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**THE RIGHTS OF INDIGENOUS PEOPLES IN BRAZILIAN AMAZON  
DURING COVID-19 PANDEMIC: NATIONAL AND INTERNACIONAL  
LEGAL MEASURES**

***DIREITOS DE POVOS INDÍGENAS NA AMAZÔNIA BRASILEIRA  
DURANTE A PANDEMIA DE COVID-19: MEDIDAS JURÍDICAS  
NACIONAIS E INTERNACIONAIS***

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**ABSTRACT**

**Objectives:** Taking in consideration the impact of the Covid-19 pandemic on Brazilian law, the aim of this article is to analyze the legal measures adopted by the Brazilian State in order to safeguard indigenous peoples in Brazilian Amazon, focusing on the effective responses to indigenous demands, both internally and internationally, during 2020.



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**Methodology:** The research, carried out within the scope of international academic cooperation, is methodologically grounded in the study of law as a constitutional policy, in dialogue with the sociological analysis of Law, which considers the interactions between constitutional and international level, using the hypothetical-deductive method. The hypothesis states that: 1) in the internal sphere, there are problems of applicability and effectiveness of the new legal measures, triggering the judicialization of indigenous rights; and problems of legitimacy, related to the adequacy of these legal measures to indigenous way of life and their participation in its drafting and application; and, 2) at the international level, the multidimensional crises in line with the pandemic crisis reduced the possibility of improving international cooperation among Amazonian countries, including through existing international organizations, fostering a form of transnational cooperation by non-governmental actors.

**Results:** As a result, the hypothesis remain confirmed, and it points also to another problem, concerning the “time-lapse” of the enacted measures.

**Contribution:** The main contribution consists in highlighting the inadequacy dynamics of the legal measures adopted by Brazilian State aimed at safeguarding indigenous peoples in facing Covid-19 pandemic, both nationally and internationally.

**Keywords:** Rights of Indigenous Peoples; Brazilian Amazon; Covid-19; Legal measures; International; International cooperation.

## RESUMO

**Objetivo:** Focalizando o impacto da pandemia de Covid-19 no direito brasileiro, o objetivo deste trabalho é analisar as medidas jurídicas adotadas pelo Estado para salvar os povos indígenas na Amazônia brasileira, focalizando as efetivas respostas às especificidades das demandas, tanto na esfera interna quanto internacional, no ano de 2020.

**Metodologia:** A pesquisa, resultado de cooperação científica internacional, parte do estudo do Direito como política constitucional, em diálogo com a análise sociológica do Direito, considerando as interações entre o plano jurídico-constitucional e a normatividade em níveis múltiplos no plano internacional, utiliza o método hipotético-dedutivo. A hipótese do trabalho segue no sentido de afirmar que: 1) na esfera interna existem problemas de aplicabilidade e efetividade das novas normas, que impulsionam a judicialização dos direitos indígenas; e problemas de legitimidade, relacionados à adequação destas medidas ao modo de vida indígena e à participação destes na sua elaboração e aplicação; e, 2) na esfera internacional, as multifacetadas crises associadas à crise pandêmica reduziram a cooperação entre os Estados amazônicos, inclusive nas organizações internacionais pré-existentes, o



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que impulsionou uma forma de cooperação transnacional de atores não-governamentais.

**Resultados:** Como resultado, tem-se a confirmação das hipóteses de pesquisa, apontando-se também para um outro problema, concernente à “tempestividade” das medidas adotadas.

**Contribuição:** A principal contribuição do trabalho está em evidenciar as dinâmicas de inadequação das medidas jurídicas adotadas pelo Estado brasileiro, nacional e internacionalmente, para salvaguardar os povos indígenas durante a pandemia da Covid-19.

**Palavras-chave:** Direitos de povos indígenas; Amazônia brasileira; Covid-19; Medidas jurídicas; Cooperação internacional.

## 1 INTRODUCTION

The Covid-19 pandemic has considerably impacted social, political and legal relations throughout the world. Since the first outbreak in China several political and legal measures have been taken, both by States and International Organizations, in order to curb contagion and contain the damage caused by the pandemic. Restrictive measures, ranging from the imposition of rigid lockdowns to millions of people – and during a considerable period of time –, to the limitation of travels and activities in public spaces, were adopted by several governments. And also, measures aimed at the promotion and protection of public health, investments in research for vaccination, public subsidies, also aimed at guaranteeing the subsistence of peoples and communities, tax exemptions, debt suspension, strategic planning and incentives for economy resumption and containment of hunger.

Indeed, this is a major public health crisis, with its real effects not yet fully accounted for, given that the seriousness of the situation was compounded by the unpreparedness of governments to provide effective responses to a scenario hitherto “unusual”. And which continues to worsen in view of the fact that mass vaccination is still slow, with rare exceptions. Indeed, the management of this crisis by different



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States has produced what can be called the “*politics of pandemic*”, or even the “*law of the pandemic*”, being both a result of the several measures adopted to face it.

It can be said that the health crisis had a direct or indirect impact on all societies around the world. However, it is noted that certain communities, due to social, cultural or biological conditions, are more acutely impacted. In this respect, Amazon indigenous peoples can be categorized in this condition, having registered, throughout 2020, high rates of contagion and lethality due to Covid-19. Indigenous peoples of different ethnicities and cultures inhabit Brazilian Amazon, and were directly affected by the pandemic. Indigenous peoples are recognized as subjects of rights by Brazilian constitution, and have specific demands that need adequate response by public authorities, what therefore represent a further element of complexity in this scenario.

The advent of the pandemic give prominence to a political actor that was relatively losing protagonism in recent times: the State. It surely is a key political actor in this context, especially given to the need to articulate effective legal and political responses to face the pandemic, both domestically and internationally – especially within the scope of international and regional systems for the protection of human rights and international cooperation.

Taking it in consideration, the aim of this article is to analyze the legal measures adopted by the Brazilian State in order to safeguard indigenous peoples in Brazilian Amazon, focusing on the effective responses to indigenous demands, both internally and internationally, during 2020. The research, using the hypothetical-deductive method, is methodologically grounded in the study of law as a constitutional policy<sup>1</sup>, in a fruitful dialogue with the sociological analysis of law, which appreciates the internal and external elements of the legal system, also considering the interactions between constitutional system and international law, by conceiving legal normativity at multiple levels – internationally and regionally – for the solution of problems that go beyond national borders.

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<sup>1</sup> Regarding the analysis of law as a constitutional policy: MELO; CARDUCCI, 2016.



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The hypothesis of the article states that: 1) in internal level there are a) *problems of applicability and effectivity* of the new legal norms, which triggered the judicialization of indigenous peoples' rights; and, b) *problems of legitimacy*, related to the level of adequacy of these new legal measures to the indigenous way of life, to intercultural dialogue and indigenous participation in drafting policies aimed at responding to the specificity of their demands; and, 2) in the international sphere, the multidimensional crises, that are in line with the pandemic crisis, reduced the possibility of improving international cooperation in legal field among Amazonian countries, including through the already existing international organizations, which encouraged and deepened a form of transnational non-governmental cooperation. The article is the result of researches carried out within the scope of scientific cooperation between Brazilian and Italian Universities and research centers, and has four topics: 2 Rights of Indigenous Peoples and Covid-19 in Brazil; 3 Legal measures related to the Covid-19 Pandemic crisis; 4 Elements of international public law governance and international cooperation; 5 Between texts and contexts: rights of indigenous peoples in the Brazilian Amazon.

## 2 RIGHTS OF INDIGENOUS PEOPLES AND COVID-19 IN BRAZIL

The coronavirus pandemic has considerably impacted social, political and legal relations across the world, being it a multidimensional social phenomenon<sup>2</sup>. In Brazil, one of its most affected regions was the Amazon – officially called as “*Amazônia Legal*”. The rainforest corresponds to 5,034,740 km<sup>2</sup>, equivalent to 59.1% of the national territory, where about 170 ethnic groups live in 422 recognized Indigenous lands. Indigenous lands are equivalent to 23% of the total Brazilian

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<sup>2</sup> The Covid-19 pandemic can be considered as a “total social fact”: “The COVID-19 pandemic, both on the global scale and in each of the countries and regions where the novel coronavirus circulates, is one of these processes that can be interpreted as a ‘total social fact or phenomenon’. The pandemic is manifested in a wide range of dimensions (economy, religion, legislation, morals, aesthetics, science), interwoven in highly complex ways. Still, specific social segments display their own characteristics, as in the case of indigenous peoples in Brazil, a segment of the population that has been heavily affected by the pandemic” (SANTOS; PONTES; COIMBRA JR., 2020, p. 1).



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Amazon territory and 98.2% of the extent of all indigenous lands throughout the national territory. These peoples have an active and essential role in conserving of the forest *in situ* and in improving agrobiodiversity in the Amazon<sup>3</sup>, through the use of their respective traditional knowledge on land cultivation and conservation practices. In this regard, those Peoples are *agents of socio-environmental sustainability*, not only of the Amazon rainforest, but of the entire planet – considering the systemic integrations of life in an ecological perspective.

The Amazon rainforest and its Indigenous Peoples have been particularly hit by the recent Covid-19 pandemic. The health emergency has, directly or indirectly, impacted indigenous lands' management and the effective guarantee of the right to land. As pointed out in the recent Report of the UN Special Rapporteur on the Rights of Indigenous Peoples, indigenous peoples “face higher risks of dying of the disease, of experiencing discrimination and a disproportionate impact as a result of confinement measures, and of being left without support to defend their peoples from intensifying rights violations even as the pandemic rages” (TZAY, 2020, p. 5). View in this way, at least three factors directly contributed to the contagion growth in indigenous territories, which demonstrate State's omission in guarantying the rights of Indigenous Peoples: 1) the precarious indigenous health system in the region, that have problems in terms of testing individuals and controlling the pandemic; 2) the lack of State protocols for delivering food and essential goods to indigenous populations; and, 3) the continuous and permanent invasion of indigenous lands by companies and individuals to carry on with mining exploitation.

The fact that Brazil has not documented official data on the number of infected indigenous peoples is a major problem for formulating an adequate public policy. Indeed, at the end of the year, on December 31th, 2020, according to official data from John Hopkins University, Brazil had recorded 7,675,973 confirmed cases

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<sup>3</sup> Manuela Carneiro da Cunha and Mauro Almeida highlight that: “The agricultural systems of indigenous peoples are central to agrobiodiversity. They provide a largely under-recognised contribution to on-farm conservation of germplasm diversity, a free service economists call ‘a positive externality’. Their emphasis on great numbers of varieties of cultivated plants conserves and actually enriches germplasm collections otherwise available, whether they are stored in ex situ germplasm banks or cultivated in situ on official farm plots” (CARNEIRO DA CUNHA, ALMEIDA, 2000, p. 317). See also: CARNEIRO DA CUNHA, 2009.



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of covid-19, ranking third in the overall ranking of affected countries – behind United States and India – and a total of 194,976 deaths – ranking second in the world, just behind United States – representing 3.0% of lethality rate<sup>4</sup>.

However, there is no official governmental data regarding the number of Indigenous individuals and groups infected by Covid-19<sup>5</sup>. The data, therefore, are recorded by the communities themselves and compiled by Non-Governmental Organizations. In Brazil, the *Instituto Socioambiental* recorded, on December 31th, 900 deaths, with more than 40,000 confirmed cases, and more than 150 indigenous tribes affected<sup>6</sup>. In a report published in September 2020 by the “*Plataforma Indígena Regional contra a COVID-19*”, it is stated that “In a group of 13 countries, Brazil, Peru and Guatemala have the highest number of cases of contagion in Indigenous populations, representing 72.5% of all cases in Latin America”<sup>7</sup> (KAIN, MARTINEZ, 2020, p. 63-64).

Through data analysis, it is found that due to several circumstances and political decisions, Amazonian Indigenous Peoples are in a context of epidemiological and social vulnerability to Covid-19 (CEPAL, 2020). As a matter of fact, it evidences a contrast with the rights of Indigenous Peoples officially recognized by the Constitution and international treaties<sup>8</sup>. It is important to emphasize that despite the expansion of the range of fundamental rights, and the multilevel dynamics of Indigenous Peoples’ protection – at national and international levels –, it

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<sup>4</sup> The data can be found in the official Website of John Hopkins University: <https://coronavirus.jhu.edu/map.html>

<sup>5</sup> In Brazil, there is data provided by SESA (Special Secretariat for Indigenous Health), but these data is characterized by underreporting, as it only reports the cases and deaths that occur “in indigenous lands recognized by the Brazilian State”, leaving out several other indigenous peoples that, for example, live in the cities.

<sup>6</sup> According to the website, the available data is a compilation from some Indigenous Organizations and official government websites. Data are available at: <https://covid19.socioambiental.org/>; See also the available data in: <https://emergenciaindigena.apiboficial.org/>

<sup>7</sup> Our translation from the Spanish: “*Del grupo de 13 países considerados, Brasil, Perú y Guatemala presentan el mayor número de casos de contagios en las poblaciones indígenas, representando el 72,5 % del total de casos*” da América Latina”, our translation.

<sup>8</sup> In a complex perspective and in a fruitful dialogue with the Inter-American Human Rights System, the rights of Indigenous Peoples can be conceived in an “essential core” approach, in which the right to land remains at its core and radiates all other rights: nature rights, cultural rights, right to water, among others. For further analysis, see: MELO; BURCKHART, 2020.



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remains a *gap* between the legal norms and their concrete operability, their factual concretization.

Indeed, Brazil is a country that has a high level of Constitutional protection for the rights of Indigenous Peoples. The 1988 Brazilian Constitution dedicates the Chapter VIII (arts. 231 and 232) to the rights of Indigenous Peoples, recognizing their social organization, customs, languages, beliefs and traditions, in addition to the original rights over the lands they traditionally inhabit (art. 231, § 2)<sup>9</sup>. It also recognizes the permanent ownership of lands traditionally occupied by Indigenous Peoples and the right to exclusive enjoyment of soil's riches, and rivers that constitute these lands (art. 231, § 2). The Constitution provides that indigenous lands are inalienable and not possible to be sold, and their rights are imprescriptible (art. 231, § 2 °); and also recognizes the Brazilian Amazon as part of the national natural heritage (art. 225, § 7 °).

In the legal sphere, the *Indigenous Statute* (Law 6,001/1973) also established provisions that assure indigenous right to land. Although the law is prior to the Constitution, it currently reinforces, in what is constitutionally compatible, the constitutional text. In its art. 2°, it provides that the Union, States and Municipalities must act together to protect indigenous communities and preserve their rights, by guaranteeing the permanence in their lands, providing them with the resources for their development, according to their culture (item V ); and by guaranteeing the permanent possession of the lands they inhabit (item IX). Likewise, the text of the *Indigenous Statute* also provides for mechanisms to regulate the right to land of Indigenous Peoples, set out in article 17 onwards.

At international level, it is worth mentioning the Convention 169 of International Labor Organization (ILO), signed in 1989, which, among other things, establishes the right to prior consultation in *art. 6, 1, a*, in which it established that governments, when applying the Agreement, must consult the peoples concerned through appropriate procedures and through representative institutions, whenever legislative or administrative measures, that may directly affect Indigenous Peoples.

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<sup>9</sup> For a detailed analysis of the rights of Indigenous Peoples in Brazil, see: KAYSER, 2010.





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This Agreement was ratified by Decree no. 5,051/2004. Therefore, it is opportune to emphasize the *United Nations Declaration on the Rights of Indigenous Peoples*, enacted in 2007. Although it is not a legally binding document, its text reaffirms the rights of Indigenous Peoples already recognized in Brazilian law and is projected internationally as an important tool that may guide political action.

The historical vulnerability related to Indigenous rights' application – which was minutely reported in a recent report on the situation of Indigenous Peoples in South America, written by the former UN Rapporteur on the Rights of Indigenous Peoples in 2016 (UNITED NATIONS GENERAL ASSEMBLY, 2016) – deepens during Covid-19 pandemic<sup>10</sup>. It is because, in addition to the health crisis, Brazil was already passing through a context of *multidimensional crises*: political, economic, environmental and social; which, combined with the pandemic crisis, produced a peculiar context of mistrust in institutions<sup>11</sup> and, consequently, the absence of a clear “risk communication” during the emergency<sup>12</sup>, which considerably prevented the effectiveness of the already existing legal provisions.

### 3 LEGAL MEASURES IN BRAZIL

On March 11<sup>th</sup>, 2020, the World Health Organization officially declared that the recent “outbreak” of the new coronavirus was, in fact, a “pandemic”, reviewing its declaration made on January 30<sup>th</sup> of the same year, in which it recognized the new

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<sup>10</sup> As states Boaventura de Sousa Santos, “[...] sus cuerpos son más vulnerables debido a las condiciones de vida socialmente impuestas por la discriminación racial o sexual a la que están sujetos. Cuando ocurre el brote, la vulnerabilidad aumenta, ya que están más expuestos a la propagación del virus y se encuentran en lugares donde nunca llega la atención médica: *favelas* y asentamientos pobres de la ciudad, aldeas remotas, campos internamiento de refugiados, prisiones, etc.” (SANTOS, 2020 p. 72).

<sup>11</sup> In a pandemic context, distrust of democratic institutions is a central problem, as this makes it even more difficult to adopt and put in place adequate measures when the population of a given country does not trust institutions and public authorities.

<sup>12</sup> This is a technical term used by the International Health Regulations.



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coronavirus as a Public Health Emergency of International Concern (PHEIC)<sup>13</sup>. Although, from a practical perspective, the international declaration of a “pandemic” does not represent a significant difference from an PHEIC, it does operate as a “warning” for States to take measures aimed at containing the spread of the disease that, at that moment, had already community transmission on all continents.

Brazil has developed legal measures to face the pandemic, particularly related to safeguard the rights of indigenous peoples. The first legislative measures were taken with the enactment of law n. 13,979/2020, known as the “*Quarantine Law*”<sup>14</sup>, which provides for measures to deal with the Public Health Emergency of International Concern resulting from the new coronavirus. The Law was urgently deliberated, approved and promulgated, three days after the declaration of the National Public Health Emergency made by the Brazilian Ministry of Health (through the Ordinance n. 188, of February 3<sup>rd</sup>, 2020). Since then, specific legal measures regarding the rights of Indigenous Peoples have been promulgated.

On July 7<sup>th</sup>, the law n. 14.021/2020 was enacted, providing for social protection measures to prevent the contagion and dissemination of Covid-19 into indigenous territories, and also creates the *Emergency Plan to Face Covid-19 in Indigenous Lands* (“*Plano Emergencial para o Enfrentamento à Covid-19 nos Territórios Indígenas*”). The aforementioned Plan aims to ensure access to basic needs required to maintain the health conditions of Indigenous Peoples and to treatment and recovery of those infected (art. 4). Among the measures, under the responsibility of the Union – in the Federal State –, are the needs to guarantee universal access to drinking water (art. 5 °, I); free distribution of medicines, hygiene materials, cleaning and disinfection of surfaces to indigenous communities, officially recognized or not, including the ones in the urban context (art. 5, II and art. 9, II); participation of Indigenous Peoples in Multiprofessional Health Teams (art. 5, III) and access to rapid tests (art. 5, IV); emergency supply, such as hospital beds (art. 5, V, a), and the acquisition and availability of ventilators and blood oxygenation machines

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<sup>13</sup> The denominations “Public Health Emergency of International Concern (PHEIC)” and “Pandemic” are technical categories of the World Health Organization (WORLD HEALTH ORGANIZATION, 2005).

<sup>14</sup> For an analysis of its content, see: VENTURA; AITH; RACHED; 2020.



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(art. 5, V, b). It also establishes the provision of internet points in indigenous lands in order to facilitate access to information, avoiding the displacement of indigenous people to urban centers (art. 5, VIII), and the drafting and distribution of a material that contains information about Covid-19 symptoms in accessible language (art. 5, VI and art. 3).

The *Emergency Plan to Face Covid-19 in Indigenous Lands* also provides for quarantine measures to all medical professionals who enter indigenous lands (art. 5, III) and, likewise, establishes that the isolation and quarantine measures applied to Indigenous Peoples must take in consideration their epidemiological vulnerability and the characteristics of each indigenous community (art. 5, § 2). The law also states a specific chapter related to “Food and Nutritional Security”, in which provides for the Union’s obligation to furnish food, through basic food basket distribution (art. 9, § 3). Likewise, the law establishes a specific chapter for “isolated Indigenous Peoples or in recent contact”. In the later, it specifies that only in case of imminent risk, exceptionally and by means of a specific plan articulated by the Union, any type of approximation will only be allowed for the purposes of preventing and facing the pandemic (art. 11). The law obliges the Federal Government to prepare, within 10 days, contingency plans for indigenous peoples to face the outbreaks of covid-19 (art. 11, II), and the suspension of any activity near to Indigenous isolated tribes (art. 11, IV). However, it also establishes that religious missions may remain in place with the approval of the responsible medical service (art. Art. 13, § 1 °).

In the regulatory field, it is important to mention three legal acts issued by the National Indigenous Foundation (FUNAI, a federal agency responsible for Indigenous Peoples): Normative Instruction n. 9/2020, Ordinance n. 413/2020 and Ordinance n. 419/2020. These regulations contrast with each other regarding the protection of Indigenous’ territories. The Normative Instruction n. 9, of April 16<sup>th</sup>, 2020, establishes new directives regarding the attribution of the *Declaration of Limit Recognition* (*Declaração de Reconhecimento de Limites*) of private rural properties. With the change, FUNAI must issue the document only for the indigenous lands already recognized by presidential decree – according to the administrative procedure. The Ordinances no. 413 and 419, however, published respectively on March 13<sup>th</sup> and



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17<sup>th</sup>, 2020, established temporary measures to prevent infection and spread of the new coronavirus within the scope of FUNAI, and suspend the granting of new authorizations for accessing indigenous lands, except those strictly necessary for the continuation of essential services of any community (art. 3, § 1 of Ordinance 419/2020).

More recently, the Provisional Measure n. 1005, of September 30<sup>th</sup>, 2020, edited by the President of the Republic, also provides for the establishment of protective sanitary barriers in indigenous areas. Its aim is to control the transit of people and goods at these areas in order to avoid the contagion and spread of the covid-19. The health barriers are made up of Federal civil servants or active duty military personnel.

Likewise, it is also worth mentioning the Congressional Bill n. 2,179/2020, authored by Deputy Paulo Paim, which provides for the obligation of all health agencies and institutions in the national territory to promote the registration of data referring to “ethnic” markers, and also age, gender and condition of disability or vulnerability attended due to the Coronavirus. The Bill, which is being analyzed by the Chamber of Deputies, is a response to the lack of some specific data on both infected and deaths resulting from Covid-19 in the country.

#### 4 ELEMENTS OF PUBLIC INTERNATIONAL LAW GOVERNANCE AND INTERNATIONAL COOPERATION

In the American continent, the Inter-American Commission on Human Rights issued a historic resolution (Resolution n. 01/2020) entitled “*Pandemic and Human Rights in the Americas*”. The Resolution points out that the Americas are the most socially unequal continent, characterized by the lack of access to basic common goods, such as drinking water and food, and with its populations directly suffering with environmental pollution and the lack of adequate housing. The Resolution further establishes the need for all American countries to develop “intersectional” policies with specific measures for “historically excluded or high-risk groups”, such as



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Indigenous Peoples<sup>15</sup>. In its operative part, the Resolution brings up a specific topic for the “Indigenous Peoples” (items 54 to 57) in which it recommends: 1) the dissemination of information about the pandemic in their languages; 2) unconditional respect for voluntary non-contacted and / or isolated groups; 3) take all actions to protect their rights, especially the right to health; and, 4) refrain from taking legislative and administrative measures authorizing mining exploitation in indigenous lands during the pandemic (INTERAMERICAN COMMISSION ON HUMAN RIGHTS, 2020).

In South America, the recent destabilization process of the Union of South American Nations (USAN)<sup>16</sup>, marked by the formal withdraw of Brazil and other countries, made it difficult to articulate a joint South American response in facing Covid-19 pandemic – as it happened in the European Union<sup>17</sup>.

Indeed, one of the remaining International Organization in the South American political integration is the Amazon Cooperation Treaty Organization (ACTO)<sup>18</sup>. This Organization was created in 1995, eighteen years after the Amazon Cooperation Treaty (ACT) was signed (1978), with the protagonist negotiations carried out by Brazil and Peru<sup>19</sup> – that can be read as the genesis of the Amazonian dialogue. The treaty establishes as its main objective: “to carry out joint efforts and actions in order to promote the harmonious development of their respective Amazonian territories” in order to produce “equitable and mutually beneficial results, as well as for the preservation of the environment and the conservation and rational use of territorial natural resources”, according to the art. 1. It further establishes that

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<sup>15</sup> As states the Preamble, III.

<sup>16</sup> It is worth mentioning that USAN had as a part of its organization the “South American Health Council”, which brought together all the ministers of health of these countries, with the objective of proposing common political frameworks for the region. For further details, see: LIMA & ALBUQUERQUE, 2019.

<sup>17</sup> For a critical analysis of the differences between South American and European Union responses to the pandemic, see: PINZANI, 2020.

<sup>18</sup> In this sense, it is worth noting that both MERCOSUR and the Andean Community are economic blocs, where, despite contemplating a certain dimension of political and legal integration, the economic dimension prevails.

<sup>19</sup> “Brasil e Peru começaram os primeiros entendimentos relativos a um projeto de cooperação amazônica e em 1975, firmaram acordos bilaterais sobre zonas fronteiriças, cooperação técnico-científica e um *Acordo para a Conservação da Flora e da Fauna dos Territórios Amazônicos*” (TOBAR & LINGER, 2020, p. 203)



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“For this purpose, there must be information exchange by the States on operative agreements and understandings, as well as the relevant legal instruments that allow the fulfillment of the purposes of this Treaty”, article 1. In this context, it establishes the protection of indigenous cultures and natural resources of the Amazon (article XIII) and also provides for the promotion and coordination of health services in Amazonian territories for improving methods aimed at preventing and fighting epidemics (article VIII)<sup>20</sup>.

Taking in consideration the advancement of covid-19 in the Amazon region and its direct impact on indigenous populations that inhabit it, ACTO and the Pan-American Health Organization (PAHO) developed a *Contingency Plan for the Protection of the Highly Vulnerable Indigenous Population*, covering all the Amazonian states, with the exception of Venezuela and French Guiana. More recently, in October 2020, a Framework Agreement for Collaboration was also signed within ACTO, in partnership with FILAC (Fund for the Development of Indigenous Peoples in Latin America and the Caribbean), aiming at the “protection, promotion and exercise of the rights of indigenous people and other tribal communities in the Amazon Region”. It will be in force for a period of six years (OCTA, 2020).

Within the scope of Non-Governmental Organizations there was also an articulation with International Organizations. The *Organizaciones Indígenas de la Cuenca Amazónica* (COICA), the largest indigenous organization in the Amazon, firmed an agreement with the Pan-American Health Organization (PAHO) in July 2020, with the aim to “strengthen the attention to health services in the Amazon, with the endowment of human resources, health inputs, medical devices, including tests, treatments and vaccines for the COVID-19 when they are available”<sup>21</sup>. COICA, in a coordinated action with all indigenous representations of Amazonian countries – which includes French Guiana –, signed on March 31th, 2020, in Quito, the “*Amazon*

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<sup>20</sup> In 2011, the Manaus Commitment was signed under the ACTO, recognizing the regional commitment in terms of investment in scientific knowledge and sustainable development. (LIMA, 2012).

<sup>21</sup> “*Fortalecer la atención en los servicios de salud de la Amazonía, con la dotación de recursos humanos, insumos y dispositivos médicos, incluidas las pruebas y tratamientos y vacunas para la COVID-19 cuando estas estén disponibles*” (ORGANIZACION PANAMERICANA DE LA SALUD, 2020)



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*Declaration in the Face of Health and Social Emergency due to Covid-19*'. Although it is not legally binding, this declaration seeks to (re) affirm the rights of indigenous peoples in the Amazon in facing Covid-19. In its preamble, it states that:

Considering: That the world is going through a crisis and a health emergency due to the unpredictable consequences of COVID-19, which to date has killed more than 30,000 people and infected hundreds of thousands in almost every country in the world. That indigenous peoples face a double vulnerability due not only to the historical exclusion and marginalization to which we have been subjected, but also as a result of the characteristics and geographical conditions in which we survived in the ancestral lands and territories due to the difficulty of access. That, in the face of the emergency, indigenous peoples do not have specific protocols in the case of none of our countries to face the pandemic since the states have not been in charge of generating this type of instrument to prevent contagion in vulnerable populations (COORDINACION DE LAS ORGANIZACIONES INDIGENAS DE LA CUENCA AMAZONICA, 2020).

By reaffirming the rights of Indigenous Peoples already recognized, the Declaration demands the adoption of urgent action by Amazonian States in protecting the rights of Indigenous Peoples (art. 1 and 2); and also calls for actions of United Nations and, in particular, the High Commission for Social Rights and the Special Rapporteur for the Rights of Indigenous Peoples, in order to intervene to preserve these rights (art. 3 and 4). The Declaration highlights the necessity of international cooperation in guaranteeing the rights of indigenous communities in the Amazon (art. 5 and 6), with a culturally appropriate primary prevention action (art. 8). It also states the necessity to guarantee the right to food (art. 7) and to protect indigenous lands and territories (art. 10 and 11).

## **5 BETWEEN TEXTS AND CONTEXTS: RIGHTS OF INDIGENOUS PEOPLES IN BRAZILIAN AMAZON**

The historic problematic situation of indigenous peoples in Brazil directly impacts the effectiveness of legal norms aimed at protecting them and their fundamental rights, particularly territorial rights. This observation remains explicit



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nowadays with the unexpected advent of the health emergency, and deepens in a context marked by *multidimensional crisis* with political, economic, social and environmental extensions. These contexts of crisis – and, especially, of multidimensional crises – are characterized, to a large scale, by the weakening of constitutional guarantees of certain rights<sup>22</sup>, especially the ones that in times of “stability” had already precarious guarantees.

Taking into consideration the constitutional Brazilian law, a careful analysis of the drafting and application of the new legal measures aimed at safeguarding indigenous peoples points towards, at least, two common problems that, however, are closely related: 1) the *problem of applicability and effectiveness*; and, 2) the *problem of legitimacy*. The first concerns precisely the lack of appropriate applicability of indigenous rights, a problem largely reported by Amazonian indigenous communities and also by the national and international press (HANSEN, 2020; FRANCO, 2020; CALAPUCHA, 2020; BARBOSA; MARCHIORO; SIMIONATTO, 2020). It inexorably promotes the judicialization of indigenous rights, by which indigenous peoples and organizations aim at obtain, by the judicial system, the responses that they did not find in other spheres of the State. And the problem of legitimacy, on the other hand, concerns the lack of participation of indigenous peoples in the drafting process of these norms, which directly reflect on the level of adequacy to indigenous ways of life and intercultural dialogue.

The lack of legitimacy reduces the cognitive openness of the legal system, since the positivization of law also imposes a process of learning the law itself, in a double perspective, that is, of the subjects to whom the decisions are made, but also of those who decide. At the same time, it is worth remembering Habermas’ theory, in which states that the proceduralization of law must be endowed of attributes that allow administrative action “in a context of full communicative citizen participation, in order to be immune of subsystems’ intervention that, armed with strategic rationality,

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<sup>22</sup> For a better analysis, see: FERRAJOLI, 2007.





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may colonize communicative spaces of non-linguistic means, such as power and money” (MARCHIORI, 2018, p. 173)<sup>23</sup>.

The “judicialization of politics”<sup>24</sup> has become a common practice in many countries and mainly in Brazil. The ineffectiveness of legal and constitutional provisions promotes the judicialization of indigenous rights – on occasions being it the only path for guaranteeing these rights. In Brazil, due to actions and omissions of Federal Government in managing the pandemic, especially in safeguarding indigenous peoples, the Articulation of Indigenous Peoples of Brazil (*Articulação dos Povos Indígenas do Brasil, APIB*), and six other Political Parties, joined the Federal Supreme Court with an *Ação de Descumprimento de Preceito Fundamental (ADPF)* n. 709. It claimed that the actions and omissions of Federal Government are causing a “true genocide, which may result in the extermination of entire ethnic groups” and, therefore, require the immediate adoption of actions aimed at facing the pandemic among indigenous populations (SUPREMO TRIBUNAL FEDERAL, 2020).

The ADPF n. 407 was filed on July 1<sup>st</sup> and the precautionary measure were granted on July 8<sup>th</sup> – one day after the enactment of the aforementioned Law n. 14,021<sup>25</sup>. The precautionary measures determined actions in two areas: related to Indigenous Peoples in isolation, or with no contact, and to Indigenous Peoples in general. Regarding the first group, it states the need for 1) the installation of sanitary barriers; and 2) the creation of monitoring groups with the participation of indigenous peoples, State’s Attorneys, Public Defender's Office and the National Council of Justice. Related to the second group, it stated: 1) the emergent need to evacuate land invaders; 2) the application extent of these actions on lands that have not yet been administratively recognized as indigenous lands; and 3) the elaboration and

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<sup>23</sup> Our translation from the original in portuguese: “*num contexto de plena participação comunicativa dos cidadãos e imune à intervenção dos subsistemas que, munidos de racionalidade estratégica, colonizam espaços comunicativos de meios não-linguísticos, como o poder e o dinheiro*” (MARCHIORI, 2018, p. 173). For a deeper analysis, see HABERMAS, 2003.

<sup>24</sup> For a critical analysis of this process, see: HIRSCHL, 2009.

<sup>25</sup> It is necessary to mention that this Law was vetoed by the President of the Republic, Jair Bolsonaro, in crucial points related to: “access to drinking water”, “distribution of basic food baskets” and “free distribution of hygiene, cleaning and disinfection materials for indigenous territories”, “to guarantee emergency supply in hospital and intensive care beds” and the mandatory purchase of ventilators and blood oxygenators for these communities. The Brazilian Congress, however, intervened to overturn these vetoes. According to: SENADO FEDERAL, 2020. See also: OLIVEIRA, 2020.



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monitoring of a Work Plan<sup>26</sup> to be applied by Federal Government (SUPREMO TRIBUNAL FEDERAL, 2020).

The latter Work Plan was made by the Federal Government, but failed in being approved by the Supreme Court in three times during 2020. In the last decision, which took place on December 18<sup>th</sup>, the Minister Luís Roberto Barroso determined that a new document must be presented by the date of January 8<sup>th</sup>, 2021. The Minister argued that the latest version of the plan remains generic, which does not allow to have any sort of control over its implementation. According to the decision, “It is impressive that, after almost 10 months of pandemic, the Union has not managed the minimum: to offer a plan with its essential elements, a situation that continues to expose the life and health of indigenous peoples to risk” (SUPREMO TRIBUNAL FEDERAL, 2020).

The referred “*problems of legitimacy*” were also faced by the Supreme Court, which imposed the need to create adequate conditions for indigenous participation, improving an effective intercultural dialogue (SUPREMO TRIBUNAL FEDERAL, 2020); and the need to respect International Labor Organization (ILO) Convention 169 and the prior indigenous legislation. However, the President of the Republic’s action to veto important provisions of the aforementioned law n. 14.021/2020, as well as the attempt to “deregulate” FUNAI’s functions and duties during the pandemic – through the aforementioned Normative Instruction no. 09/2020 –; the inclusion of the Bill n. 191/2020 by the President – which is currently being discussed in the Parliament –; and the aim to legalize mining and hydrocarbons exploitation, and the use of water resources in Indigenous Lands<sup>27</sup>, may be considered substantially problematic in terms of political and legal legitimacy, and even questioned concerning its constitutional-environmental adequacy.

Indeed, the problems related to *applicability/effectivity* and *legitimacy* call into question the constitutional values and International Conventions. The continued

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<sup>26</sup> The elaboration of the referred Plan was later rejected by the Supreme Federal Court, as it was considered “very vague” and “out of date” in a judicial decision issued in ADPF no. 709. Indeed, it resulted in the aforementioned Provisional Measure of n. 1,005/2020. According to: SUPREMO TRIBUNAL FEDERAL, 2020.

<sup>27</sup> For a deepen analysis, see: ROCHE; PORTO, 2020.



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actions and omissions of the Federal Executive Branch against the rights of indigenous peoples also calls into question the constitutional values and International Conventions signed by the Brazilian State. It is observed, therefore, that these problems, historically existing, deepen in a context of multidimensional crisis.

Related to the international field, it can be noted: 1) the multidimensional crisis that are in keeping with the pandemic, and 2) the difficulty in establishing a fruitful dialogue among governments in the institutional instances of integration and political cooperation at the South American level – with the emptying of USAN – reduced the possibility of a response to the pandemic in the ground of international cooperation among regional countries. However, it has fostered and deepened a form of international cooperation made by indigenous non-governmental actors, which can be understood as a new form of transnational cooperation. Indeed, the literature on international cooperation already points towards the birth of new forms of cooperation beyond the ones centered on the Nation-State, whether through Federal States, regions, municipalities, and also Non-Governmental Organizations and private companies, which have an increasingly important role in the international scenario. Amazonian Indigenous Peoples, marked by a history of vulnerability and violation of human rights, have started to strengthen their international cooperation networks *by themselves*, with the aim of ensuring their rights and demand actions by the States – the *Amazon Declaration in the Face of Health and Social Emergency due to Covid-19* is a clear example –, transforming and improving international cooperation.

## 6 FINAL CONSIDERATIONS

The pandemic caused by the new coronavirus has deepened the dynamics of crises in Brazil, in which is possible to be called as a *multidimensional pandemic crisis*.

Indeed, the condition of political and legal vulnerability of the Amazonian indigenous peoples have deepened during the pandemic by the high rates of



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contagion and lethality among individuals and indigenous communities. In this respect, the inadequacy of the legal measures adopted in relation to indigenous ways of life remains evident, as well as the lack of intercultural dialogue and indigenous participation in drafting the norms aimed at containing or mitigating the irreparable effects and damages caused by the pandemic. In addition, governmental decisions taken in 2020 directly impacted the management indigenous lands, aggravating the already precarious protection of the original right over their lands, which contributes to the worsening of the environmental crisis in the Amazon, in view of the fundamental role of indigenous peoples as actors in socio-environmental sustainability. The first part of the hypothesis of this study, therefore, remains confirmed, since the *problems of applicability/effectiveness* and *problems of legitimacy* are projected as common features of the new legal norms emanated by the State in facing the pandemic.

However, it should also be noted that in addition to these two sets of problems, related to applicability/effectiveness and legitimacy at the internal level, another problem is noteworthy: concerning the time-lapse of the adopted measures. It is perceived that the norms, be it legislative or administrative, have been enacted after a considerable period of time since the outbreak of the pandemic emergency. Most of these rules were issued when South America had already been considered by the World Health Organization as a new epicenter of the pandemic, and when Covid-19 had already spread within indigenous territories. This factor may help to understand both the ineffectiveness and the illegitimacy of enacted legal measures, as well as the consequent process of judicialization, that aims to obtain the concretization of law which has been silenced or deliberately denied by other branches of power.

The serious time-lapse and inadequacy of the legal measures adopted by the Brazilian State, made arise questions on the personal responsibility of the Chief of Federal Executive branch. In this regard, complaints were filed in International Criminal Court (ICC) against the current President of the Republic, Jair Bolsonaro. Among these, two complaints are directly related to indigenous peoples and accuse the President of committing “crimes against humanity” and/or “inciting genocide”: one



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was presented in July 2020 by the *UniSaúde Union Network* and another was presented in January 2021, by *Cacique Raoni*, an important Brazilian indigenous leader. Other complaints and denunciations were also filed in international organizations of the International Human Rights System, such as the Petition sent to the Inter-American Commission on Human Rights, in January 2021, by the Federal Council of the Brazilian Lawyers Association (OAB), demanding recognition of the violation of the American Convention on Human Rights by the Brazilian State “due to its failure to resolve the collapse of the Brazilian health system”.

It is noted that the legal measures, that constitute the “law of pandemic”, enacted during Covid-19 pandemic, have deep difficulties for its application, reproducing “old problems” related to the ineffectiveness of the rights of indigenous peoples in Brazil. These *new old* problems are directly related to the “problems of applicability/effectiveness” and to the “problems of legitimacy” that accompany the obstacles of the troubled history of indigenous peoples’ rights in the country and, more broadly, in all Amazon countries.

In international level, the Resolution n. 01/2020 of the Inter-American Commission on Human Rights can be understood as one of the greatest documents in terms of legal impact in the Americas, pointing towards the need of States to take effective actions aimed at protecting indigenous peoples. However, in the specific South American scope, the lack of legal mechanisms that concretely foster international cooperation and the lack of political will by the part of regional governments made it difficult to articulate a joint response to the pandemic, both in general terms and also specifically with regard to the Amazon and the rights of indigenous peoples. Therefore, it can be said that although the States have placed themselves as central actors in the “governance” of the pandemic – and this has been the case in most national experiences, when observing internal dynamics – there was resistance by them to cooperate at the international level for the protection of the rights of the most vulnerable populations, such as Indigenous Peoples. At the same time, the lack of action by States, coupled with the historical context of social, political and legal vulnerability of indigenous peoples, promoted the strengthening of non-governmental organizations in the Amazon that, through bilateral agreements



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and coordinated actions, managed to reduce the impacts of the pandemic for these populations. These observations also allow us to confirm the second part of the hypothesis of this study.

The study carried out leads to the conclusion that currently the protection of indigenous rights is a seriously problematic issue in Brazil, particularly in the Amazon. Although the legal norms enacted create a response to the serious situation in which indigenous peoples are facing during the pandemic, the “loopholes in the law”, the “restrictive interpretations”, the legal deregulation in the operative field of instructions and resolutions, and the political incapacity in articulating an effective responses in protecting the rights of indigenous peoples at the transnational level, evidence that “the indigenous issue” remains a pathological legal, political, geopolitical and ethical problem, being, especially in the Brazilian Amazon, an open wound.



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