REVISTA JUSTIÇA DO DIREITO
DOI 10.5335/rjd.v36i1.13327

The land right of indigenous peoples in Brazil: among insufficiencies and potentialities[1]

O direito à terra dos povos indígenas no Brasil: entre insuficiências e potencialidades

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Abstract

The indigenous peoples in Brazil have conquered many rights with the promulgation of the 1988 Constitution. As the most critical right for their survival as peoples, the land right was guaranteed by the constitution next to implementation instruments. Throughout four decades, many indigenous lands were established by the demarcation procedures, reserving approximately 14% of the Brazilian territory. Although this represented a great accomplishment, there are still numerous indigenous lands to be demarcated, and the rate of violence against the indigenous territories is on a continuous rise. This paper seeks to report the patterns of illegitimacy and insufficiency in the legal norms concerning the demarcation of indigenous peoples' lands in Brazil. The sustained hypothesis is that: due to the lack of effectiveness and materialization perceived among the territorial rights of the indigenous peoples in Brazil, the constitutional land right and the official procedure of indigenous land demarcation unravel both their insufficiencies and potentials.

Keywords: Brazilian Constitution. Human rights. Indigenous peoples. Indigenous territories. Land demarcation. Land right.

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DOI 10.5335/rjd.v36i1.13327

Resumo

Com a promulgação da Constituição de 1988, os povos indígenas no Brasil conquistaram diversos direitos. Sendo o direito mais crítico para a sua sobrevivência enquanto povos, o direito à terra foi garantido pela constituição junto a instrumentos para a sua implementação. Ao longo de quatro décadas, inúmeras as terras indígenas foram estabelecidas pelos procedimentos de demarcação, o que resultou na reserva de aproximadamente 14% do território brasileiro. Embora isto tenha representado uma grande conquista, ainda existe um número considerável de terras indígenas a serem demarcadas, além de que o índice de violência contra os territórios indígenas não para de crescer. O presente artigo tem como objetivo descrever os padrões de ilegitimidade e insuficiência das normas jurídicas relativas à demarcação de terras indígenas no Brasil. A hipótese sustentada é a de que: devido à falta de efetividade e materialização percebida entre os direitos territoriais dos povos indígenas no Brasil, o direito constitucional à terra e o procedimento oficial de demarcação de terras indígenas desvendam suas insuficiências e potencialidades.

Palavras-chave: Constituição Brasileira. Direitos humanos. Demarcação de terras. Direito de terra. Povos indígenas. Territórios indígenas.

Introduction

The Brazilian Constitution of 1988 represented an unprecedented mark for the regulation and recognition of the indigenous peoples' land rights. It has shed a broader light on the territorial issues they have suffered since the establishment of the Portuguese colony. The constitution granted the indigenous peoples a stronger claim to their traditional territories as it prescribed a wider content of rights and a larger set of protection instruments.

Although the constitutional land right has represented some important achievements to the indigenous peoples in Brazil, the number of gains has been tended to diminish towards a complete paralysis of the demarcation process.

To the present day, about 31% of the indigenous territories are in fact demarcated, turned into the institutional category of indigenous lands. That occurs despite the constitutional deadline[4] that states the lapse of five years until the full realization of the processes of land demarcation.

[4]The Act of transitional constitutional dispositions, *Ato de disposições constitucionais transitórias* in Portuguese (ADCT) establishes in the art. 67 the amount of five years for the government to process all the territorial claims of indigenous peoples, turning their territories into indigenous lands protected by the State. Counted from the year of the promulgation of the Brazilian constitution (1988), the deadline extended until the year 1993.

This paper aims to report the patterns of illegitimacy and insufficiency in the legal norms concerning the demarcation of indigenous peoples' lands in Brazil. The investigation takes the following hypothesis: due to the lack of effectiveness and materialization perceived among the territorial rights of the indigenous peoples in Brazil, the constitutional land right and the official procedure of indigenous land demarcation unravel both their insufficiencies and potentials.

According to that, this paper is divided into three parts. The first part establishes an investigation towards the multiple factors that could attest to different shades of illegitimacy within the juridical norms prescribed to the indigenous peoples and also the rights assembled to their protection.

Part two discusses different views on the rights, contrasting the negative and positive aspects through a dialectical approach. Distinguishing the true rights from the anti-rights, also known as deceived rights, is intended to shed light on the rights' potentials and to avoid some juridical traps.

Part three intends to propose and discuss some alternatives capable of increasing the realization of the indigenous peoples' land rights in Brazil, such as the political processes of a confluence of social struggles and also the autodemarcation initiatives.

The methodological structure assembled in this investigation combines two different techniques from the fields of sociology and law. Through a qualitative perspective, the process of historical-narrative reconstruction is intended to unravel the colonial, cultural, economic, juridical, and political factors that have an influence on the relation among the Brazilian State and the indigenous peoples.

Also from a qualitative perspective, the law dialectics, based on the propositions by Roberto Lyra Filho[5], is used as a tool for the contraposition and synthesis of the potentialities found in the relations kept among the State and the Brazilian indigenous peoples.

[5]LYRA FILHO, Roberto. **A nova escola jurídica brasileira.** *In:* CHAUÍ, Marilena. FAORO, Raimundo. LYRA FILHO, Roberto. Direito e Avesso. Boletim da nova escola jurídica brasileira. Brasília: NAIR, 1982a. p.13-15. LYRA FILHO, Roberto. **Criminologia Dialética.** Rio de Janeiro: Borsoi, 1972. LYRA FILHO, Roberto. **Normas jurídicas e outras normas sociais.** *In*: CHAUÍ, Marilena. FAORO, Raimundo. LYRA FILHO, Roberto. Direito e Avesso. Boletim da nova escola jurídica brasileira. Brasília: NAIR, 1982b. p.49-57. LYRA FILHO, Roberto. **O direito que se ensina errado.** Sobre a reforma do ensino jurídico. Brasília: UNB, 1980. LYRA FILHO, Roberto. **Pesquisa em que direito?** Brasília: NAIR, 1984.

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First of all, the historical-narrative reconstruction is put on use in this investigation to find, examine and constitute an illegitimacy pattern left on the foundations of the juridical norms and constitutional rights created for the protection of indigenous territorial people's rights.

Due to that, the law dialectics serves as a device to distinguish the many forms taken by formal, official, and institutional rights. Discerning the true and legitimate rights inscribed in the juridical norms, born from the real territorial claims of the indigenous peoples, from those misleading, mischievous, and deceived rights, known as anti-rights or also the negation of rights, helps the examination of obstacles and potentials within the juridical, social and political scope for the protection of indigenous territories. And it also guides the analysis of the possible paths to follow in order to achieve the realization and materialization of indigenous rights and claims.

For comprising the recent developments on this matter through a quantitative perspective, this investigation conducts a data analysis of the administrative decrees on the process of indigenous land homologation. The intention is to compare the creation of indigenous lands throughout the last four decades, identifying the outspread and possible causes that lead to thecomplete paralysis of the official processes of indigenous land demarcation in Brazil.

1. The pattern of illegitimacy printed on the land right and its juridical norms

The term "legitimacy" represents an intricate concept for the study of law. As an attribute of the State, legitimacy is pointed out as an instrument for transforming law obedience into law adherence[6]. In this sense, the State establishes its own law as the only authentic, rightful, truthful, and ultimate form of right.

In this context, legitimacy has been wrongly mistaken and assumed as a synonym of legality. Treating those terms interchangeably reflects the assumption that the inscription of a right in the terms of the law is a sufficient manner to attest its legitimacy. Thus, any other material aspect of the legitimacy spectrum is deflected.

[6] LEVI, Lucio. **Legitimidade.** *In:* BOBBIO, Norberto. Dicionário de Política. Brasília: UnB, 1998. p.675.

Based on a formalist and state-centered juridical positivism, the instituted order of law establishes itself regardless of its legitimacy[7]. This limitation simplifies the essence of the rights, turning their contents into something capable of being completely translated into the legal norms[8].

On balance, this investigation seeks to contribute with another view of legitimacy as a concept in the study of law. That other legitimacy is distinguished from the frugal and formal meaning of legality and assumes the questioning of the instituted order and the State's power to legitimate itself. In this sense, legitimacy is viewed as a potency born from the claims of those who detain the rights as translations of their own social demands.

On that matter, at first, this paper focuses on a report of five aspects– colonial, cultural, economic, legal, and political – to attest and describe an illegitimacy pattern in the social and juridical relation among the Brazilian State and the indigenous peoples.

Through the establishment and development of the colonial process in Portuguese America, numerous acts of violence have been put in place against the inhabitant peoples. Based on acts of physical and moral aggression[9], forced labor[10], cultural destruction, also known as, ethnocide[11], instigation of ethnic disputes among different groups[12], identity suppression[13], knowledge destruction or epistemicide[14], and territorial loss[15], the indigenous peoples in Brazil have suffered a progressive succession of acts of violation and annihilation.

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[7] LYRA FILHO, Roberto. **A nova escola jurídica brasileira.** *In:* CHAUÍ, Marilena. FAORO, Raimundo. LYRA FILHO, Roberto. Direito e Avesso. Boletim da nova escola jurídica brasileira. Brasília: NAIR, 1982a. p.14.

[8] COSTA, Alexandre Bernardino. **Por uma Teoria Prática:** O Direito Achado na Rua. *In:* SOUSA JUNIOR, José Geraldo de. *et al*. Introdução Crítica ao Direito das Mulheres. Série O Direito Achado na Rua, vol. 5.Brasília: CEAD, FUB, 2011. p.138.

[9]MARTÍNEZ DE BRINGAS, Asier. **Los pueblos indígenas ante la construcción de los processos multiculturales.** Inserciones en los bosques de la biodiversidade. *In*: MARTÍNEZ, Alejandro Rosillo *et al*. Teoria crítica dos direitos humanos no século XXI. Porto Alegre: EDIPUCRS, 2008. p.271-272.

[10]WALLERSTEIN, Immanuel. **Universalismo Europeu.** A retórica do poder. São Paulo: Boitempo, 2007.p.30-31.

[11]CLASTRES, Pierre. **Arqueologia da violência:** pesquisas de antropologia política. São Paulo: Cosac & Naify, 2004. p.56. TUKANO, Álvaro. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p.13.

[12]BANIWA, Gersen [LUCIANO, Gersen José dos Santos]. **O Índio Brasileiro:** o que você precisa saber sobre os povos indígenas no Brasil de hoje. Brasília: Museu Nacional, 2006b. p.57.

[13]GUAJAJARA, Sônia. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p.50.

[14]SANTOS, Boaventura de Souza. **Pela mão de Alice:** o social e o político na pós-modernidade. São Paulo: Cortez, 1999. p.328.

[15] OLIVEIRA FILHO, João Pacheco. Viagens de ida, de volta e outras viagens: os movimentos migratórios e as sociedades indígenas. **Revista Travessia**, São Paulo: CEM, v.9, n.24, p. 5-9, jan./abr.

The main goal of this process was to open and expand a larger logic of land accumulation designed to turn the wildlands into private properties owned by the settlers. Thus, the machinery of violence was used against the indigenous peoples that were seen as obstacles to the development of the colonial rule.

To some extent, that pattern was continuously kept by the Portuguese rule in Brazil and by the following Brazilian empire and republic. As the independence of the Latin American countries took place, their colonial remnants still endured on their processes, procedures, and laws.

Brazil, like most Latin American countries, has not been founded as the State of Law *per si*, where the rule of law and the division of private and public interests occurs, but as a piece of patrimonial machinery[16]. This constitutive fragility explains why the protection instruments of the indigenous peoples were never fully applied in a reality where the private, economic and financial interests take the rule of the State.

During the years of military dictatorship (1964-1985), a political project of assimilation and integration of the indigenous peoples was developed in order to banish the natives from their traditional territories[17]. After the promulgation of the 1988 Brazilian constitution, many indigenous rights and protection instruments were assembled. However, the constitution does not represent an effective rupture[18] from the colonial past and its violent ways against the indigenous peoples.

In this sense, the continuity and protruding, to some extent, of a colonial dynamic state the colonial aspect as an illegitimacy factor printed on the indigenous rights and juridical norms. Taking that into consideration, a legitimate juridical norm would be one that can tear apart the remnants of a colonial dynamic among the Brazilian State and the indigenous peoples.

The impacts of a violent colonial dynamic imposed upon the indigenous peoples also assume a cultural take. The imposition of cultural aspects and concepts has been of extreme importance for the foundation and function of the colonial machinery designed to evict the indigenous peoples from their traditional lands.

1996.p.6.

[16]GALLARDO, Helio. Teoría crítica y derechos humanos. Una lectura latinoamericana. **Revista de Derechos Humanos y Estudios Sociales**, San Luis Potosí, año II, n. 4, 2010. p.63.

[17]GUAJAJARA, Sônia. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p. 50. p.22.

[18]KAUFMANN, Rodrigo de Oliveira. **Direitos Humanos, Direito Constitucional e Neopragmatismo.** 2010.364 f. Tese (Doutorado em direito, estado e constituição) Programa de Pós-Graduação em Direito da Universidade de Brasília, Brasília, 2010. p.43-44.

Due to that, the natives were cast in a place of shadow, death, and neglect [19], inaugurating the constitution of an inequality created by the land accumulation process. The geographic control of the colonial areas represented the inscription of a whole new variety of cultural relations concerning land and property[20]and, on the other hand, the complete oblivion of the traditional aspects sustained by the indigenous cultures. Therefore, the colonization process marks the acculturation of previous territorialities leading to the destruction of those specific ethnical dynamics.

That historic neglect is currently translated to some extent as the allegation made by ruralists about the size of indigenous demarcated lands. According to them, there is "too much land for too few Indians", and for that, they represent an obstacle to the development of the rural business [21]. However, while the indigenous lands comprehend an area of 117.639.837 acres, or circa 14% of the Brazilian territory[22], the cultivated lands extend to an amount of 851.487.659acres, or 41% of the country[23], an area compared in extension to the whole of India.

In order to establish its dominion all over the cultural, social, and economic structure, the bourgeoisie imposes the strict recognition of only one universal human experience as legitimate. For that matter, its establishment suppresses other cultural and economic ways of understanding and interacting with and within the world[24], favoring the views of capitalist appropriation and accumulation.

In contrast to that, the 1988 Brazilian constitution recognizes a few of the indigenous rights, such as the social and cultural ways of organization and disposal of their lands and resources. Taking the colonial process of cultural assimilation into consideration, the constitutional norm generates a tension between the capitalist interests of those who control and impose their will and the indigenous peoples suppressed by them.

[19]OLIVEIRA, João Pacheco de. Las formas del olvido. La muerte del indio, el indianismo y la formación de Brasil (siglo XIX). **Desacatos**, n.54, p. 160-181. 2017. p.161.
[20]MBEMBE, Achille. Necropolítica. **Arte & Ensaios**, Rio de Janeiro, n.32, 2016. p.135.
[21]KOPENAWA, Davi. ALBERT, Bruce. **A queda do céu**: palavras de um xamã yanomami. São Paulo: Companhia das letras, 2015. p.387.
[22]ISA, Instituto Socioambiental. **Terras indígenas no Brasil.** São Paulo: Instituto Socioambiental, 2020.
[23]IBGE, Instituto Brasileiro de Geografia e Estatística. **O Brasil indígena.** Brasília: Ministério da Justiça, 2011. p.61
[24]GALLARDO, Helio. Teoría crítica y derechos humanos. Una lectura latinoamericana. **Revista de Derechos Humanos y Estudios Sociales**, San Luis Potosí, año II, n. 4, 2010. p.7.

It is the nature of law to impose some people's interests over the aspiration of certain groups and individuals[25].However, the real problem relies on the selective aspects in which the coercion of law occurs, imposing only certain norms, such as those for the private property regulation, ignoring other norms related to the institution, and protection of indigenous territorialities.

This tension between the implementation of private property and the exclusion of indigenous territorialities shows that the occidental concept of land necessarily imposes the suppression of other forms of territoriality.

In this sense, it is not legitimate that for a right to exist it might exclude and suppress other rights. Therefore, on the other hand, a juridical norm compatible with the multiplicity, complementarity and harmony among different prescriptions in the legal order, is considered legitimate. In other words, a legitimate juridical norm is intended to protect and regulate different forms of territorialities, providing real conditions for the right to be put into practice.

Stating that concepts such as economic progress and development do not apply to the collective way of living of most the Brazilian indigenous peoples[26]is vital to understand that the accumulation of lands and wealth does not match the indigenous cultures' sense of nature, land, water, and air as non-negotiable aspects of life[27].

Progressive economic growth is only a particular perception inscribed in the occident cultural spectrum. In that sense, it is necessary to ponder on cultural patterns imposed on others as a universal truth against any other perspective. The incompatibilities and disparities among the concept of private property - as an individualistic notion that expands and annihilates other territorialities - and the indigenous collective and cultural expressions concerning their traditional lands generate a cultural, economic, juridical, and political tension.

On the face of that, the Brazilian State in use of juridical norms granted to the protection of the indigenous peoples, more specifically the land right stated on the art. 231 of the constitution, represents the ultimate barricade against the offensive of private property towards the indigenous land rights.

[25]LYRA FILHO, Roberto. **Normas jurídicas e outras normas sociais.** *In*: CHAUÍ, Marilena. FAORO, Raimundo. LYRA FILHO, Roberto. Direito e Avesso. Boletim da nova escola jurídica brasileira. Brasília: NAIR, 1982b. p.52.
[26]TUKANO, Álvaro. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p.39.
[27]WERÁ, Kaká. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p.45.

Despite that protection, the law tends to unravel a co-opted function as a promoter of the hegemonic interests, bending its main public purpose[28] to attend to the aspirations and ambitions of the economical hegemonic class. Thus, the territory assumes the position of the main instrument to focus and pressure the territorial dispute[29] among the private property and the indigenous territorialities.

This process of domination incarnates one strict and particular perspective as an alleged consensus[30], and that excludes the possibility of development of multiple other perspectives due to the prevalence of one specific tradition [31] is said to characterize the concept of hegemony.

That aspect is shown in the dynamics founded by the colonial enterprise, invested in the creation of an unequal and hierarchical structure based on domination and assimilation[32], even though the indigenous peoples in Brazil have never had the intention of imposing their worldview on other cultures. On the contrary, the indigenous cultures are traditionally more open to the sharing of ideas, experiences, and practices[33].

To that extent, according to the economical illegitimacy pattern, in the face of the suppression and assimilation of indigenous territorialities by the cultural and economic aspirations of western society, a juridical norm can be considered legitimate when it guarantees priority attention to the interest of its recipients. In other words, illegitimate norms are those that bend into the accomplishment of different interests that collide with the purpose of the creation of the law itself.

Although the indigenous peoples have been granted laws concerning their territories since the early beginning of the colonial era, the establishment and regulation of such juridical norms have not in fact guaranteed their possessions. It represented nothing more than empty words as the protection of their traditional lands were never indeed effectively put into practice.

[28]LYRA FILHO, Roberto.**O direito que se ensina errado.** Sobre a reforma do ensino jurídico. Brasília: UNB, 1980. p.7.
[29]HAESBAERT, Rogério. **Del mito de la desterritorialización a la multiterritorialidad.** Ciudad de México: Siglo XXI, 2011. p.25.
[30]LACLAU, Ernesto. **La impossibilidad de la sociedad.** 2 ed. Buenos Aires: Nueva Visión, 2000.p.122.
[31]MOUFFE, Chantal *et al*. Democracia y conflicto en contextos pluralistas: entrevista con Chantal Mouffe. **História, Ciências, Saúde**, Rio de Janeiro, v. 21, n. 2, jun. 2014. p.752.
[32]QUIJANO, Aníbal. Colonialidad del poder, cultura y conocimiento en América Latina. **Ecuador Debate**, Quito, CAAP, n.44, 1998. p.230.
[33]YAWANAWÁ, Biraci. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p.101.

The 1680 *alvará régio*, recognized the native inhabitants as the truthful and original owners of the lands, long after that, in 1755, the law n.6 ratified their ownership[34]. During the Brazilian empire, the decree n. 426 instituted for the first time the demarcation of indigenous lands [35]. However, this law continuum has not accomplished a considerable level of concretization of the indigenous territorial rights.

The main issues faced by indigenous communities today persist as consequences of the colonial pressures put upon their territories long ago and still on these days[36]. As the hegemonic economic interests transformed their aspirations into laws[37], the indigenous peoples were cast on the edge of the juridical system.

In this context, the collective territories of the indigenous peoples continued to be invaded and exploited, even under the alleged protection of the law. The cultural and economic domination by the hegemonic class benefited from the instrument of law to conceive the subordination and obliteration of others, including the indigenous peoples. The system of law produces subordination on its own, as a matter of normalization and standardization of the individuals subjected to the law.

A false assumption that the rule of law stands independently from economic and political factors[38] causes a misleading perception that, just by the inclusion of some protective and comprehensive rights, the social demands of those cast aside from society, such as the indigenous peoples, would have been easily implemented.

In fact, the insertion of those aspirations in the frame of law represents an effective way for the depoliticization of legitimate claims made by many parts of society. Taking that into consideration, the immense effort put on political deals and regulations for the protection of indigenous territorial rights tends to be diminished in the sense of social concrete materialization[39].

According to Davi Kopenawa, on the matter of indigenous rights, the inscription of a community demand in the written law conducts to the detachment from

[34]BRAZIL. **Lei nº 6**, de 6 de junho de 1755. *In:* SILVA, António Delgado da. Collecção da Legislação Portugueza - desde a última Compilação das Ordenações - Legislação de 1750 a 1762. Lisboa: Maigrense, 1830. p. 369-376.
[35]BRAZIL. **Decreto nº 426**, de 24 de julho de 1845.
[36]UNITED NATIONS. **Los pueblos indígenas y el sistema de Derechos Humanos de las Naciones Unidas.** Folleto informativo n. 9, rev. 2. Oficina del alto comisionado. Nova York e Genebra, 2013. p.4.
[37]SILVA, José Afonso da. **Aplicabilidade das normas constitucionais.** São Paulo: PC, 2008. p.57.
[38]HERRERA FLORES, Joaquín. **A (re)invenção dos direitos humanos.** Florianópolis: Fundação Boiteux, 2009. p.134.
[39]STAVENHAGEN, Rodolfo. Los derechos de los pueblos indígenas: desafíos y problemas. **Revista IIDH**, v.48, 2008. p.267.

the asserted compromise due to “the western mind of oblivion” that separates word from action by the use of the written word[40].

Pondering that the law represents one single perspective of the social demands, attending mainly the hegemonic class economic and political interests, and assuming that the written word exposes an asymmetry between prescription and materialization, the official rights imposed by the State serve as an instrument to benefit anti-indigenous interests.

Due to that, a legitimate juridical norm is one that involutes an authentic right, based on the conformity with the social demands that generates it. In other words, illegitimate norms are those that attend to other interests against the core commandment sustained by them.

Considering all of the aspects presented in this investigation, the political criteria take place as one capable of bringing all the perspectives together, by unveiling the main characteristics assumed by the Brazilian State towards the indigenous peoples. After all, politics represents the potency within institutionalization, as it states the foundation of what is considered legitimate and non-legitimate by the law.

In this context, the absence of political participation of some constitutive groups of society is taken as a clear mark of non-legitimacy[41] as long as the prevalence of interests by the class in power, which represents the sacrifice of some parts of society only to fulfill their economical aspirations[42].

Even though the indigenous peoples in Brazil have accomplished unprecedented participation in the elaboration of the 1988 constitution, especially concerning the articles of indigenous interest, the colonial, cultural, economic, juridical, and political pressures they are exposed to prevent their rights from practical materialization.

As noted in this paper, the social, political, and economical system tends to coopt the indigenous peoples from their truthful claims and demands trapping them inside a non-indigenous political and juridical logic. Due to that, the present investigation questions the official political platform as an unequivocal and exclusive place for the enunciation of rights. Therefore, it is raised the suspicion that the

[40]KOPENAWA, Davi. ALBERT, Bruce. **A queda do céu**: palavras de um xamã yanomami. São Paulo: Companhia das letras, 2015. p.75-76.
[41]DUSSEL, Enrique. **20 teses de política.** Buenos Aires: CLACSO, 2007. p.104.
[42]DUSSEL, Enrique. **20 teses de política.** Buenos Aires: CLACSO, 2007. p.16-17.

legitimacy established by the State is not capable of amplifying the extra-official libertarian impulses. Instead of that, politics and the law tend to deflect the aspirations of the indigenous peoples.

All of these perceptions lead into an exam characterized as a process of legitimacy contestation, shedding light on the State as a generator of institutionalized contradictions, therefore questioning its imposed order, the corrupted aspects of the system[43], and the pattern of legitimacy itself, trapped inside an official logic.

In order to build a "non-formalistic, decolonized and plural juridical culture, founded upon values expressed by society's participation"[44], it is necessary to rethink the basis of another legitimacy, closer to the meaning of *potentia*, as a people's inherent capability of expressing their authority, sovereignty and governability[45].This is an attempt to dodge from the negotiations and bargains with the State, which usually end up as a way of authority subordination, instead of autonomous emancipation.

According to that, the official juridical norms cannot be seen as the only possible basis to the rights, for the potency of an emancipatory right, moved by the vivid collective claims of the indigenous peoples, is something apart and independent from the State recognition.

By taking all of the aspects found in the illegitimacy pattern into consideration, this paper reaches the understanding that the main source of non-legitimacy in the relation among the Brazilian State and the indigenous peoples rely on the institution of a machinery dated from the colonial times, composed by cultural, economic, juridical and political engines that conducts into a process of expropriation and accumulation of lands.

2.The insufficiencies and potentialities of official and extra-official rights concerning the indigenous peoples' lands in Brazil

As instruments for the realization of social interest, the rights play a vital role for the sake of democracy and State of Law well function. Although their content and form mark an intricate field of discussion, plurality, and dispute of colliding interests,

[43]LEVI, Lucio. **Legitimidade.***In:* BOBBIO, Norberto. Dicionário de Política. Brasília: UnB, 1998. p.677.
[44]WOLKMER, Antonio Carlos. **Pluralismo jurídico, movimentos sociais e processos de lutas desde América Latina.** *In:* WOLKMER, Antonio Carlos; LIXA, Ivone Fernandes (orgs).Constitucionalismo, descolonización y pluralismo jurídico en América Latina. Florianópolis: UFSC-NEPE, 2015. p.95.
[45]DUSSEL, Enrique. **20 teses de política.** Buenos Aires: CLACSO, 2007. p.29.

only one version of the struggles they represent is to be endowed as an official piece of legislation.

It is sensible that the inscription in law represents only an attempt for the conformation and settlement of loose aspirations and interests. For that reason, it does not constitute a final decision on solving or putting an end to the clash among different aspirations. As an intricate social and political battleground, where intense disputes take place, the after-match between the opposing categories of official and extra-official rights is still to be put into consideration.

Different versions concur for the post of official right attested by the State, aspiring to define what is properly juridical and what is not[46]. Taking that into account, this paper intends to confront official and extra-official rights on the matter of indigenous peoples' lands. To discern and measure the potentialities and limitations found in law and social pretensions, this investigation manipulates the dialectic tension between these categories of rights.

From official to extra-official, and indigenist to indigenous rights, there is a social, economic, and political tensioning capable of unveiling both the potential and the limits present within the law and the legitimate aspirations concerning indigenous lands. Through a process of synthesis and antithesis, the contraposition between these categories arises as an instrument to separate rights from anti-rights.

The final product of this process could be categorized as true human rights, as they are generated through a process of liberation and enlargement of justice[47]. Therefore, this methodological approach is intended to access a territorial right enriched by the legitimate aspirations of the indigenous peoples.

In order to analyze the limitations and potentials in the rights, the material and immaterial aspects of the indigenous peoples' land and territorial rights ought to be carefully examined. At first, concepts such as indigenous land, indigenous territory, land right and territorial right will be distinguished as they seem to be crucial for the confrontation between rights.

[46]LYRA FILHO, Roberto. **O direito que se ensina errado.** Sobre a reforma do ensino jurídico. Brasília: UNB, 1980. p.7.
[47]LYRA FILHO, Roberto. **Pesquisa em que direito?** Brasília: NAIR, 1984. LYRA FILHO, Roberto. **Criminologia Dialética.** Rio de Janeiro: Borsoi, 1972.

DOI 10.5335/rjd.v36i1.13327

In Brazil, the concept of indigenous land reflects a political institute created by the State[48] for the end of regulation and implementation of the constitutional commandment inscribed in art. 321. Therefore, this terminology refers to the official land right regarding the indigenous peoples in Brazilian law.

On the other hand, the territory is the term used by the indigenous peoples in reference to the collective space they share as a people[49], and it is related to a more symbolic meaning as the space where they socially and culturally interact[50]. For that matter, the territorial right refers to a broader concept of right, an extra-official right, generated and developed by the indigenous peoples, according to their own social and cultural aspirations.

On that ground, land right is a formal and official juridical category established and limited by the State, therefore inscribed in the constitution. It represents the political and juridical basis for the demarcation of indigenous reservations in Brazil. As a governmental policy, oriented by the rule of law, it is remarkably an indigenist right.

In contrast, territorial right represents a larger category, as an informal, extra-official right derived from the legitimate territorial aspirations by the indigenous peoples. As a social claim defined only by those who demand it, the territorial right is clearly an indigenous right and not an indigenist policy.

Taking that distinction into account, both the official indigenist land right and the extra-official indigenous territorial right possess interesting aspects that can potentially complement each other. That could only happen if properly separated from the inherent limitations in the juridical system, and if taken apart from the obstacles or deceptions mischievously put in the law or in policies, the so-called anti-rights.

As stated by article 231, the constitutional land right contributes with its four main aspects: originality, tradition, collectiveness, and essentiality.

[48]GALLOIS, Dominique Tilkin. **Terras ocupadas? Territórios? Territorialidades?** *In:* RICARDO, Fany (org.). Terras Indígenas e Unidades de Conservação da natureza: o desafio das sobreposições. São Paulo: Instituto Socioambiental, 2004. p.39.

[49]SOUZA FILHO, Carlos Frederico Marés de. **Multiculturalismo e direitos coletivos.** *In:* SANTOS, Boaventura de Souza (org.) Reconhecer para libertar. Rio de Janeiro: Civilização Brasileira, 2003. p.102.

[50]LLANOS-HERNÁNDEZ, Luis. El concepto del territorio y la investigación en las Ciencias Sociales. **Agricultura, Sociedad y Desarrollo**, Chapingo, v.7, n.3, 2010. p.208.

As an inherent right to the indigenous peoples, constituted by the anthropological relation kept by them and the land they inhabit[51] the land right is considered an original right. The main consequence of this characteristic is that this right does not depend on the State to determine its existence. Apart from any federal recognition, the indigenous peoples' land right is stated to be above any public title belonging to non-indigenous people.

It is also a traditional right, for grating that the extent of the indigenous land is determined by the cultural territorial bond, and not by a temporal aspect of permanence and endurance in the habitation[52]. In that same sense, the land right is essentially determined by its collectiveness. As a shared space that cannot be individually disposed or divided[53], the indigenous lands are constituted by the indigenous social, political, and cosmovision practices[54].

The land right also functions as a bond, unifying all other indigenous claims. Due to that, this right is considered to be essential, in the sense that its effectiveness generates a waterfall effect in the efficiency and the application of other indigenous rights.

It is also an essential condition for the indigenous peoples' survival[55] as the land is pivotal to assure the peoples' cultural ways of living[56].

According to those characteristics, the official land right contributes to a broader sense of indigenous territorial right as it enriches the social demand for territory with its sensible official aspects.

In a different way, the territorial right represents a social claim and a matter of political dispute lead by the indigenous leaders. For the purposes of this investigation, six aspects were identified as central for the exchange process based

[51]FREITAS JÚNIOR, Luís de. **A posse das terras tradicionalmente ocupadas pelos índios como um instituto diverso da posse civil e sua qualificação como um direito constitucional fundamental.** Dissertação (Mestrado em Direito) - Programa de Pós- Graduação em Direito, Universidade de Fortaleza. Fortaleza, p.82.
[52]SILVA, José Afonso da. **Curso de direito constitucional positivo**. 41 ed. São Paulo: Malheiros, 2018. p.875.
[53]NEVES, Lino João de Oliveira. **Volta ao começo: demarcação emancipatória de Terras Indígenas no Brasil.** Tese (Doutorado em Economia) - Faculdade de Economia da Universidade de Coimbra. Coimbra, p. 839. 2012. p.525.
[54]GONZÁLEZ, Ana. *et al*. **Derechos de los pueblos originarios y de la Madre Tierra**: una deuda histórica. Buenos Aires: CLACSO, 2019. p.85.
[55]RIBEIRO, Darcy. **Os índios e a civilização:** a integração das populações indígenas no Brasil moderno. 7. Ed. São Paulo: Global, 2017. p.173.
[56]GUAJAJARA, Sônia. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p.83.

on the law dialectics proposed in this paper. They are sacredness, ancestral belonging, identity, nature habitat, collective dwelling, and subsistence.

A great number of indigenous peoples maintain a sacred bond with their ancestral territories. The spiritual content of their lands[57]constitutes, as long as the geographic formations, the peoples' identity and corporeality[58].

In this sense, the ancestral territory represents the place where generations pass, culture prospers and occurs, and where the forebearers leave their mark[59].Due to that, the territorial deprivation of the indigenous peoples leads to the loss of their history[60], as the place of tradition, culture, and customs are lost.

It is also part of who they are as a collectivity. The territory is the place where every aspect is granted a meaning[61]and for that is the ultimate guardian of one people's identity[62].

As the indigenous peoples dwell within nature, their ways of living are structured from equal relations among plants, human beings, and other animals[63], and therefore, their territories represent a real habitat, preserved by the peoples' own traditional knowledge and practices.

Another crucial characteristic is that the territory generates the aspect of collective dwelling, as the group shares its common home within the inhabitants. This is an essential part of indigenous peoples' way of living[64]. The territorial space also represents the main source of subsistence for the peoples, as it holds areas for

[57]POPYGUÁ, Timóteo Verá. **Em vez de desenvolvimento, envolvimento.** *In*: Instituto Socioambiental - ISA. Povos indígenas no Brasil 2001/2005. São Paulo: Instituto Socioambiental, 2006. p.32.
[58] MAKUNA, Maximiliano Garcia. **Os lugares sagrados são uma parte nossa.** *In*: Instituto Socioambiental - ISA. Povos indígenas no Brasil 2006/2010. São Paulo: Instituto Socioambiental, 2011. p. 25.
[59]METUKTIRE, Raoni. GUAJAJARA, Sonia. XAKRIABÁ, Célia. *et al.* **Manifesto do Piaraçu.** Das lideranças indígenas e caciques do Brasil na Piaraçu. Terra Indígena Capoto Jarina – MT, aldeia Piaraçu, 17 jan. 2020. p.1.
[60]BANIWA, André. **É preciso fortalecer e avaliar a tradição.** *In*: Instituto Socioambiental - ISA. Povos indígenas no Brasil 2001/2005. São Paulo: Instituto Socioambiental, 2006a. p.24.
[61]KRENAK, Ailton. **Entrevista no Vale do Rio doce.***In:* COHN, Sergio. KADIWÉU, Idjahure. (orgs.) Tembetá – conversas com pensadores indígenas, v.1. Rio de janeiro: Azougue, 2019. p.14.
[62] SEGATO, Rita Laura. En busca de un léxico para teorizar la experiencia territorial contemporánea.**Politika** - Revista de Ciencias Sociales, n. 2. p. 129-148, 2006. p.131.
[63]XAVANTE, Wautomoaba. **Muito antigamente, a gente andava muito no cerrado... como se a gente dividisse o espaço com os bichos.** *In*: Instituto Socioambiental - ISA. Povos indígenas no Brasil 2006/2010. São Paulo: Instituto Socioambiental, 2011. p.39.
[64]KAINGÁNG, Azelene. **Histórico da Declaração**. *In:* FRANCO, Fernanda. (org.) Um olhar indígena sobre a Declaração das Nações Unidas. Gráfica JB, 2008. p.17.

cultivation, besides the forest and rivers where they collect fruits and do hunting and fishing[65], and plant their traditional medicines[66].

Taking those aspects into account, the indigenous extra-official right to their territories brings forth a number of characteristics that are fundamental to the enrichment of the official land right. Overcoming the legal and juridical limitations, through the potential of social claims, may provide stamina in the process of territorial assurance for the indigenous peoples in Brazil.

Throughout the demarcation procedures progression, nearly 14% of Brazilian territory was effectively guarded and protected as indigenous lands. Although it represented an expressive accomplishment, in recent years the complete paralysis of the demarcation procedures and the escalation of violence towards indigenous lands reveal a whole different picture.

The limits stated by the law are inherent to the ways coercion functions within the juridical system. However, some limitations can be perceived as results of different and even more complex social, economic, and political dynamics. Through the examination of the constitutional land right and the legal process of indigenous lands demarcation, some important barriers stand out as they inhibit the materialization of the indigenous territorial guarantee, leading the demarcation procedure to malfunction.

In 1996, the presidential decree n. 1755 added a new possibility for non-indigenous landowners, or at least presumed ones, to manifest the alleged presence of flaws or vices within the indigenous land demarcation process[67]. This was responsible for expanding the moment for questioning the demarcation procedure, leading to a larger sense of uncertainty. Much more than a defense mechanism, this decree represented the beginning of a tendency that ultimately would lead to the demarcation process complete stagnation.

According to one view, the presidential decree n. 1755 increased the legal certainty of the procedure as it guaranteed the right to a prior hearing and defense for

[65]XAVANTE, Wautomoaba. **Muito antigamente, a gente andava muito no cerrado... como se a gente dividisse o espaço com os bichos.** *In*: Instituto Socioambiental - ISA. Povos indígenas no Brasil 2006/2010. São Paulo: Instituto Socioambiental, 2011. p. 37-38.
[66]KAIABI, Mairawê. **Cuidar da saúde não é só tomar Remédio. É também cuidar da terra.** *In*: Instituto Socioambiental - ISA. Povos indígenas no Brasil 2001/2005. São Paulo: Instituto Socioambiental, 2006. p. 27.
[67]BRAZIL. **Decreto nº 1.775**, de 8 de janeiro de 1996.

the non-indigenous claimers. Despite that, the landowners' right to be compensated for the land loss was already recognized by the law, and in fact, the decree forged an obstacle for the constitutional commandment to be assured.

In 2010, the Supreme Court has formulated an unprecedented interpretative parameter, the so-called temporal landmark. In the case n. 3388/RR, ruling about the *Raposa Serra do Sol* indigenous land demarcation, the highest Court in the Brazilian Judiciary has decided that only the indigenous lands inhabited prior to October the 5th, 1988 were to be considered for the demarcation procedure[68].

After that, the constitutional land right was potentially limited in its applicability[69] as the violence against indigenous peoples and their lands seem to be legitimized and legalized[70]. In this sense, the Brazilian indigenous peoples completely reject the juridical thesis regarding the temporal landmark[71].

In 2017, the Advocacy-general of the Union emitted a legal opinion concerning the demarcation of indigenous lands. This public institution issued that the *Raposa Serra do Sol* decision served as a precedent for all future juridical decisions. Therefore, it had to be considered as a binding juridical parameter[72], which is utterly incoherent and contradictory to the juridical nature of an opinion instrument[73]. According to recent decisions, the Supreme Court has indefinitely suspended the effects of this legal opinion.

As the rest of those limitations are still validated by both the Brazilian Judiciary and Executive, they represent a wall put between the constitutional land right of the indigenous peoples and its legitimate territorial assurance and protection. In this sense, this investigation leads to the analysis of the indigenous lands homologation decrees from 1981 until 2020.

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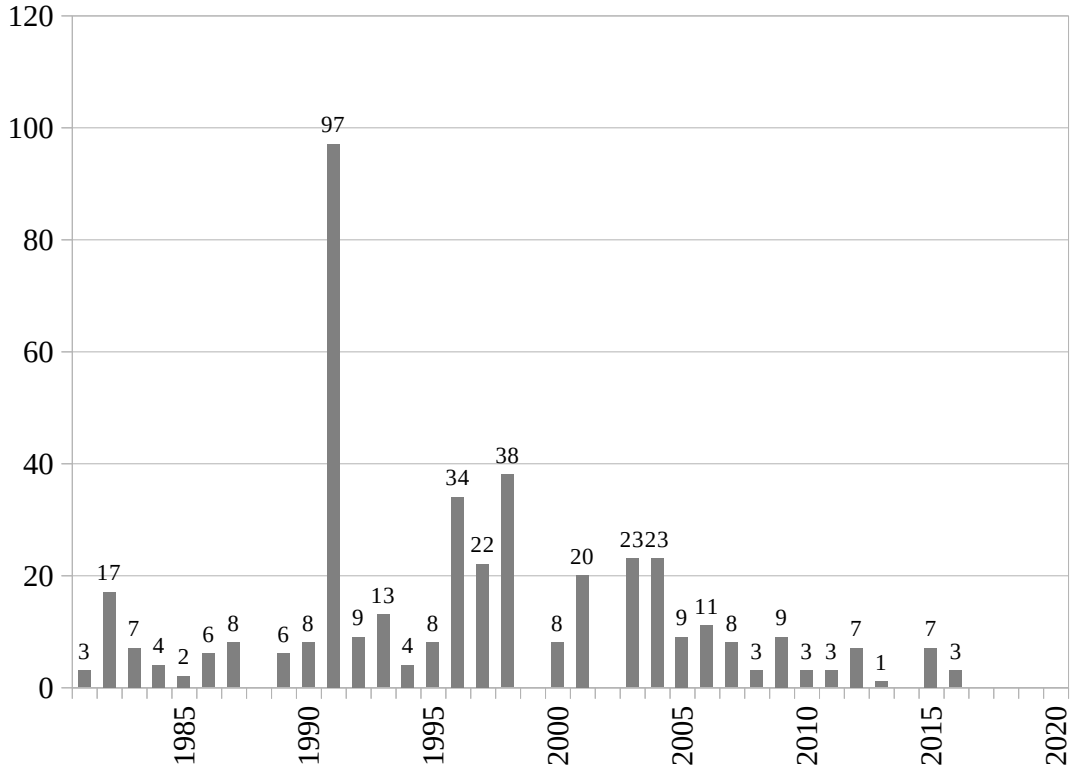
[68]BRAZIL. Supremo Tribunal Federal. **Ação popular n. 3.388/RR.** Relator: Min. Carlos Ayres Britto. Brasília, 01 de julho de 2010.
[69]BATISTA, Juliana de Paula. GUETTA, Maurício. **O "marco temporal" e a reinvenção das formas de violação dos direitos indígenas.** *In:* Instituto Socioambiental - ISA. Povos indígenas no Brasil 2011/2016. São Paulo: Instituto Socioambiental, 2017. p. 69.
[70]APIB. Articulação dos povos indígenas do Brasil. **Nossa história não começa em 1988! Marco Temporal não!** APIB, 3 ago. 2017.
[71]METUKTIRE, Raoni. GUAJAJARA, Sonia. XAKRIABÁ, Célia. *et al.* **Manifesto do Piaraçu.** Das lideranças indígenas e caciques do Brasil na Piaraçu. Terra Indígena Capoto Jarina – MT, aldeia Piaraçu, 17 jan. 2020.
[72]BRAZIL. Advocacia-Geral da União. **Parecer n. 001/2017**, de 19 de julho de 2017. Diário Oficial da União, n. 138, 20 de julho de 2017. p.8.
[73]MEIRELLES, Hely Lopes. **Direito Administrativo Brasileiro.** 42. ed. São Paulo: Malheiros, 2016. p.189.

DOI 10.5335/rjd.v36i1.13327

Chart 1: Indigenous lands homologated by year



Source: Elaborated by Gonçalves[74], based on the data from the ISA[75].

[74]GONÇALVES, Douglas Oliveira Diniz. **Insuficiências do direito à terra dos povos indígenas no Brasil.** 2020. 143 f. Dissertação (Mestrado em direitos humanos) Programa de Pós-Graduação em Direitos Humanos da Universidade Tiradentes, Aracaju, 2020.

[75]ISA, Instituto Socioambiental. **Terras indígenas no Brasil.** São Paulo: Instituto Socioambiental, 2020. Disponível em: <https://terrasindigenas.org.br/pt-br/brasil>. Acesso em: 13 abr. 2020.

DOI 10.5335/rjd.v36i1.13327

At first, it can be clearly observed that the climax of indigenous land homologation has been reached starting from 1988, thus reflecting the promulgation of the Brazilian constitution. Assuming a time-lapse of about two or three years between the implementation of the obstacles and their effects on the demarcation process, it is perceived that the homologation declines in 1998 and 1999 can be indicative of the presidential decree n. 1755.

A second downfall can also be noticed between 2012 and 2013, as a possible consequence of the temporal landmark juridical thesis in 2010, leading to the status of zero demarcations after the 2017 legal opinion from the Advocacy-general of the Union.

According to this brief analysis, those limitations have had a significant impact on the course of the demarcation process. This phenomenon reveals the negative potential of those obstacles concerning the materialization of the constitutional land right of the indigenous peoples via land demarcation procedure.

In addition to that, the troubling ways the judicial system operates for the defense of the indigenous peoples' rights have yet to be examined in this investigation. Assuming that the juridical mechanisms for the protection of indigenous peoples' rights are original instruments by and for the State[76] and due to that they represent a non-indigenous tradition and culture, it is essential to question the insufficiencies within the official judicial system.

For many different reasons, the juridical protection proves to be insufficient for the effective protection of the indigenous lands and rights. The justice system happens to diminish the expression of indigenous rights, as it is: remarkably bureaucratic; based on a non-indigenous right and process of justice; and focused upon the reparation of damage already done. For all of that, despite the recent paralysis of the demarcation, those procedures are still more beneficial than the judicial trials for defending and protecting indigenous peoples' land rights.

Examining the insufficiencies and potentialities in between the official land right and the extra-official territorial rights of the indigenous peoples in Brazil, the

[76]KAINGÁNG, Azelene. **Histórico da Declaração**. *In:* FRANCO, Fernanda. (org.) Um olhar indígena sobre a Declaração das Nações Unidas. Gráfica JB, 2008. p. 16.

DOI 10.5335/rjd.v36i1.13327

legitimate rights and its counterpart – the anti-rights, or deceived rights – were clearly separated and distinguished.

To that extent, through the investigation of the right's dynamics among the Brazilian State and the indigenous peoples, a dialectical synthesis of the land right and the territorial rights was accomplished. This parameter will be later used for the analysis of alternatives to the materialization of indigenous peoples' territorial claims in the following part.

3. Some alternatives to the insufficiencies within the indigenous peoples' land right

Despite its designed function, or maybe according to an unexposed and more obscure function, the official juridical apparatus has a considerablecapability to silence and pasteurize the peoples' legitimate vindications. In this process, the transformation of social claims into rights turns them into insipient expressions of what they once were.

Therefore, in order to rethink alternatives to the insufficiencies found within the indigenous peoples' official land right, this investigation focuses on two different options, taking two different perspectives. The first proposed alternative relies on the State's political power and on the belief that the system of law can still serve its righteous purpose. The second alternative attempts to question the monopoly of State power, relying on the indigenous peoples' wit to materialize their territorial claims.

In the following examination, the parameters developed through this investigation will serve as criteria to evaluate the potential and the limitations of the proposed alternatives. In this sense, both the illegitimacy pattern assembled in part one and the dialectical synthesis developed in part two will be put to use.

Taking the assumption that the Brazilian State is yet to be considered - if it ever was - a Democratic State of Law, the first proposition relies upon the juridical

institutions' capability to represent a platform for the materialization of social claims as rights.

The uprising of a shared social problem is considered to be the germen of a process known as the confluence of social struggles. As experienced in Ecuadorian society, the simultaneous confluence of at least two social claims from different social groups can lead to a process of political transformation[77].

Assuming that the land access in Brazil is a broader problem shared by indigenous peoples and other groups, such as the *quilombola* communities and the landless field workers, it has the capacity to conform a shared claim for land planning. For that, the peculiarities of each claim must be observed and preserved, avoiding the homogenization of different and maybe conflicting aspects.

Another cause linked to the indigenous peoples' territorial claims is the matter of environmental protection, for the indigenous peoples' territorial rights materialization impacts on nature preservation[78], along with the protection of indigenous peoples' traditional knowledge[79] that can be applied on environmental practices.

From the illegitimacy parameter assembled in part one, the confluence of social struggles represents a viable way to the disruption the colonial, cultural, economic, juridical, and political patterns.

As a strategy of social mobilization, this alternative can bring rupture into the process of expropriation and accumulation of lands established since colonial times and continued henceforth. The territorial vindications inserted within the confluence of struggles process are in fact a series of insurgent practices capable of dismantling the precarious contexts they fight against.

The confluence of social struggles has also the potential to bring balance, harmony, and complementarity among the constitutional norms, therefore dispelling the cultural and economic inequalities that affect the materialization of indigenous peoples' land right. As the junction of different and plural claims constitutes the essence of this process, the confluence of struggles represents a feasible alternative to effectively attend to the interests of the territorial rights detainers.

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[77] GALLEGOS, Franklin Ramírez. STOESSEL, Soledad. Campos de conflictividad política y movimientos sociales en el Ecuador de la Revolución Ciudadana. **Plural**, Revista do Programa de Pós Graduação em Sociologia da USP**.** São Paulo, v.22.1, 2015. p.11-12.
[78]WERÁ, Kaká. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p.30.
[79]GUAJAJARA, Sônia. **Tembetá.** Revista de Cultura. Rio de Janeiro: Beco do azougue, 2019. p.85.

DOI 10.5335/rjd.v36i1.13327

A sensible point in this alternative is that it requires or at least it assumes that the system of law and rights can be recovered in its vigor. It is also necessary to question the State's monopoly over the political and juridical contexts.

For all of that, according to the synthesis between official and extra-official rights, the confluence of social struggles represents an alternative that must rely upon the potential within the constitutional land right inscribed in article 231. Due to that, in order to be functional and to be enriched by the social claims, this alternative has to overcome the juridical obstacles within the institutional process of land demarcation, demanding the reformation of those procedures.

Taking an opposite approach towards the materialization of indigenous peoples' territorial rights, the so-called process of self-demarcation among Brazilian indigenous communities represents an extra-official way for attempting the materialization of the peoples' territorial claims.

In the long wait for their land rights to be effectively materialized by the Brazilian State[80], along with a pertinent suspicion that the government lacks interest in the defense of indigenous lands[81], the indigenous peoples usurp from the State the prerogative to process the demarcation of their own territories.

The series of actions led by the indigenous peoples for the promotion of geographical and material demarcation of their own territories are known as the process of self-demarcation[82]. This terminology translates on both the autonomy and the capability of materialization of indigenous territories.

As effects of this process, the non-indigenous inhabitants of indigenous lands surroundings start to understand and respect the indigenous territorial claims, as the native peoples portray their vindications and entitlement to their land by the actions of self-demarcation. It also affects their perception of themselves, as those processes enhance the sense of territorial enclosure and capability for materializing their own claims without the presence of the State.

[80]GALLOIS, Dominique Tilkin. **Terra Indígena Wajãpi:** da demarcação às experiências de gestão territorial. São Paulo: Iepé, 2011. p.34.
[81]MUNDURUKU, Povo. **I Carta da autodemarcação do território Daje Kapap Eypi.** Aldeia Sawré Muybu – Itaituba/PA, 17 de novembro de 2014.
[82]NEVES, Lino João de Oliveira. **Volta ao começo: demarcação emancipatória de Terras Indígenas no Brasil.** Tese (Doutorado em Economia) - Faculdade de Economia da Universidade de Coimbra. Coimbra, p. 839. 2012. p.542.

DOI 10.5335/rjd.v36i1.13327

Taking the illegitimacy parameter assembled in part one into consideration, the processes of self-demarcation also represent a feasible way to the disruption the colonial, cultural, economic, juridical, and political patterns.

As it is intrinsically contrary to the domination of colonial violence patterns, this alternative is not only untangled from the limitations and contradictions within the system of law, but also provides a space for the plurality of indigenous territorial claims. In this sense, the self-demarcation processes counterbalance the disharmony produced by the economic and political hegemonic dominance.

Due to the questioning of the established legal order, the self-demarcation can dodge the obstacles found in the official norms and instruments, previously referred to as anti-rights. In addition to that, as it is remarkably an extra-official solution to the land right insufficiencies, the processes of self-demarcation are apart from the legal system's inability to solve indigenous controversies.

Therefore, the autonomic and independent aspect of the self-demarcation represents a feasible alternative to the lack of effective measures to protect the indigenous peoples' territories in Brazil.

DOI 10.5335/rjd.v36i1.13327

Conclusion

Due to the lack of effectiveness and materialization perceived among the territorial rights of the indigenous peoples in Brazil, the constitutional land right and the official procedure of indigenous land demarcation unravel both their insufficiencies and potentials. Assuming that hypothesis, this investigation was guided towards the development of a diagnostic description concerning the territories of the indigenous peoples in Brazil.

According to that, a pattern of illegitimacies and insufficiencies was built to expand and rethink the juridical relation among the Brazilian State and the many indigenous peoples. The main goal was to elaborate a diagnostic capable of not only pointing out the limitations and obstacles within the system of law and justice but also unraveling the potential from this dynamic.

Based on the legitimacy pattern developed through the investigation, it was assembled that, to be considered legitimate, a juridical norm must attend at least the following criteria: (1) to disrupt the colonial dynamics; (2) to express the plurality of claims; (3) to shelter the indigenous peoples' interests; (4) to express the content of indigenous claims; and (5) to not subdue or silence the vigor from the collective aspirations.

By comparing the official land right to the extra-official territorial rights, some characteristics from the extra-official rights were revealed to be fundamental to the

enrichment of the official land right, such as sacredness, ancestral belonging, identity, nature habitat, collective dwelling, and subsistence.

In contrast with that, some obstacles within the system of justice were found to be reasonable factors of malfunction and stagnation, such as the presidential decree n. 1755, the temporal landmark, and the Advocacy-general legal opinion. Those obstacles were therefore categorized as anti-rights, for they mislead and deceive the real roles of the land right and the indigenous lands procedures.

Taking that into account, the two alternatives tested for the enhancement of the land right and the demarcation procedures were proved to be plausible. The confluence of social struggles represents a mobilization to pressure the State structure to function in favor of indigenous peoples' aspirations. On the contrary, the auto demarcation represents an extra-official way for attempting the materialization of the peoples' territorial claims.

As noted in this paper, through a historic perspective and a dialectical approach, the illegitimacies, limitations, and potentialities within the land right could be traced and cataloged. Thus, the various aspects in which they interact were insightful to comprehend, question, and rethink the juridical reality concerning the territorial issues faced by the indigenous peoples in Brazil.

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