indigenous movements is how, in a considerably short period of time, they became "organized and propelled into international arenas as legitimate and widely visible political actors".⁹⁰² Williams observes that indigenous peoples "sought to redefine the terms of their right to survival under international law" by telling their stories in "recognized and authoritative international human rights standard-setting bodies";⁹⁰³ and that international law "provides a unique opportunity to witness the application of rights discourse and story-telling in institutionalized, law-bound settings around the world".⁹⁰⁴

Anaya maintains that the increased presence of indigenous organizations at global level has transformed the response to indigenous peoples' demands into a human rights imperative now widely recognized within the international system. Moreover, "with this recognition has come a sustainable level of international activity focused upon indigenous peoples' concerns and a corresponding body of norms built upon long-standing human rights precepts".⁹⁰⁵ Anaya also highlights the tension created by the emergence of this global regime of protection of indigenous peoples' rights "with notions of state sovereignty that continue as central to the international legal system" because, among other factors, the indigenous peoples' rights regime challenges the "human rights system's traditional focus on the rights of individuals rather than the collective rights of groups".⁹⁰⁶

The consolidation of the indigenous peoples' agenda within international *fora* has also contributed to an emerging trend in the way international law is perceived. It could be argued that principles and norms developed in international law concerning indigenous and, sometimes, other socio-ethnic distinct peoples are broader and more pluralistic as a result, for

⁹⁰¹ Hurst Hannum, "New Developments in Indigenous Rights (1998) 28 Va. J. Int'l. L. 649 at 657.

⁹⁰² Ramos, *supra* note 41 at 251.

⁹⁰³ Robert Williams, Jr., "Encounters on the Frontiers of International Human Rights Law: Redefining the terms of Indigenous Peoples' Survival in the World" [1990] Duke L. J. 660 at 663-664.

⁹⁰⁴ *Ibid.* at 662-663.

⁹⁰⁵ Anaya, *Indigenous Peoples*, *supra* note 57 at 7.

⁹⁰⁶ *Ibid.*

instance, of negotiations that search for universality and do not relate to pre-existing State-centred and often obsolete legal models. An indigenous peoples' rights regime "continues to develop within international law's human rights program".⁹⁰⁷ While from a State-centred perspective it remains in constant tension with consolidated models of rights' recognition and enforcement, from the perspective of grassroots groups and local communities, the international legal framework point to a characterization of international law as a symbol of hope, as a conveyer of a type of law that legitimately aims at pluralist goals and is a powerful tool for accountability issues of recognition and cultural diversity rights.⁹⁰⁸

The straightforward phrasing of international law provisions, especially the ones that safeguard the right to self-determination and legitimize legal and political pluralism at local levels, are perceived by indigenous peoples' advocacy groups and scholars, as key to ensure dignity, cultural integrity as well as the targeted or localized monitoring of international human rights standards.⁹⁰⁹ This perception approaches international law as a tool that bridges the gap between top-bottom legal provisions and the local or community-based legal spheres transforming international law into *glocal* law.⁹¹⁰

⁹⁰⁷ *Ibid.*

⁹⁰⁸ This perception of the role international law was established by the author through the analysis of records of negotiations between indigenous peoples and international organizations and enforcement efforts concerning indigenous peoples' economic development, the environment and human rights legislation sponsored or developed under the auspices of the United Nations. The analysis included materials available through the United Nations Permanent Forum on Indigenous Issues and shadow reports by indigenous peoples' organizations. Results of this specific analysis were presented by the author in poster format at the 103rd Annual Meeting of the American Society of International Law.

⁹⁰⁹ Targeted or localized monitoring of human rights standards in this context refers to the practice of disaggregation of data collected for local and national purposes aiming to acquire an accurate understanding of indigenous peoples' situations in order to monitor the impact of existing initiatives or the development of new ones. See United Nations Permanent Forum on Indigenous Issues, *Report of the International Expert Workshop on Data Collection and Disaggregation for Indigenous Peoples*, 3d Sess., UN Doc. E/C.19/2004/2. See also e.g. Anaya, *supra* note 57 at 217-247; S. James Anaya, "Indigenous Rights Norms in Contemporary International Law" (1991) 8 *Ariz. J. Int'l & Comp. Law* 1 [Anaya, "Indigenous Rights"]; Dalee Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?" (1993) 3 *Transnat'l L. & Contemp. Probs.* 13; and Les Malezer, "Permanent Forum on Indigenous Issues: 'Welcome to the Family of the UN'" in Joshua Castellino & N. Walsh, eds., *International Law and Indigenous Peoples* (Leiden: Martinus Nijhoff, 2005) 67.

⁹¹⁰ The term *glocal* is formed by the combination of the words global and local and usually refers to the ability of thinking globally and acting locally; see also *supra* note 60.

This *glocal* perception of law often by-passes State-centred legislation, jurisprudence and policy or only analyses State law in comparison with international legal standards. Despite obstacles in the negotiation and implementation of international law, usually connected to government reluctance to broaden the scope of enforcement mechanisms, international law seems to have succeeded in presenting legal policies and operational frameworks for the effective protection of indigenous peoples and the improvement of their lives. Partnerships for the harmonization of international, national and local legal standards with participation of all those concerned is fairly recent and not fully implemented at the State level. This participation is not usually facilitated at the national level in Brazil, a scenario reinforced by the perpetuation of the *circular argument*. In the past decades, consultation on indigenous peoples' issues with all those concerned has occurred at the United Nations system and some regional organizations;⁹¹¹ and it could be argued that, although consultation only occurs at the institutional global level, this is one of the factors that enables international law to directly address local concerns and promote localized legal and political structures of decision-making.

The acknowledgement of the unique existence of indigenous peoples in the national and global orders,⁹¹² and the binding international customary practices that directly affect indigenous peoples in a positive manner at local and national levels⁹¹³ have consolidated the international indigenous human rights agenda. This international framework has become a widely accepted reference in terms of establishing global human rights monitoring standards and parameters for the (re)negotiation of State-based relations and interactions between the government, the dominant society and indigenous and, sometimes, other socio-ethnic distinct peoples akin to them.

The *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, sponsored by the International Labour Organization and known as ILO 169 is considered to be the first binding

⁹¹¹ See e.g. United Nations Department of Public Information, *Indigenous Peoples, Indigenous Voices* (New York: UN, 2007); United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Resource Kit on Indigenous Peoples' Issues* (New York: UN, 2008).

⁹¹² Some aspects of this unique existence are described in the preamble of the *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17.

⁹¹³ See e.g. Anaya, "Indigenous Rights", *supra* note 909 at 8-10; and Anaya, *Indigenous Peoples*, *supra* note 57 at 61-72.

step towards the consolidation of the international framework of rights as it recognizes the aspirations of indigenous peoples to “exercise control over their own institutions, ways of life and economic development and to maintain and develop their own identities, languages, religions within the framework of the States in which they live”.⁹¹⁴

Although the use of the term *peoples* was very controversial during the debates leading to the approval of ILO 169, the rights-setting agenda adopted in the Convention is in harmony with what became known as the internal dimension of the principle of self-determination of peoples.⁹¹⁵ The core of the matter was the use of the term *peoples*, therefore, implying the recognition of indigenous peoplehood.⁹¹⁶ When ILO 169 was adopted in 1989, peoplehood recognition was irremediably linked to the anti-external colonization approach attributed to the right of self-determination during the 1960s and 1970s.⁹¹⁷ At that stage the principle was widely used to restore sovereign status to nations under European colonial rule in Africa and Asia.⁹¹⁸ This ‘saltwater thesis’ in the application of the right to self-determination extinguishes external colonization while simultaneously preserving the territorial integrity of the colonizing power.⁹¹⁹

Although plausible within the context of internal colonization, the recognition of the international dimension of the right to self-determination, usually applied to indigenous and other socio-ethnic distinct peoples akin to them discards a fully inherent ‘nation-to-nation

⁹¹⁴ ILO 169, *supra* note 212 at preamble.

⁹¹⁵ See generally Patrick Thornberry, “The democratic or internal aspect of self-determination with some remarks on federalism” in Christian Tomuschat, ed. *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993) 101 at 101-105.

⁹¹⁶ See text accompanying notes 699-701 for an analysis of the Brazilian official position at the time of the convention’s negotiations as well as in 2002 when ILO 169 was ratified by Brazil.

⁹¹⁷ See e.g. James Irving, *Self-determination and International Law: Freedom’s Limits*, 3v. (D.C.L. thesis, Institute of Comparative Law, McGill University, 2004) [unpublished]. Similarly to the categories designed by other authors, Irving proposes the subdivision of the concept of self-determination in three phases: political self-determination from 1914 to 1945; legal self-determination from 1945 to 1989 and modern self-determination from 1989 to 2001. Irving connects the use of the principle from 1945 to 1989 to rules relating directly to external decolonization and alien occupation. The 1989 to 2001 phase relates to the regulation of democratic governance, indigenous peoples, minorities and autonomy rights and could be argued to exist in this shape until now. See e.g. *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17 at art. 3.

⁹¹⁸ *Declaration on the Granting of Independence to Colonial Countries and People*, GA Res. 1514(XV), 15th Sess., Supp. No. 16, UN Doc. A/RES/1514 (XV) (1960).

⁹¹⁹ Kymlicka, *Odysseys*, *supra* note 70 at 206; Maivân Clech Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Ardsey: Transnational Publishers, 2000) at 139.

relationship'. An inherent 'nation-to-nation relationship' is defined by its defenders as the indistinct exercise of the principle of self-determination, without the internal and external formula caveats, on the basis of the fact that the recognition of indigenous peoples' self-determination rights shall not be defined by State-centred constitutional law or jurisprudence. This understanding is based on the premise that the definition of parameters by the State only perpetuates (post-)colonial domination over indigenous peoples.⁹²⁰

It could be argued that in most contexts, processes of internal colonization have irrevocably impacted the 'nation-to-nation relationship', a context clearly evidenced by the perpetuation of the *circular argument* in Brazil. Consequently, the claim for the consideration of internal colonialism by the same standards as external colonialism may not be sufficient to redress the relationship between indigenous peoples and the State. As observed above, the Portuguese colonial strategy in Brazil did not encompass treaty-making policies with indigenous peoples, thus, adding another layer to the obstacles towards the possible implementation of an inherent 'nation-to-nation' relationship at present times.⁹²¹

Moreover, given the context exposed thus far, the proposition of an inherent 'nation-to-nation' relationship in Brazil could be argued to be counterproductive to break the *circular argument*. The constitutional recognition of diversity of socio-ethnically distinct peoples is often praised by the State as the immediate solution to all problems of vulnerability and exclusion while adversarial and favourable agendas continue to perpetuate the 'lack of agency' or partial discourses towards the enforcement of constitutionally recognized rights. Within a scenario in which the *circular argument* still exists, an inherent 'nation-to-nation' relationship that disregards the differentiation between the internal and external dimensions of the principle of self-determination of peoples would either be automatically refuted on the basis of the 'lack of agency' discourse, therefore, only perpetuating the *circular argument* or, if accepted, fail to address the consequences of centuries of assimilation and integration policies.

⁹²⁰ Tully, "Struggles", *supra* note 28 at 280-300.

⁹²¹ See text accompanying notes 35-36.

International law and doctrine are certainly more prolific and clear about the external dimension of self-determination than the internal one. The external dimension, which responds to external colonization or recent territorial invasion, promotes higher degrees of autonomy or territorial secession; and consequently challenges traditional principles of State sovereignty.⁹²² The increase in claims on the basis of the external dimension of the right to self-determination from the 1960s to the 1990s, precisely when the indigenous peoples' international rights framework was being consolidated, still causes misunderstandings regarding the two dimensions of the principle, which may motivate States to avoid the discussion of possibilities fostering the internal dimension of the right to self-determination.⁹²³

The increased proactive positioning of indigenous peoples in the international arena, in itself a form of exercise of the right to self-determination, enabled the formulation of a "broader and more flexible concept of self-determination" that "guarantees full and genuine participation and fundamental human rights" to indigenous peoples.⁹²⁴ Alfredsson illustrates this scenario: "self-control by a group over its internal affairs is probably the most effective means of protecting the dignity and identity of diverse groups within states," and encouraging this practice "is essential for placing them on equal footing with other parts of society".⁹²⁵ Alfredsson highlights that the reason for the absence of initiatives of this type "may range from ignorance to racism to fear of secession" but it is to be expected that "positive national experiences and the desire to avoid conflicts will gradually lessen the scepticism and lead to meaningful international standard-setting".⁹²⁶

⁹²² See Cassese, *Self-Determination*, *supra* note 55; Antonio Cassese, "The International Court of Justice and the right of peoples to self-determination"; and James Crawford, "The General Assembly, the International Court and self-determination" in Vaughan Lowe & Molgosia Fitzmaurice, eds. *Fifty years of the International Court of Justice: essays in honour of Sir Robert Jennings* (Cambridge: Cambridge University Press, 1996) 351; 585; Marc Weller, "Settling Self-Determination Conflicts: Recent Developments" (2009) 20:1 EJIL 111.

⁹²³ See e.g. Lãm, *supra* note 919 at 127-142; Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press, 2002) at 109-274; Thomas Musgrave, *Self-Determination and National Minorities* (Oxford: Clarendon Press, 1997) at 239-259; and, Gerry J. Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age" (1996) 32 Stan. J. Int'l L. 255.

⁹²⁴ Thornberry, *supra* note 915 at 129-130.

⁹²⁵ Gudmundur Alfredsson, "The Right of Self-Determination and Indigenous Peoples" in Christian Tomuschat, ed., *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff, 1993) 41 at 52.

⁹²⁶ *Ibid.* at 52-53.

The division of the principle of self-determination into an external and an internal dimension seems to be a practical solution for ensuring that the claim of indigenous self-determination is not dismissed by State authorities concerned about territorial integrity or the concession of the right to other groups within the same State that might claim the right to exercise the principle's external dimension. Nevertheless, the division of the principle into an internal and an external dimension may not be ideal as a permanent solution. As highlighted by Alfredsson "the label of 'internal self-determination' for autonomy and democracy does not in itself offer improvements while it can lead to disappointment".⁹²⁷ Alfredsson suggests that while "political rights, political participation and autonomy certainly enhance equality for and dignity of indigenous peoples", the rights offered "should be called by their right names" in order to avoid the advancement of the rights' image "by doubtful labelling".⁹²⁸

The application of the internal and external dimensions' formula should, therefore be considered as a transitional tool to break the *circular argument* as its permanent use could lead to the return of the 'lack of agency' discourse and the argument's perpetuation through the distorted use of the internal/external divide criteria. This understanding of the right to self-determination is proposed here as a tool to break the *circular argument* under the same premise that consolidated the right in the international framework, in other words, through the internal/external divide avenue. However, it is expected that once the *circular argument* has been broken, a more holistic approach to the principle of self-determination can be adopted in Brazil towards an even more pluralist approach to the enforcement of constitutionally recognized rights.

Anaya states that indigenous peoples seek to be recognized "as viable communities – indeed, as self-determining *peoples* – and not to be relegated to histories of conquest or pre-modernity, or to be among the objects of tourists' voyeurism".⁹²⁹ This approach implies the rupture of the *circular argument* within the Brazilian context as "the right of indigenous peoples to maintain the

⁹²⁷ *Ibid.* at 53.

⁹²⁸ *Ibid.* at 53-54.

⁹²⁹ S. James Anaya, "International Human Rights and Indigenous Peoples: the Move Toward the Multicultural State" (2004) 21 *Ariz. J. Int'l & Comp. L.* 13 at 13 [Anaya, "Multicultural State"].

integrity of their cultures is a simple matter of equality, of being free from historical and ongoing practices that have treated indigenous cultures as inferior to the dominant cultures”.⁹³⁰

The internal dimension of the principle of self-determination of peoples identifies the right as rooted in core values of freedom and equality and is understood to be “within the realm of human rights as opposed to sovereign rights, and to be concerned broadly with individuals and groups as they relate to the structures of government under which they live”.⁹³¹ Anaya describes it as a right that entitles individuals and groups “to meaningful participation, commensurate with their interests” and leads “to the development of or change in the governing institutional order”.⁹³² Anaya maintains that values linked with self-determination constitute a standard of legitimacy against which institutions of government are measured.⁹³³

The right to self-determination “is not separate from other human rights norms”, but a “configurative principle or framework complemented by the more specific human rights norms that in their totality enjoin the governing institutional order”.⁹³⁴ Furthermore, Anaya states that “this framework concerns both the procedures by which governing institutions develop and the form they take for their ongoing functioning”.⁹³⁵ The power of the enforcement of the principle of self-determination in its role as an instrument that promotes the rupture of the *circular argument* is reinforced by the underlying premise that constitutive self-determination does not in itself dictate the outcome of the renewed participation procedures but imposes “requirements of participation such that the end result in the political order can be said to reflect the collective will of the people, or peoples, concerned”.⁹³⁶

⁹³⁰ *Ibid.* at 16.

⁹³¹ S. James Anaya, “A Contemporary Definition of the International Norm of Self-Determination” (1993) 3 *Transnat’l L. & Contemp. Probs.* 131 at 133 [Anaya, “Self-Determination”].

⁹³² *Ibid.*

⁹³³ Anaya, *Indigenous Peoples*, *supra* note 57 at 99.

⁹³⁴ *Ibid.*

⁹³⁵ *Ibid.*

⁹³⁶ Anaya, “Self-Determination”, *supra* note 931 at 145.

Within the international legal framework, the right of peoples to self-determination is textually affirmed in common art. 1(1) of the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, which state that “all peoples have the right to self-determination” and “by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.⁹³⁷ The *African Charter on Human and Peoples Rights*, in force since 1986, regionally affirmed the right in art. 20(1): “all peoples shall have the right to existence”; and the “unquestionable and inalienable right to self-determination”; and as a consequence of this right, peoples “shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen”.⁹³⁸

Due to the timeframe of enactment of the Covenants, the 1960s, the right to self-determination textually recognized through them used to be connected only with the external dimension of the principle. However, “the dramatic boost in the last two decades, when the United Nations human rights machinery became increasingly involved in the promotion of indigenous rights” gradually “transformed indigenous peoples from ‘victims’ to ‘actors’ of international law” and consequently, “the era when demands for recognition of *sui generis* rights for indigenous peoples were met with strenuous resistance has definitely passed”.⁹³⁹

⁹³⁷ *International Covenant on Civil and Political Rights*, *supra* note 58 at art. 1(1); *International Covenant on Economic, Social and Cultural Rights*, *supra* note 58 at art. 1(1).

⁹³⁸ AU, *African Charter on Human and Peoples’ Rights*, Assembly of Heads of State and Government, 18th Sess., OAU Doc. CAD/LEG/67/3 rev. 5 (1981) at art. 20(1). The claim *Katangese Peoples’ Congress v. Zaire* was brought before the African Commission on Human and Peoples’ Rights under art. 20(1) of the *African Charter*. The Commission decided that there were no allegations of “specific breaches of other human rights apart from the claim of the denial of self-determination” and determined that “in the absence of concrete evidence of violations of human rights to the point that the territorial integrity of Zaire should be called to question and in the absence of evidence that the people of Katanga are denied the right to participate in government”, “the Commission holds the view that Katanga is obliged to exercise a variant of self-determination that is compatible with the sovereign and territorial integrity of Zaire”. *Katangese Peoples’ Congress v. Zaire*, African Commission on Human and Peoples’ Rights, Comm. No. 75/92 (1995) at §§ 2; 6. The African Commission’s reinforces the view that the right to self-determination has evolved in international law to encompass forms of enforcement that do not pertain to secession or independence, thus reinforcing the internal dimension of the principle.

⁹³⁹ Mauro Barelli, “The Role of Soft Law in the International Legal System: the case of the United Nations Declaration on the Rights of Indigenous Peoples” (2009) 58:4 Int. & Comp. L. Q. 957 at 957.

The increased role claimed by indigenous peoples in decision-making processes at local, national and international levels rendered the right of self-determination as textually defined by the International Human Rights Covenants and the African Charter to be interpreted as encompassing its enjoyment by indigenous peoples within State frameworks. According to Anaya, “beyond its textual affirmation, self-determination is widely held to be a norm of general or customary international law”, and arguably “a peremptory norm”.⁹⁴⁰ The adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007 comprises the specific textual recognition of the right to self-determination to indigenous peoples.⁹⁴¹

Art. 3 of the *Declaration on the Rights of Indigenous Peoples* states that “indigenous peoples have the right to self-determination” and that “by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.⁹⁴² According to Xanthaki, art. 3, and consequently, the right to self-determination have been referred to as ‘the heart of the Declaration’, its cornerstone, the pillar upon which all other provisions of the Declaration shall rest and as the “pre-requisite for the full enjoyment of all human rights’ of indigenous peoples”.⁹⁴³ Within the agenda of recognition of the uniqueness of indigenous peoples in the global order, the Declaration contextualizes the entitlement of indigenous peoples to a set of widely recognized human rights. Moreover, it addresses common difficulties faced within national contexts that are the by-product of internal colonization and the assimilationist and integrationist legislative and political paradigms often still in force, such as land ownership and exploitation of natural resources.⁹⁴⁴

The enjoyment of all rights respecting the socio-ethnic distinctiveness of indigenous and other peoples akin to them is derived, in different extents, from the the right to self-determination. The Declaration delves further than previous documents which textually refer to the principle and specifically addresses what the right to self-determination may encompass at local and

⁹⁴⁰ Anaya, “Indigenous Rights”, *supra* note 909 at 29-30.

⁹⁴¹ *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17 at art. 3.

⁹⁴² *Ibid.*

⁹⁴³ Alexandra Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (Cambridge: Cambridge University Press, 2007) at 131.

⁹⁴⁴ See *e.g.* *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17 at arts. 26-29.

national contexts, in addition to the right to consultation and participation in actions that affect them.⁹⁴⁵ Art. 4 states that “indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions”; and art. 5 states that “indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions” but “retain their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State”.⁹⁴⁶ Furthermore, art. 20 affirms indigenous peoples’ right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities”.⁹⁴⁷ This approach complemented by art. 23: “indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development”.⁹⁴⁸ The text of the Declaration also takes a stand against the ‘frozen in time’ approach in relation to indigenous peoples affirming that “indigenous peoples have the right to practice and *revitalize* their cultural traditions and customs”.⁹⁴⁹

The textual affirmation of the right to self-determination was the most controversial topic in the debates that preceded the approval of the Declaration. A caveat similar to the one adopted to pacify similar opposition during the ILO 169 debates⁹⁵⁰ was adopted in 2007 in relation to the Declaration; although in terms that reflect the progress achieved by indigenous and other peoples akin to them in the two decades elapsed between ILO 169’s adoption in 1989. The negotiated formula comes in the shape of art. 46: “nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations” or be construed “as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign or independent States”.⁹⁵¹

⁹⁴⁵ *Ibid.* at arts. 18-19.

⁹⁴⁶ *Ibid.* at arts. 4-5.

⁹⁴⁷ *Ibid.* at art. 20.

⁹⁴⁸ *Ibid.* at art. 23.

⁹⁴⁹ *Ibid.* at art. 11 [emphasis added].

⁹⁵⁰ See *supra* text accompanying note 701.

⁹⁵¹ *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 17 at art. 46(1).

This compromise seems to have appeased some States, including some decision-makers in Brazil, considering the formula was directly referred to in the *Raposa Serra do Sol* case. Justice Lewandowski affirms that the Declaration is a moral and ethical international law landmark despite its non-binding nature and that the “recognition of autonomy to indigenous peoples granted by the Declaration should not motivate fears of the development of an indigenous nation immune to State sovereignty because the Declaration’s text already takes care of the matter in article 46”.⁹⁵² The view of the majority of the Supreme Court Justices in the context of the *Raposa Serra do Sol* case was of misinformation about the caveat offered by art. 46.⁹⁵³

The recognition of the right to self-determination of indigenous peoples has been a controversial issue towards the enactment of a regional declaration in the Americas. The adoption of the Organization of American States’ *Proposed Declaration on the Rights of Indigenous Peoples*, in addition to the global provisions, would reinforce the need for proactive pluralist action concerning the enforcement of indigenous peoples’ rights in the Region. The proposed text demonstrates efforts to declare an indissociable relationship between indigenous peoples and the States in which they reside, in an attempt to compromise fears of external self-determination claims with the overdue recognition of rights that respect socio-ethnic distinctiveness.⁹⁵⁴

The proposed text asserts the recognition of “indigenous peoples as foundational societies that form an integral part of the Americas and that their values and cultures are inextricably linked to the identity both of the countries in which they live and of the region as a whole”, furthermore, demonstrating awareness that “the indigenous peoples of the Americas play a

⁹⁵² PET 3388, Lewandowski, *supra* note 775 [translated by author].

⁹⁵³ See e.g. PET 3388, Ayres Britto, *supra* note 532 at §69; PET 3388, Peluso, *supra* note 167; PET 3388, Menezes Direito, *supra* note 167; and PET 3388 Antunes Rocha, *supra* note 775.

⁹⁵⁴ It could be argued that the OAS has enabled an even higher level of indigenous participation in the drafting and ongoing negotiation process regarding the *Proposed Declaration* than the *United Nations Declaration on the Rights of Indigenous Peoples*. This perception results from the analysis of the timeline and accompanying comments updated electronically on the website of the OAS Committee on Juridical and Political Affairs’ Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, online: Organization of American States <www.oas.org/consejo/CAJP>.

special role in strengthening the institutions of the State and achieving national unity based on democratic principles”.⁹⁵⁵ The proposed text affirms the equality of worth of indigenous legal and political structures of decision-making in relation to those of the mainstream or dominant society, stating that “some of the democratic institutions and concepts embodied in the constitutions of the American States have their origins in institutions of the indigenous peoples”,⁹⁵⁶ and many of the indigenous peoples’ participatory systems for decision-making may contribute to the improvement of democracies in the Americas.⁹⁵⁷ The formulation of the right to self-determination presupposes the application of the principle through the internal dimension as the only possible course of action: “within the States, the right to self-determination of the indigenous peoples is recognized, pursuant to which they can define their forms of organization and promote their economic, social and cultural development”,⁹⁵⁸ reaffirming that “nothing in this Declaration shall be construed as to authorize or foster any action aimed at breaking up or diminishing, fully or in part, the territorial integrity, sovereignty, and political independence of States”.⁹⁵⁹

The proposed declaration also refutes the ‘permafrost’ approach asserting the right of indigenous peoples to “use, develop, revitalize, and transmit to future generations their own stories, languages, oral traditions, philosophies, systems of writing, and literature; and to designate and retain their own names for their communities, members, and places”.⁹⁶⁰ Both the global and the regional text leave little room for debate regarding the evolving existence of indigenous peoples and evidence that the promotion of the lack of compromise of indigenous peoples with the nation-building projects of States, and therefore, the denial of their right to self-determination within existing States is as innocuous and mythical as the perception of indigenous peoples’ lack of agency to participate in existing or shared structures; or to enjoy the full and pluralistic enforcement of constitutionally recognized rights.

⁹⁵⁵ OAS, *Proposed Declaration*, *supra* note 59 at preamble.

⁹⁵⁶ *Ibid.*

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Ibid.* at art. 3.

⁹⁵⁹ *Ibid.* at art. 4.

⁹⁶⁰ *Ibid.* at art. 13(1).

The potential scope of application of the proposed Declaration is extremely specific stating that it “applies to the indigenous peoples of the Americas and their members, who within the national States descend from a native culture that predates European colonization and who conserve their fundamental distinctive features”.⁹⁶¹ Despite the positioning of the proposed legislation at regional level to restrict the rights to those peoples who were internally colonized with the arrival of Europeans to the Americas, the Inter-American Human Rights system’s jurisprudence has been one the strongest proponents in the global arena of the expansion of the rights to peoples who may not have been subjected to internal colonization but are akin to indigenous peoples in terms of their socio-ethnic distinctiveness and their interactions with the dominant society and the State legal and political structures.

The *Case of Moiwana Village v. Suriname* and the *Case of the Saramaka People v. Suriname* were filed before the Inter-American Court of Human Rights and decided in 2005 and 2007 respectively.⁹⁶² In both stances, the Court has extended the application of its indigenous peoples-related jurisprudence⁹⁶³ to other groups considering that they are more akin to indigenous communities than they are to other ethnic, linguistic and religious minorities, thus “extending the protection afforded to indigenous groups to an ethnic community with similar ancestral traditions”.⁹⁶⁴

In the *Moiwana Village* judgement, the Court considers as proven facts that during colonization of present-day Surinam, Africans were forcibly taken to the region and used as slaves in the plantations and that many of these Africans managed to escape to the rainforest areas in the eastern part of the country “where they established new and autonomous communities” and the individuals who formed these communities became known as “Bush Negroes or

⁹⁶¹ *Ibid.* at art. 1(1).

⁹⁶² *Moiwana Village*, *supra* note 7; *Saramaka People*, *supra* note 7.

⁹⁶³ *Case of Mayagna (Sumo) Awas Tingni Community (Nicaragua)* (2001), Inter-Am. Ct. H.R. (Ser. C) No. 79; *Case of the Yakye Axa Community (Paraguay)* (2005), Inter-Am. Ct. H.R. (Ser.C) No. 125; *Case of the Sawhoyamaya Indigenous Community (Paraguay)* (2006), Inter-Am. Ct. H.R. (Ser.C) No. 146. Some authors, see e.g. Claudia Martin, “The *Moiwana Village* Case: A New Trend in Approaching the Rights of Ethnic Groups in the Inter-American System” (2006) 19 *Leiden J. Int’l L.* 491 at 492-493; also consider the *Case of Yatama (Nicaragua)* (2005), Inter-Am. Ct. H.R. (Ser. C) No. 127 as part of the Inter-American Court of Human Rights indigenous peoples protection-related jurisprudence.

⁹⁶⁴ Martin, *supra* note 963 at 492.

Maroons”.⁹⁶⁵ Furthermore, the Court states that “eventually six different groups of Maroons emerged” amongst which were the Saramaka and the N’djuka whom the *Moiwana Village* case refers to.⁹⁶⁶ This definition undoubtedly relates the communities in the *Moiwana Village* and *Saramaka People*’s cases to the *maroon* peoples that live throughout the Americas, naturally including the *quilombola* peoples in Brazil. The correlation is of extreme relevance, in spite of the Court’s resistance to clearly state the peoplehood status of indigenous and other peoples akin to them.⁹⁶⁷

In *Moiwana Village*, the Court states that community members “are not indigenous to the region”, nevertheless, community members settled and lived in the area “in strict adherence to N’djuka custom” since late in the 19th Century.⁹⁶⁸ The Court affirms that “the N’djuka, like other indigenous and tribal peoples, have a profound and all-encompassing relationship to their ancestral lands” and that “their inability to maintain their relationships with their ancestral lands and its sacred sites has deprived them of a fundamental aspect of their identity and well-being”.⁹⁶⁹ The Court also highlights that “their concept of ownership regarding that territory is not centred on the individual, but rather on the community as a whole”.⁹⁷⁰

In the *Saramaka People* case, the Court affirmed “the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied”.⁹⁷¹ Despite stating later that such property rights may be restricted by previously established laws, or with the aim of achieving a

⁹⁶⁵ *Moiwana Village*, *supra* note 7 at §86.

⁹⁶⁶ *Ibid.*

⁹⁶⁷ See e.g. Martin, *supra* note 963 at 498-499. Martin maintains that the Inter-American Commission and Court have consistently refused to view cases on the basis of its jurisdiction *rationae personae* in which the alleged victims were not individual persons. Martin highlights that the Commission never analysed whether an ethnic or indigenous community could claim rights as a group beyond the harm suffered by its individual members; and observes that the Court has expanded that perception through the interpretation of the rights of the members of an ethnic community in light of the fact that they are a vulnerable group deserving enhanced protection.

⁹⁶⁸ *Moiwana Village*, *supra* note 7 at §132.

⁹⁶⁹ *Ibid.*

⁹⁷⁰ *Ibid.* at §133.

⁹⁷¹ *Saramaka People*, *supra* note 7 at §95.

legitimate objective in a democratic society”,⁹⁷² or when such restrictions do not deny the Saramaka’s survival as a tribal people.⁹⁷³

Albeit demonstrating similar shortcomings to the approach adopted in Brazil for the recognition of rights, the Inter-American Court’s jurisprudence establishes a relevant connection between indigenous and other socio-ethnic distinct peoples akin to them. The interrelation relates to an ancestral connection to lands and collective usufruct and occupation of these lands, in other words, it relates to the *sui generis* entitlement to lands traditionally occupied by peoples that are socio-ethnically differentiated in relation to the dominant society.

Moreover, according to the analysis developed thus far, the association between indigenous and other socio-ethnic distinct peoples can be more beneficial within the international context, rather than the Brazilian one, due to the strongly consolidated indigenous rights’ agenda at global level. The current scenario of interpretation of constitutionally recognized rights in Brazil highlights the double standards developed between the integrationist-prone indigenous rights’ approach and the more creative solutions developed, for instance, towards the enforcement of quilombo land rights. Taking the global hermeneutical development regarding indigenous and other socio-ethnic distinct peoples into account,⁹⁷⁴ the rupture of the *circular argument* in Brazil should first of all, encompass an effort to truly elevate the constitutionally recognized rights to the global standards of recognition and enforcement. Secondly, the global standards allied to localized initiatives in constant development and revitalization should be cohesively applied in the enforcement of rights of indigenous and other socio-ethnic distinct peoples. This approach shall consider the differences within the groups; the internal colonization and involuntary incorporation scenarios that the indigenous peoples were subjected to and the unique experience of exclusion and interactions of each people or community with the dominant society.

⁹⁷² *Ibid.* at §127.

⁹⁷³ *Ibid.* at §128.

⁹⁷⁴ Global hermeneutical developments concerning the rights of indigenous and other socio-ethnic distinct peoples are understood here as the entire jurisprudential body of the Inter-American Court of Human Rights, *supra* notes 7 and 963; and the African Commission on Human and Peoples’ Rights, *supra* note 938.

The interrelation between indigenous and other socio-ethnic distinct peoples by the Inter-American Court has been restricted to an ancestral relationship with the lands they traditionally occupy. Although collective and traditional land occupation indeed constitutes the strongest point of association, the actual existence, as well as the recent recognition of rights to other traditional peoples in Brazil, in addition to indigenous and *quilombola* peoples, on the basis of their socio-ethnic distinctiveness demonstrates that traditional land occupation may not be the only determining factor in the proposed joint recognition, interpretation and enforcement of rights. An ancestral connection to social, legal and political structures that maintain the cohesiveness of a community of common heritage, usually associated with a geographically-specific collective and sustainable economic enterprise could be argued to be as strong a factor for the recognition of traditional communities as socio-ethnic distinct peoples as the criteria of traditional occupation of lands.⁹⁷⁵

Recent legal developments in Brazil recognizing the traditional usufruct of lands and ensuring group representation in policy-making to traditional peoples other than indigenous and *quilombola* communities support this approach. These developments are most welcome as they advance the idea of a true socio-ethnic distinct existence for traditional peoples other than those whose land rights have been recognized by the 1988 Constitution. An indirect consequence of these developments, however, is of fundamental importance to break the *circular argument*. The association of other socio-ethnic peoples with indigenous peoples in Brazil may assist in the renewal of the enforcement of indigenous peoples' rights through the more self-determining and pluralist framework of reference recently recognized to socio-ethnic distinct peoples in general which includes indigenous peoples.

The scope of the right to self-determination of peoples proposed here follows the understanding that it is a broad principle collectively articulated politically and legally according

⁹⁷⁵ An analysis of the legislation and policy developments regarding other socio-ethnic distinct peoples is undertaken in section 4.2.2 below. Examples of socio-ethnic distinct peoples that meet these criteria are the Amazon rubber-tappers and *castanha*-nut gatherers; the *caiçara* fishers of the South-Southeastern Coast; and the *babaçu* breakers from the Northern States.

to international law and various political ideologies but “articulated best in terms of agency, conceptions of autonomy and relationships”.⁹⁷⁶ The entitlement to self-determination is not granted but merely recognized at global and national levels. The principle of self-determination of peoples only operates as a tool to break the *circular argument* when it is understood as an inherent collective attribute flowing from sources within a people rather than external sources. The right is recognized at global level, its legitimate exercise, however, can only take place locally – through localized social, legal, economic and political structures or by means of localized negotiation of forms of participation at higher levels of decision-making. This conceptualization of the principle of self-determination as a global right implying realization within a local reality also responds to the critique voiced by Santos that current State structures do not appropriately address the increased relevance of global and local time-spaces.

4.2.1 Reality from Above: State-Centred Hegemonism

As seen above, in many occasions, even after the (re)democratization of the State in 1988, Brazil has demonstrated a resolute position of intolerance towards external or even internal intermeddling in political affairs, most notably when the controversy involves the territorial location or the exploitation of natural resources. The actions by the judicial, executive and legislative branches of government described in relation to the *circular argument* throughout this thesis confirm that classical conceptions of national unity, territorial integrity and sovereignty are still very much in vogue in the ways the State’s role and authority are perceived by the dominant society.

This perception that formulations that render the political, legal and judicial authority of the State more flexible or malleable through self-determining agreements are a challenge to the State’s sovereignty are fuelled by the wording of art. 4, III of the 1988 Constitution that recognizes the principle of self-determination of peoples but limits the recognition to external relations,⁹⁷⁷ hence, not expressly extending the direct recognition of the right within the State’s

⁹⁷⁶ Val Napoleon, “Aboriginal Self-Determination: Individual Self and Collective Selves” (2005) 29:2 Atlantis 31 at 31.

⁹⁷⁷ *Constituição*, 1988, *supra* note 23 at art. 4, III.

internal boundaries. Even when the right to self-determination or other rights recognized at global level that derive from it are discussed in the Brazilian context, the constitutional reference to the principle is rarely mentioned. On the few occasions that the potential recognition of the right was acknowledged, it derives either from international law documents interpreted as non-binding by courts⁹⁷⁸ or from the special constitutional status of international human rights legislation granted by art. 5, §§2-3 of the 1988 Constitution.⁹⁷⁹

The implementation of a self-determining framework of constitutionally recognized rights is hindered, furthermore, by the 1988 constitutional text itself as it uses the terms populations, minorities and peoples interchangeably and adopts an extremely traditional concept of individual-oriented, citizenship-as-right-bearing-status equally valid and equally applicable to all legal residents of the State. Although the Constitution recognizes land and other specific rights for indigenous and *quilombola* peoples, it could be argued that the 1988 Constitution categorizes indigenous and other socio-ethnically distinct peoples as minority groups that are bearers of special rights virtually indistinguishable historically, socially, legally and politically from other vulnerable groups that claim racial or other types of discrimination as a component of exclusion and poverty. As analysed in the previous chapters, the constitutional system also has a number of provisions that indirectly refer to indigenous and other socio-ethnic distinct peoples' rights that are 'scattered' through the text and rarely interpreted as a systemic whole. This scenario renders the proposed implementation of a cohesive approach to socio-ethnic distinctiveness as a citizenship defining factor an additional challenge to overcome in the recognition and enforcement of rights.

The UN *Report on the Situation of Indigenous Peoples in Brazil* does not acknowledge the recognition of the external dimension of the principle of self-determination in art. 4, III of the Constitution. Similarly to the approach adopted by the Supreme Court,⁹⁸⁰ the Special Rapporteur relates the recognition of the right to self-determination of indigenous peoples to

⁹⁷⁸ PET 3388, Ayres Britto, *supra* note 532 at §69; PET 3388, Grau, *supra* note 775; and PET 3388, Lewandowski, *supra* note 775.

⁹⁷⁹ Agravo de Instrumento n. 2008.04.00.010160-5/PR, *supra* note 569. See text accompanying notes 323-332 for a discussion of the different forms of interpretation of art. 5, §§2-3 of the Constitution.

⁹⁸⁰ See text accompanying note 978.

the international legal framework citing Brazil's adherence to the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.⁹⁸¹ The Rapporteur suggests that "promoting self-determination for indigenous peoples can only strengthen Brazil as a democratic State" that is "respectful of diversity" and enables "indigenous peoples to become full participants in the life of the State with due regard for their own cultural patterns, authority structures and connections to land".⁹⁸² Moreover, the Special Rapporteur highlights that "the right of self-determination is a foundational right, without which indigenous peoples' other human rights, both collective and individual, cannot be fully enjoyed",⁹⁸³ and a "lack of empowerment of indigenous peoples in the design, management, and delivery of services, and in the decisions affecting their territories and resources, through their own institutions, in partnership with the State and other actors, contributes to a persistent relationship of dependency",⁹⁸⁴ that ultimately inhibits "the realization of the right to self-determination".⁹⁸⁵

An entire section of the UN Report's recommendations to the Government of Brazil is dedicated to self-determination. The suggestions range from the enhancement of the control of indigenous peoples "over their communities, territories and natural resources" and the provision of "effective recognition of indigenous peoples' own institutions of authority and customary laws, to the extent compatible with universal human rights standards".⁹⁸⁶ A recommendation that, if implemented, could be instrumental to break patterns of perpetuation of the *circular argument* suggests that "relevant government agencies should, to the extent possible, facilitate greater decision-making power by indigenous peoples over the delivery of government services in their communities, and assist them to develop the capacity to effectively exercise that power".⁹⁸⁷ The Rapporteur also recommends that "the Government should ensure adequate consultations with indigenous peoples in regard to all legislative or

⁹⁸¹ Anaya, *Brazil Report*, *supra* note 3 at §22.

⁹⁸² *Ibid.* at §23.

⁹⁸³ *Ibid.* at §22.

⁹⁸⁴ *Ibid.* at §25.

⁹⁸⁵ *Ibid.*

⁹⁸⁶ *Ibid.* at §78.

⁹⁸⁷ *Ibid.* at §79.

administrative decisions affecting them, in accordance with applicable international standards”.⁹⁸⁸

Despite the lack of express recognition of the internal dimension of the right to self-determination of peoples, Marés advocates that a broad interpretation of art. 231 of the 1988 Constitution, which specifically recognizes indigenous peoples’ “social organization, customs, languages, creeds and traditions”,⁹⁸⁹ enables the recognition of autonomous legal and political structures.⁹⁹⁰ Furthermore, within the context of the *Raposa Serra do Sol* case, Justice Grau maintains that the claim to self-determination of peoples by indigenous groups is ‘valid as a principle’ but limited by the Constitution. Justice Grau expressly endorses the existence of the internal dimension of the principle on the basis of a ‘differentiated citizenship’ status enjoyed by indigenous peoples.⁹⁹¹ The concept of ‘differentiated citizenship’ is, in fact, proposed as a theoretical approach by Kymlicka & Norman⁹⁹² affirming that members of certain groups would be incorporated into the political community not only as individuals but also through the group, and their rights would depend, in part, on their group membership,⁹⁹³ considering that culturally excluded groups often have distinctive needs which can only be met through group differentiated policies.⁹⁹⁴

It could be speculated that arguments about equality and a politics of recognition do not seem to be sufficient to convince the three branches of government in Brazil that the enjoyment of the right to self-determination by indigenous and other socio-ethnic distinct peoples is not a threat to State-centred paradigms of sovereignty, even if such approaches should be revisited for the same reasons. Within this conjuncture, the fact that every international legal provision regarding indigenous peoples’ rights, including those that could be extended to other socio-ethnic distinct peoples akin to them, hold the caveat that the right to self-determination should

⁹⁸⁸ *Ibid.* at §82.

⁹⁸⁹ *Constituição*, 1988, *supra* note 23 at art. 231.

⁹⁹⁰ Marés, *Renacer*, *supra* note 6 at 162.

⁹⁹¹ PET 3388, Grau, *supra* note 775.

⁹⁹² Kymlicka & Norman, “Return of the Citizen”, *supra* note 268 at 370-377.

⁹⁹³ *Ibid.* at 370.

⁹⁹⁴ *Ibid.* at 371.

be enjoyed only through the internal dimension of the principle should, therefore, suffice to motivate a renewed and open-minded reinterpretation of the constitutional paradigm of recognition of the right to self-determination. A constitutional reform acknowledging the indivisible value of the principle, without the external/internal caveat would enable an *ecology of knowledges* approach to legal and political decision-making as well as a constant process of *diatopical hermeneutics*, consequently breaking the *circular argument*.

4.2.2 Reality from Below: Traditional Peoples and Communities' Rights

As seen above, the recognition of the right to self-determination of indigenous and other socio-ethnic distinct peoples in Brazil may be controversial, most notably when the interpretation of internationally established standards is at stake. The adoption of the UNESCO *Universal Declaration on Cultural Diversity*⁹⁹⁵ in 2001 and the ratification of *United Nations Convention on Biological Diversity* in 1998;⁹⁹⁶ and ILO 169 in 2002,⁹⁹⁷ however, have, according to Shiraishi Neto,⁹⁹⁸ motivated the creation of the *Comissão Nacional de Desenvolvimento Sustentável das Comunidades Tradicionais* in 2004⁹⁹⁹ and the implementation of the *Política Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais* in 2007.¹⁰⁰⁰ It is relevant to note that in 2006 the Commission underwent a name change, implying its support not only to 'traditional communities' but to 'traditional peoples and communities' and now includes representatives of the traditional peoples in addition to the government represented-only body proposed by the 2004 decree.¹⁰⁰¹

The creation of a National Commission to promote the sustainable development of traditional peoples and the adoption of a national policy were initiatives of the executive power, enforced through presidential decrees. The implementation of a cohesive National Policy, however,

⁹⁹⁵ UNESCO, *Universal Declaration on Cultural Diversity*, General Conf., 31st Sess., 2 November 2001.

⁹⁹⁶ *United Nations Convention on Biological Diversity*, *supra* note 454; *Decreto n. 2.519*, *supra* note 454.

⁹⁹⁷ ILO 169, *supra* note 212.

⁹⁹⁸ Joaquim Shiraishi Neto, "A Particularização do Universal: povos e comunidades tradicionais face às Declarações e Convenções Internacionais" in Shiraishi, *Direitos*, *supra* note 21; 25 at 35-46.

⁹⁹⁹ *Decreto de 27 de Dezembro de 2004*, 27 December 2004.

¹⁰⁰⁰ *Decreto n. 6.040*, *supra* note 454.

¹⁰⁰¹ *Decreto de 13 de Julho de 2006*, 13 July 2006.

comes after the enactment of several laws at the municipal and federated-State levels as well as federal level executive decrees that specifically address the protection or traditional usufruct of lands by socio-ethnic distinct peoples.¹⁰⁰² Albeit referring to diverse groups in different regions of the country, these legislative and policy initiatives, which emerged in the late 1990s and peaked with the enactment of the National Policy, feature a common target. Their goal is the protection of geographically-specific economic activities that promote the sustainable exploitation of natural resources and are intrinsic to traditional peoples' lifestyle and unique structures of social organization.

Art. 3 of the National Policy conceptualizes traditional peoples and communities as “culturally differentiated groups self-identified as such” possessing “their own forms of social organization” and who “occupy and use territories and natural resources as a condition for their cultural, social, religious, ancestral and economic reproduction through the use of knowledge, innovative methods and practices that are traditionally generated and transmitted”.¹⁰⁰³ Traditional territories are defined as “the spaces of permanent or temporary use necessary to the cultural, social and economic reproduction of traditional peoples and communities”.¹⁰⁰⁴ Following this definition, the policy expressly affirms the inclusion of indigenous and quilombo lands within its scope of action by adding that “art. 231 of the Constitution and art. 68 of the ADCT must be considered, respectively, in the characterization of traditional territories when indigenous and *quilombola* peoples are concerned”.¹⁰⁰⁵

Indeed, the inclusion of both indigenous and *quilombola* peoples within the recently created legal and political category of traditional peoples and communities was clear since the executive decree establishing the National Commission for the Sustainable Development of Traditional Communities was created in 2004 and its name and mandate enhanced in 2006. The Commission is formed by fifteen representatives from federal government bodies and fifteen representatives of non-governmental organizations with equal voting rights.

¹⁰⁰² See *e.g.* compiled list of legislation in Almeida, *Terras*, *supra* note 22 at 57-60.

¹⁰⁰³ *Decreto n. 6.040*, *supra* note 454 at art. 3, I [translated by author].

¹⁰⁰⁴ *Ibid.* at art. 3, II [translated by author].

¹⁰⁰⁵ *Ibid.*

Government agents represent the Ministries of the Environment, Agrarian Development, Social Development, Education, Culture, Labour, and Science and Technology. Furthermore, other governmental agencies are represented, some of which historically involved in the enforcement of socio-ethnic distinct peoples' rights for instance: IBAMA, the Environment and Renewable Resources Institute; INCRA, the National Institute for Agrarian Reform; FUNASA, the National Health Foundation, *Fundação Cultural Palmares*, FUNAI, the special federal secretariats for the promotion of racial equality; and, for aquaculture and fishing.¹⁰⁰⁶

According to Almeida, the enactment of the National Policy was the result of many processes of small-scale advocacy by traditional peoples' grassroots movements and organizations towards the enactment of localized legislation and policies guaranteeing the reproduction of the socio-ethnic distinct lifestyles through the preservation and privileged use of their traditional forms of land occupation and/or exploitation.¹⁰⁰⁷ Once again, the positive role played by municipalities and federated States in the enforcement of socio-ethnic distinct peoples' rights is evidenced.¹⁰⁰⁸ The proposal of a localized approach to break the *circular argument* involves not only self-determining action that emanates from the socio-ethnic distinct communities but also more localized levels of government in relation to federal measures. In light of the efforts successfully implemented by municipalities and federated States of recognition and towards the enforcement of the rights of, for instance: *quilombolas*; rubber-tappers; *babaçu* breakers; and the communities of *ribeirinhos*; *fundo de pasto*; and, *faxinais*,¹⁰⁰⁹ it could be speculated that the historical formula granting exclusive competence to the federal government for the enforcement of indigenous peoples' rights may be hindering more than assisting in the fulfilment of these rights.

Indigenous and *quilombola* movements are credited for the social change and political evolution that culminated with the enactment of the National Policy in 2007,¹⁰¹⁰ in addition to grassroots

¹⁰⁰⁶ *Decreto de 13 de Julho de 2006*, *supra* note 1001 at art. 4.

¹⁰⁰⁷ Almeida, *Terras*, *supra* note 22 at 25-30.

¹⁰⁰⁸ See *supra* note 434 on the role of federated States in the consolidation of *quilombola* land rights.

¹⁰⁰⁹ See respectively *infra* notes 1011, 1013, 1015 and 1016.

¹⁰¹⁰ Almeida, *Terras*, *supra* note 22 at 57-62.

organizations of rubber-tappers;¹⁰¹¹ *castanha*-nut gatherers;¹⁰¹² *babaçu* breakers;¹⁰¹³ *caiçara* fishers;¹⁰¹⁴ *ribeirinhos*,¹⁰¹⁵ and rural communities known as *fundos de pasto* in the Northeastern areas of the country and *faxinais* in the South.¹⁰¹⁶ It is also relevant to note that the ancestral heritage of most traditional communities is interrelated to indigenous or *quilombola* communities, forming an indissociable background of socio-ethnic distinctiveness that provides further support to the self-determining and ‘differentiated citizenship’ approaches proposed above.¹⁰¹⁷

Communities highly organized in cooperatives or non-governmental organizations, have, therefore, been the main stakeholders in the processes of negotiation of laws and policies enabling the traditional exploitation of lands and preservation of their socio-ethnic distinct lifestyles. Almeida maintains that another example of grassroots mobilization is the creation of federal extractivist reserves protecting certain areas from logging and deforestation, which have

¹⁰¹¹ Rubber-tappers extract the sap of *seringueira* trees for the production of latex. Efforts by organized rubber-tappers are credited for the enactment of State-level laws in Acre protecting the *seringais* against deforestation for cattle or agriculture enterprises and granting access to accredited rubber-tappers to work on *seringais* in public and private properties. *Lei Estadual n. 1.277*, Estado do Acre, 13 January 1999; *Decreto Estadual n. 868*, Estado do Acre, 5 July 1999. See also, *supra* notes 270 and 809.

¹⁰¹² *Castanheiros* are gatherers of the *castanha*-nut, also known as *Brazil nut*, harvested in the States of Acre, Amapá, Amazonas, Maranhão, Mato Grosso, Pará and Rondonia.

¹⁰¹³ *Babaçu* breakers or *quebradeiras* gather and break *babaçu* nuts from palm trees in the Northern areas of the country. *Babaçu* palm trees take approximately a century to bear fruit and grow in the States of Maranhão, Piauí, Pará and Tocantins, areas which have also been targeted for larger-scale economic activities implying deforestation. *Babaçu* breaking is done almost exclusively by women and every part of the nut is processed through traditional methods generating oil used in cosmetics and flour. The communities’ houses are roofed with *babaçu* leaves, the nut’s shell is used as charcoal, the mesocarpo is used to make a local porridge and the kernel is used as a component of fuel. The *babaçuais* have been protected by the *Constituição do Estado do Maranhão*, 15 May 1990 at art. 196; and similarly to the rubber-tapping-related legislation, access to trees in public and private properties is granted through licensing processes that have been defined in municipal laws in the States of Maranhão, Tocantins and Pará. See Almeida, *Terras*, *supra* note 22 at 59; War on Want, *The babaçu breakers of Brazil: fighting for the protection of the forest and their way of life* (London: War on Want, 2007) at 1-3.

¹⁰¹⁴ *Caiçara* communities, usually formed by descendants of white settlers and indigenous peoples, practice artisanal fishing in the Atlantic coast between the States of Rio de Janeiro to Paraná.

¹⁰¹⁵ *Ribeirinhos* have been recognized by the *Constituição do Estado do Amazonas*, 5 October 1989 at arts. 250-251 as traditional communities devoted to the practice of fishing and other types of aquaculture in the rivers and lakes of the Amazon region.

¹⁰¹⁶ *Fundo de pasto* and *faxinal* communities practice subsistence or small-scale farming according to principles of collective ownership of the lands and harvest results. The communities and their right to collective ownership of the lands have been recognized to *fundo de pasto* communities by the *Constituição do Estado da Bahia*, 5 October 1989 at art. 178 and to *faxinal* communities by *Lei Estadual n. 15.673*, Estado do Paraná, 13 November 2007.

¹⁰¹⁷ See e.g. *supra* note 159 regarding the heritage of Amazon rubber-tappers. Moreover, according to the *Centro de Estudos Caiçaras* of the *Universidade de São Paulo*, online: <www.usp.br/napaub>, the word *caiçara* means ‘inhabitant of the coast’ in the indigenous language tupi, and communities have been formed by the miscegenation of indigenous peoples and Portuguese settlers. The *Babaçu breakers in Brazil* report, *supra* note 1013, informs that many of the *quebradeiras* are descendants of former slaves or indigenous peoples.

thus far benefited rubber-tappers, *castanha*-nut gatherers, *babaçu* breakers and *caiçara* fishers.¹⁰¹⁸ It could be argued that, as a consequence of the visibility of grassroots organizations, the criteria established for the representation of traditional peoples and communities within the national commission is by means of specifically named organizations from a diverse range of distinct communities.

The National Policy undoubtedly involves an unprecedented amount of stakeholders in the processes of recognition and enforcement of land and other rights related to the protection and reproduction of socio-ethnic distinctiveness. Nevertheless, two critiques developed above could be argued to be applicable in relation to the national Commission and Policy frameworks. The first is the ‘socio-ethnic overlegalization’ critique.¹⁰¹⁹ By recognizing the representation of different groups and peoples by non-governmental organizations or other types of associations legally determined by dominant society standards; forms of representation that may be more closely related to the legal and political structures of socio-ethnically distinct peoples may be overlooked and effective participation, consequently, negatively affected. Moreover, even if the format of representation is disregarded, the decree establishing the commission names specific organizations to speak and vote on behalf of each of the diverse groups which may also compromise the legitimacy of the representation.¹⁰²⁰

The second critique is the categorization, and consequent representation within the national commission and policy of organizations that do not necessarily meet the criteria of unique socio-ethnic distinctiveness that affects all aspects of community life. Certain organizations represent members of the dominant society who are vulnerable but, nevertheless, do not require the same self-determining and post-abyssal redress that indigenous and other socio-

¹⁰¹⁸ See generally *supra* note 805 regarding the *Sistema Nacional de Unidades de Conservação*. The federal extractivist reserves are conservation units of sustainable use. See also Almeida, *Terras*, *supra* note 22 at 57-60.

¹⁰¹⁹ See text accompanying note 563.

¹⁰²⁰ *Decreto de 13 de Julho de 2006* at 1001 art. 4, XXVI, for instance, determines that indigenous peoples shall be represented by the *Coordenação das Organizações Indígenas da Amazônia Brasileira* and the *Articulação dos Povos e Organizações Indígenas do Nordeste, Minas Gerais e Espírito Santo*, none of which encompass representation of the indigenous communities in the South and Central part of the country. It should be noted that the areas potentially outside of the scope of representation have been the most affected by the adversarial agendas described in section 3.1.2.

ethnic distinct peoples do.¹⁰²¹ The outreach intended by policy-makers may justify the choice of the word ‘traditional’ to designate the peoples and communities covered by the legislation and policy, rather than use words such as the one chosen for the scope of this thesis, ‘socio-ethnic distinct peoples’. The term ‘socio-ethnic distinct peoples’ encompasses communities who require broader and more localized self-determining rights to flourish and be respected as such. Some of the traditional communities listed as members of the national commission face exclusion but are not, to use Santos’ metaphor, completely ‘on the other side of the line’¹⁰²² for not requiring distinct social, legal and political structures or unique formulas of land use and ownership.

Most socio-ethnic distinct peoples that require unique self-determining structures to exist as such have an ancestral connection to the lands they traditionally occupy and use for natural extractivist purposes.¹⁰²³ If, on the one hand, the broader scope of the National Policy include vulnerable groups that are socio-ethnically distinct from the dominant society, on the other hand, it also brings a positive outcome by enabling the inclusion of peoples who do not traditionally exploit lands but are still socio-ethnically distinct on the basis of their ancestral connection to unique social, legal and political structures that guarantee the cohesiveness of a community of common heritage. Examples of this recognition are the representation in the Commission and Policy of the *roma* and *calon* peoples.¹⁰²⁴

It could be argued that the traditional communities and peoples legislation and policy phenomenon witnessed in the past decade, which culminated with the adoption of the National Policy in 2007 is a considerable and undeniable advancement in the recognition and

¹⁰²¹ This critique is construed similarly to the approach named ‘legal combos’ proposed in section 3.2.1. Examples of this unbalanced association are the representation of the *Associação das Mulheres Agricultoras Sindicalizadas* (unionized women rural-workers association) and the *Comunidades Organizadas da Diáspora Africana pelo Direito à Alimentação* (organized communities of the African Diaspora for the right to food).

¹⁰²² Santos, “Beyond Abyssal Thinking”, *supra* note 13 at 45.

¹⁰²³ This notion is reinforced, for instance, by the jurisprudence of the Inter-American Human Rights system, see text accompanying notes 962-974.

¹⁰²⁴ *Decreto de 13 de Julho de 2006*, *supra* note 1001 at art. 4, XXIV. The *Associação de Preservação da Cultura Cigana* represents both the *calon* people that arrived in Brazil in the 16th and 17th centuries escaping persecution by the Holy Inquisition in Portugal and the *roma* people that arrived at a later period. The definition of traditionally occupied territories within the National Policy, see *supra* text accompanying note 1004, reinforces the flexible approach to socio-ethnic distinctiveness proposed here.

enforcement of the rights of socio-ethnic distinct peoples in Brazil. The essentially localized use and management of the lands and resources disciplined almost on a case-by-case basis provides a *glocal* self-determining context that has been nearly ignored in the enactment of legislation concerning indigenous and *quilombola* peoples. Even though the phrasing of the National Policy and the composition and framework of operation of the Commission sometimes suggests a *circular argument* conjecture; the political association of indigenous peoples with this scenario of politics of recognition could also be considered a step forward in the process of breaking the *circular argument*.¹⁰²⁵ Not many actions related to the implementation of the National Policy have taken place. It is interesting to speculate, however, how the disparity between the outdated indigenous' rights framework and the pluralist order established by this renewed legal framework would be harmonized and if once again, the integrationist heritage and the *circular argument* context would burden indigenous peoples' rights enforcement.

¹⁰²⁵ *Ibid.* at arts. 1-9; which demonstrates that the operational framework of the Commission is clearly organized in a vertical bureaucratic manner, with excessive consultation procedures of different government agencies at federal level for the implementation of specific and localized policies. *Decreto n. 6.040*, *supra* note 454, evidences that the National Policy is State-centred and seeks to establish generalizing criteria for self-identification or modalities for the traditional use of the lands.

CONCLUSION

The *circular argument* represents the lack of empowerment of indigenous peoples and to a certain extent of other socio-ethnic distinct peoples in the processes of creation, management, delivery and evaluation of policy and legislation specifically directed at them or that affects the enforcement of their rights. The mainstream framework of reference of the dominant society's representatives portrays indigenous peoples as lacking the agency to participate and contribute in decisions that affect them as well as their territories and resources. The *circular argument* is thus formed through the culturally self-referent denial of socio-ethnic distinct peoples' agency and perpetuated by the quiet denial of the enactment and/or enforcement of rights and mechanisms that could ensure dialogues in the legal and political spheres, namely by means of the fulfilment of the right to self-determination of peoples at the internal level within the framework of a pluralist constitutional order.

This purposefully self-deceptive *circular argument* paradigm was formed and is maintained mainly for political and economic reasons. It perpetuates the subjugation of peoples that according to the pluralist model endorsed by the 1988 Constitution and pursuant to international law standards should be entitled to many more rights that should be interpreted broadly and in light of diverse legal, social, and political contexts. The inception of the *circular argument* was fuelled by reasons very similar to those that justify its perpetuation from the majority standpoint of the contemporary dominant society. Political measures most certainly contributed to the formation of the *circular argument* and continue to aid its perpetuation; it is the legal system, however, through the legislative, judicial and executive branches of government that put it in motion and reinforce this shameful pattern of domination.

Naturally, the *circular argument* cannot be labelled as an institutionalized 'conspiracy theory'-type of phenomenon that is mainstreamed in all legal and political actions regarding indigenous and other socio-ethnic distinct peoples' rights. The analysis proposed throughout this thesis took aim at identifying and describing the *circular argument* and its perpetuation as a systemic trend. The study includes an overview of how the argument was formed by the segregationist,

assimilationist and integrationist models applied to legal and political encounters between indigenous and non-indigenous peoples and how it was later expanded to occasionally encompass other socio-ethnically distinct peoples. The perpetuation of the *circular argument* through legislative, executive and judicial decision-making processes was then connected to larger institutional historical and structural patterns of exclusion.¹⁰²⁶

It could be argued that legislation and policy that created and reinforced the *circular argument* have contributed, as analysed above, to the construction of generalizations and stereotyped images of indigenous peoples' agency and their entitlement to differentiated rights. Many of those elected to the House of Representatives and the Senate, as well as Supreme Court Justices – and, often, even those who proactively advocate for the enactment and enforcement of indigenous and other socio-ethnic peoples' rights, pronounce judgements or proffer speeches loaded with pejorative vocabulary and patterns that reproduce the *circular argument* – a demonstration of how embedded this partial vision of the agency of indigenous and other peoples akin to them is within the dominant society's decision-making structures.

This stereotypical pattern has been critically described by some as something peculiar to a dominant society that seeks to take the blame for the suffering caused by their ancestors towards indigenous peoples. Within this context, and after centuries of oppression, the 'colonizers' have decided to consecrate the indigenous peoples as "children without malice whose only ambition is to enjoy, in peace and isolation, the natural resources of their lands".¹⁰²⁷ The pattern has also been described as an institutionalized 'idyllic utopia' guided by 'anacronic legislation' that implies the backwardness and lack of agency of indigenous peoples in Brazil.¹⁰²⁸

¹⁰²⁶ The concept of larger structural and historical patterns of exclusion is from Sheppard, "Systemic Racism", *supra* note 601 at 56.

¹⁰²⁷ J. Edward & L. Coutinho, "As falsas vítimas" *Revista Veja* 1949 (29 March 2006) 84 at 84-85.

¹⁰²⁸ *Ibid.* at 85-86.

Representatives of all three branches of government claim that the fundamental rights and guarantees, including those geared exclusively towards indigenous peoples are among the most advanced in the world. A simple ‘compare and contrast’ analysis of the Brazilian legislation and policy with international legal standards and theoretical approaches demonstrates that this claim by Brazilian politicians is demagogical and far-fetched. The ‘sudden’ constitutional recognition of diversity of socio-ethnically distinct peoples is praised by the State as the immediate solution to all problems of vulnerability and exclusion, supposedly requiring little legislative follow-up considering that the big step towards recognition has been taken. The implementation of adequate complementary legislation and policy can also be added as a challenge that perpetuates the *circular argument* – not to mention the backlash and delays suffered as a result of adversarial legislative agendas. In the analysis of a similar context Sheppard notes that “it is impossible to promote assimilation and exclusion of diverse communities for over one hundred years and then expect to reverse the effects of such policies and practices through formal constitutional law reform”.¹⁰²⁹

Moreover, even if the matter was regarded through more realistic lenses and if true political will to further the enforcement of diversity-related rights recognized by the Constitution were stronger, a material perspective of efficiency should also be taken into account. This perspective is described by Macklem within the constitutional context, stating that “the fact that a legal actor possesses a measure of constitutional authority does not mean it possesses the material ability to accomplish what the constitution authorizes”,¹⁰³⁰ adding that a myriad of factors may affect “the ability of the legal actor to translate formal constitutional authority into material reality”.¹⁰³¹

Nevertheless, and regardless of the syllogistic opinions of legal operators concerning the recent recognition of diversity and rights of indigenous and other socio-ethnically distinct peoples, it is certain that the principles of the 1988 Constitution aspire to a considerable transformation

¹⁰²⁹ Colleen Sheppard, “Constitutional Recognition of Diversity in Canada” (2005-2006) 30 Vt. L. Rev. 463 at 477 [Sheppard, “Constitutional Recognition”].

¹⁰³⁰ Macklem, *Indigenous Difference*, *supra* note 56 at 21.

¹⁰³¹ *Ibid.* at 21.

based in legal and political pluralism and social diversity. This transformation, as this thesis suggests, requires more than has been proposed and enforced so far. However, it is undeniable that in any stance, fundamental changes will take place due to the fact that “constitutional recognition of diversity occurs against a backdrop of changing social, economic and political conditions, which affect the interpretation of legal rights and state obligations”.¹⁰³² Those changes, require emancipatory and prepared positioning of indigenous and other socio-ethnic distinct peoples, civil society, the State as well as many other stakeholders regarding issues of forced dependency, of ethnic and social-blind policies and the stereotypical image of ‘lack of agency’ or partial agency of indigenous peoples and other peoples akin to them without incurring in self-referent¹⁰³³, insufferably patronizing¹⁰³⁴ decision-making processes. Moreover, what Macklem proposes as the material perspective of efficiency should be considered because “constitutional law distributes fundamental baseline entitlements among legal actors, and, in so doing, it can have profound effects on the material circumstances of individuals and groups in society”.¹⁰³⁵

Anthropological and sociological studies reinforce the idea that “indigenous societies have been a fertile field for the most diverse projections marked throughout Brazilian history by two contradictory visions: one of the ‘indian’ as a metaphor of natural freedom and another of the ‘indian’ as the image of the ‘obsolete’ model that should be surpassed and both shared the conviction, until very recently, over the eventual extinction of those societies”.¹⁰³⁶ As observed above, the stereotypical view that dominates the legal and political decision-making scenarios also perceives indigenous social, legal and political structures and ways of life as frozen in time, dating back to periods previous to internal colonization. The mainstream view envisages indigenous structures of decision-making as less complex rather than simply culturally and organizationally differentiated.¹⁰³⁷

¹⁰³² Sheppard, “Constitutional Recognition”, *supra* note 1029 at 477.

¹⁰³³ Marés, *Renascer* *supra* note 6 at 161.

¹⁰³⁴ The justification for the use the terminology provided in Taylor, *supra* note 183 is argued to be valid in this context.

¹⁰³⁵ Macklem, *Indigenous Difference*, *supra* note 56 at 21.

¹⁰³⁶ Arruda *supra* note 585 at 45 [translated by author].

¹⁰³⁷ Marés, *Renascer*, *supra* note 6 at 117.

Moreover, the socio-cultural loss linked to segregationist, assimilationist and integrationist practices that created dependency and subordination relations is hardly taken into account. The *circular argument* patterns that damaged and weakened structures that if left unperturbed by internal colonization and involuntary incorporation practices would have followed a different course are not taken into account either. On the receiving end of the policies and enforcement of rights, the pattern is not so easily denied. Arruda observes that “from the prism of indigenous societies, the contradictions, ambiguities and tensions that are the results of the relations of dependency and subordination with the national society remain active” and are prevalent within anti-indigenous lobbies, requiring “a permanent effort of resistance, political struggle and reinvention of indigenous forms of socio-cultural reproduction”.¹⁰³⁸ Despite great challenges, some indigenous peoples have been able to maintain, adapt or reinvent their socio-political structures to cope with the dynamic impositions of society enabling indigenous and in some instances other socio-ethnically distinct peoples to maintain their flexible space or retain their ability to formulate new or renewed forms of sociability connected to their particular history and culture. This reinvention of socio-political structures has occurred despite “crashing pressures where internal relations are more and more subordinated to processes defined by exterior forces”¹⁰³⁹ and with very few or without “institutional means to resist the violation of their rights”¹⁰⁴⁰ when those exist.

In order to avoid this patronizing pattern, an approach that is not culturally self-referent, that is encouraging of a post-abyssal state of mind¹⁰⁴¹ and that serves the interests of indigenous peoples, and when appropriate, other socio-ethnic distinct peoples as well must be applied to break the *circular argument*. Possible solutions to the reinterpretation of constitutionally recognized rights should take into account that a multiplicity of identities carries with it “the aspiration to self-determination, that is to say, the aspiration to equal recognition and differentiated equalities”¹⁰⁴² and presupposes the development of transcultural criteria to

¹⁰³⁸ Arruda, *supra* note 585 at 60 [translated by author]. A similar description of the Canadian context is provided in Borrows, “Agency”, *supra* note 578 at 257: lives were unduly susceptible to government interference through the suppression of Aboriginal choice in numerous fields, such as governance, land use and ownership, parent-child relationships, economic development, association, due process, religious practices and equality.

¹⁰³⁹ Arruda, *supra* note 585 at 60 [translated by author].

¹⁰⁴⁰ Borrows, “Agency”, *supra* note 578 at 257-258.

¹⁰⁴¹ Santos, “Beyond Abyssal Thinking”, *supra* note 13.

¹⁰⁴² Santos, “*Nuestra America*”, *supra* note 13 at 211.

distinguish emancipatory from retrogressive multiculturalism.¹⁰⁴³ Furthermore, the temporalities and spaces should consider the global and local spheres through a context that reverberates the globally established right of self-determination with its localized existence.

These two aspects of the reconstruction and reinterpretation process, the multiplicity of identities and the localized exercise of the globally established-right to self-determination, play a double role in the perspective proposed here: while they represent tools that break the *circular argument*, they are also instrumental in the implementation of a system of checks and balances that ensures the openness of the process of constitutional reasoning to re-evaluation of practices that might emerge after the rupture of the *circular argument* and the consequent implementation of renewed citizenship ideals. An experiential process must be undertaken after the *circular argument* is broken, applied in the present but enabling a future of further evaluation, improvement and innovation. It is only by means of experience that it is possible to achieve a “consistent actualization of the system of rights”.¹⁰⁴⁴ The process requires a collective, interactive and inter-subjective knowledge production with full awareness that there will always be grey areas and such set-backs should be relativized for the sake of common interests of social justice.¹⁰⁴⁵

Innovation that hints at a post-abyssal approach that incipiently surmounts indolent modes of reasoning has emerged through the localized exercise and existence of globally recognized rights. In the past decades indigenous and other socio-ethnic distinct peoples akin to them have acquired a remarkable space in the international arena. Significant paradigmatic changes that safeguard the right to a socio-ethnic and culturally differentiated existence, encourage co-existence within pluralistic societies and address historical patterns of abuse and peripheral existence of indigenous and other socio-ethnic distinct peoples have been observed. Such

¹⁰⁴³ *Ibid.* at 211. It should be noted that Santos recognizes the validity of Kymlicka’s argument of ‘multicultural citizenship’ as a ‘privileged site upon which to ground the kind of mutual implication of redistribution and redefinition implied in Santos’ analysis of equal recognition and differentiated equalities’. See Kymlicka, *Citizenship*, *supra* note 65.

¹⁰⁴⁴ Jürgen Habermas, “Struggles for Recognition in the Democratic Constitutional State” in Amy Gutmann, ed., *Multiculturalism: examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 107 at 113.

¹⁰⁴⁵ Santos, *Gramática*, *supra* note 13 at 454.

developments reflect Tully's assertion that the question is no longer whether one should be for or against diversity, but rather question "what is the critical attitude or *spirit* in which justice can be rendered" to meet the demands of recognition.¹⁰⁴⁶

International law has established a trailblazing path of recognition of the unique existence of indigenous peoples in the global order. As highlighted by Anaya, "with this recognition has come a sustainable level of international activity focused upon indigenous peoples' concerns and a corresponding body of norms built upon long-standing human rights precepts".¹⁰⁴⁷ The textual straightforwardness of international law mechanisms, especially those safeguarding the right to self-determination and the legitimization of legal and political pluralism at local levels, are often perceived by indigenous peoples' advocacy groups as key to ensuring dignity, cultural integrity and targeted or localized monitoring of human rights standards. The international human rights framework established in the 1990s and consolidated with the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* in 2007 has become a widely accepted framework of reference for the (re)negotiation of State-based relations and interactions between the government, the dominant society, indigenous and other socio-ethnic distinct peoples akin to them.

The increased positioning of indigenous peoples and other socio-ethnically distinct peoples in the international arena has facilitated the formulation of a "broader and more flexible concept of self-determination";¹⁰⁴⁸ that encompasses "self-control by a group over its internal affairs" as an effective way of protecting the dignity and identity of diverse groups within States.¹⁰⁴⁹ The right to self-determination of peoples is rooted in core values of freedom and equality within a human rights framework as opposed to State-centred sovereignty rights.¹⁰⁵⁰ As indigenous and other socio-ethnic distinct peoples are recognized as self-determining peoples, the *circular argument* is potentially broken because it reinforces the idea that maintaining "the

¹⁰⁴⁶ Tully, *Strange Multiplicity*, *supra* note 56 at 1 [emphasis in the original].

¹⁰⁴⁷ Anaya, *Indigenous Peoples*, *supra* note 57 at 7.

¹⁰⁴⁸ Thornberry, *supra* note 915 at 129.

¹⁰⁴⁹ Alfredsson, *supra* note 925 at 52.

¹⁰⁵⁰ Anaya, "Self-Determination", *supra* note 931 at 133.

integrity of their cultures is a simple matter of equality, of being free from historical and ongoing practices that treated their cultures as inferior to the dominant cultures.¹⁰⁵¹

The scope of the right to self-determination of peoples proposed here follows the understanding that it is a broad principle collectively articulated politically and legally according to international law and various political ideologies but “articulated best in terms of agency, conceptions of autonomy and relationships”.¹⁰⁵² The principle of self-determination of peoples only operates as a tool to break the *circular argument* when it is understood as an inherent collective attribute flowing from sources within a people rather than external sources. The right is recognized at global level, its legitimate exercise, however, can only take place locally – through localized social, legal, economic and political structures or by means of localized negotiation of forms of participation at higher levels of decision-making.

The rupture of the *circular argument* in Brazil should first encompass an effort to truly raise the constitutionally recognized rights of indigenous and other socio-ethnic distinct peoples to the global standards of recognition and enforcement. Moreover, the implementation of the global standards allied to localized initiatives in constant development and revitalization should be cohesively recognized and applied in the enforcement these rights. This approach must consider the internal colonization and involuntary incorporation scenarios that the indigenous peoples were subjected to and the uniqueness of each people, including their circumstances of exclusion on a case-by-case basis, and, as defined by each people.

The power of the *glocal* principle of self-determination in its role as a catalyst that breaks the *circular argument* is reinforced by the underlying premise that it does not dictate the outcome of the renewed participation procedures but imposes a framework of participation that after

¹⁰⁵¹ Anaya, “Multicultural State”, *supra* note 929 at 16.

¹⁰⁵² Napoleon, *supra* note 976 at 31.

circumstantial and localized (re)negotiation should reflect “the collective will of the people, or peoples, concerned”.¹⁰⁵³

¹⁰⁵³ Anaya, “Self-Determination”, *supra* note 931 at 145.

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ANNEX 1

FIGURE 1

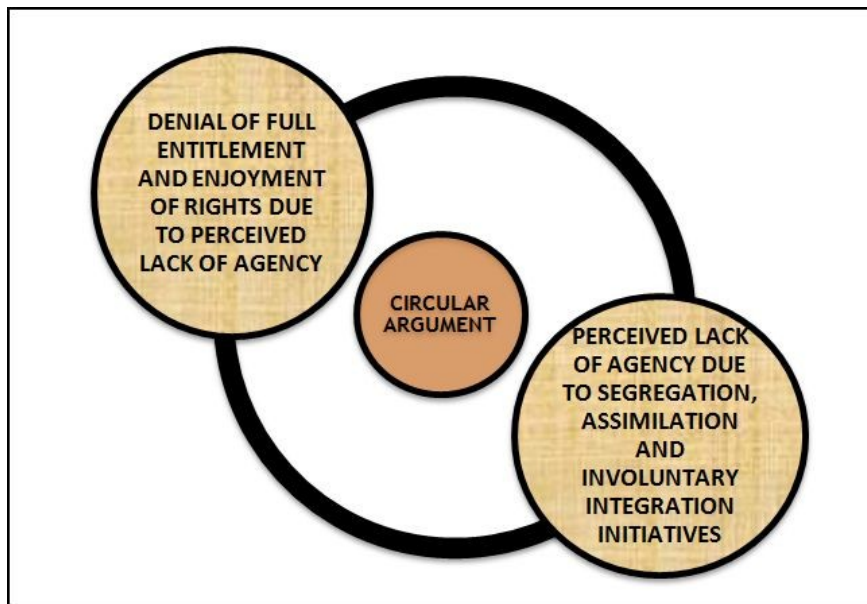
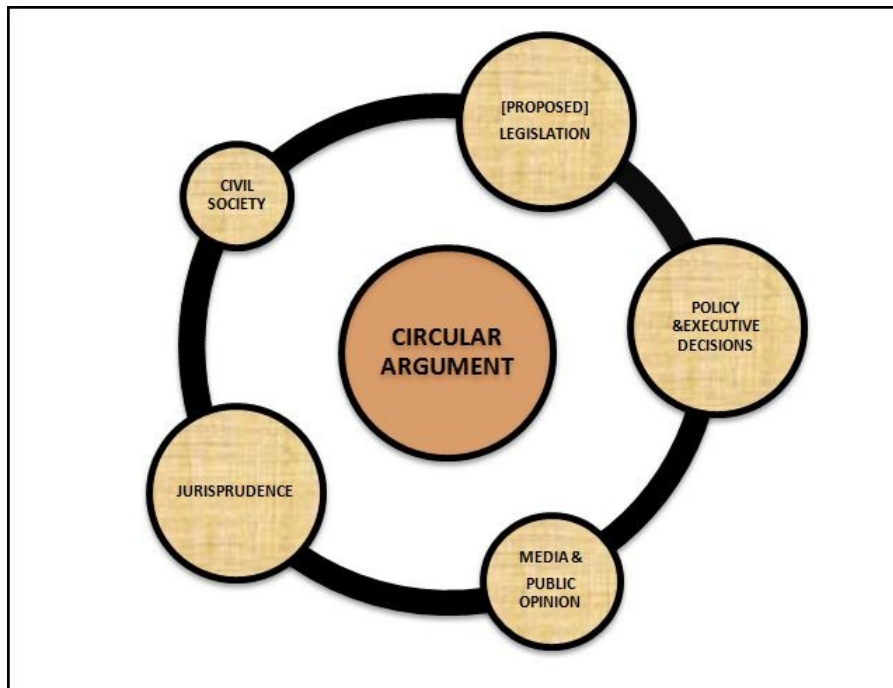


FIGURE 2



ANNEX 2

LIST OF ABBREVIATIONS

ADCT – *Ato das Disposições Constitucionais Transitórias*

ADI – *Ação Direta de Inconstitucionalidade*

AGU – *Advocacia-Geral da União*

APCC – *Associação de Preservação da Cultura Cigana*

APOINME – *Articulação dos Povos e Organizações Indígenas do Nordeste, Minas Gerais e Espírito Santo*

AU – *African Union*

CAPADR – *Comissão de Agricultura, Pecuária, Abastecimento e Desenvolvimento Rural*

CCJC – *Comissão de Constituição, Justiça e de Cidadania*

CDHM – *Comissão de Direitos Humanos e Minorias*

CEC – *Comissão de Educação e Cultura*

CF – *Constituição Federal*

CNPCT – *Comissão Nacional de Desenvolvimento Sustentável dos Povos e das Comunidades Tradicionais*

CNPI – *Comissão Nacional de Política Indigenista*

CPISP – *Comissão Pró-Índio de São Paulo*

COIAB – *Coordenação das Organizações Indígenas da Amazonia Brasileira*

CONAQ – *Coordenação de Articulação das Comunidades Negras Rurais Quilombolas*

CRC – *Convention on the Rights of the Child*

CREDN – *Comissão de Relações Exteriores e de Defesa Nacional*

FCP – *Fundação Cultural Palmares*

FNS – *Fundação Nacional da Saúde*

FUNAI – *Fundação Nacional do Índio*

FENAMAD – *Federación Nativa del Rio Madre de Dios y Afluentes*

FUNASA – *Fundação Nacional de Saúde*

IBAMA – *Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis*

IBGE – *Instituto Brasileiro de Geografia e Estatística*

ICCPR – *International Covenant on Civil and Political Rights*

ICESCR – *International Covenant on Economic, Social and Cultural Rights*

ICJ – International Court of Justice

ICMBio – *Instituto Chico Mendes de Conservação da Biodiversidade*

ILO – International Labour Organization

ILO 107 – *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*

ILO 169 – *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*

INCRA – *Instituto Nacional de Colonização e Reforma Agrária*

Inter-Am. Comm. H. R. – Inter-American Commission on Human Rights

Inter-Am. Ct. H. R. – Inter-American Court of Human Rights

IPHAN – *Instituto do Patrimônio Histórico e Artístico Nacional*

IWGIA – International Work Group for Indigenous Affairs

JF – *Justiça Federal*

MABe – *Movimento dos Atingidos pela Base Espacial de Alcântara*

MD – *Ministério da Defesa*

MEC – *Ministério da Educação*

MinC – *Ministério da Cultura*

MJ – *Ministério da Justiça*

MRE – *Ministério das Relações Exteriores*

MS – *Ministério da Saúde*

NGO – Non-Governmental Organizations

OAS – Organization of American States

OASCTJPA – Organization of American States Committee on Juridical and Political Affairs

ONU – *Organização das Nações Unidas*

PDC – *Projeto de Decreto Legislativo*

PET – *Petição*

PFDC – *Procuradoria Federal dos Direitos do Cidadão*

PGR – *Procuradoria-Geral da República*

PNCSA – *Projeto Nova Cartografia Social da Amazonia*

PNPCT – *Política Nacional de Desenvolvimento Sustentável dos Povos e Comunidades Tradicionais*

PNUD – *Programa das Nações Unidas para o Desenvolvimento*

SEPPIR – *Secretaria Especial de Políticas de Promoção de Igualdade Racial*

SPI – *Serviço de Proteção aos Índios*

STF – *Supremo Tribunal Federal*

UCs – *Unidades de Conservação*

UFAM – *Universidade Federal do Amazonas*

UFPR – *Universidade Federal do Paraná*

UN – United Nations

UN Declaration – *United Nations Declaration on the Rights of Indigenous Peoples*

UNDP – United Nations Development Program

UNDPI – United Nations Department of Public Information

UNEMRIP – United Nations Expert Mechanism on the Rights of Indigenous Peoples

UNEP – United Nations Environment Programme

UNESCO – United Nations Educational, Scientific and Cultural Organization

UNHCHRO – United Nations High Commissioner for Human Rights Office

UNHRC – United Nations Human Rights Council

UNPII – United Nations Permanent Forum on Indigenous Issues

UNTS – United Nations Treaty Series