

## **Indigenous Lives Matter: Biological Cataclysm and Themission of The Supremo Tribunal Federal**

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### **1. Introduction: Cataclysm Beyond Pandemia**

Brazil 2020 is going through a new wave of biological cataclysm. An expression used by anthropologist Henry F. Dobyns<sup>3</sup> to describe the effect of the epidemics brought by European invaders on Amerindian populations, cataclysm is synonymous with a major environmental catastrophe, or a major change that changes the organization of a society; tragedy.<sup>4</sup>

There are those who say that epidemics were the silent weapon of the conquest of America. The historical vulnerability of Brazilian indigenous populations to biological agents imported into their territories has brought devastating episodes. The Brazilian biological war takes place long before anyone can imagine. The construction of highways was the major cause of indigenous contamination by fatal viral diseases from the 1950s onwards. In 1955, 97% of the Tuparis' population was extinguished after a measles epidemic caused by contact with white people. In the 1960s, farmers and prospectors purposely donated clothing and food in boxes infected with smallpox virus and other highly contagious diseases to Indians from coveted

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<sup>3</sup> Anthropologist specialized in ethno-history and demography of native peoples in the American hemisphere, known for his innovative demographic research on the size of American indigenous populations before the arrival of Christopher Columbus in 1492.

<sup>4</sup> Meaning of the Michaelis dictionary. Available at: <https://michaelis.uol.com.br/moderno-portugues/busca/portugues-brasileiro/cataclismo>. Accessed on: May 11, 2021.

lands. In the years 1974 and 1975, in the construction of Highway BR-210, in Roraima, the Yanomami population suffered a drastic reduction after contamination by smallpox.

If the process of colonization of the Americas, as Tzvetan Todorov<sup>5</sup> well analyzed, was the greatest genocidal process in history, infinitely superior to the Jewish holocaust, with anthropological data estimating the extinction of 90% of the Brazilian indigenous population, we can boldly say that Covid -19 may be the end of this process to the indigenous population, but not only due to the viral factor. Brazil is experiencing the greatest socio-environmental disruption in recent years, fueled by aggressive mining, agribusiness and mega development projects, whose process of expansion and destruction has existed since colonization, undoubtedly, and has been accelerated at a speed difficult to keep up with.

In 2017, the Federal Government revoked a nature reserve in favor of mining, land grabbing and extraction of ores in the Amazon, in a space between the States of Pará and Amapá, which, amazingly, total the size of the State of Espírito Santo. In 2020, data from INPE - National Institute for Space Research,<sup>6</sup> revealed the sweeping devastation of the Amazon Forest between the years 2018 and 2019, emphasizing an increase of 40% in the deforested areas of Brazilian forests when compared to data from previous years. In August 2020, Germany decided to suspend the transfer of 150 million reais to Brazil for the protection of the Amazon, while Norway blocked the amount of 134 million reais that would be transferred to the Amazonian fund in view of Brazil's high deforestation rates.

Not that Brazil's history has been favored by environmental protectionism and its indigenous peoples over the years. Since the Hereditary Captaincies, the interiorization of Brazil has been destroying national biomes and their original populations in favor of the colonizer and capital. The indigenous genocide and the depopulation of the continent added to the commercialization of slaves was fundamental for the establishment of a social system based on the capitalist, racist and patriarchal hierarchy; In Juan Manoel Domínguez's view, the extermination of a people considered by the European white as “idle, unproductive and pagan” was essential. Religion, in the author's view, was a master key to legitimizing barbarism, under

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<sup>5</sup> Author of the work “A Conquista da América”, where he exposes his research on the concept of otherness, existing in the relationship of individuals belonging to different social groups.

<sup>6</sup> Brazilian federal institute dedicated to space research and exploration. Created in 1961.

the Church's argument that the decline in the indigenous population was the result of a “divine punishment” for centuries of paganism.

Five hundred years later, history repeats itself. Today's Brazil is counting on the destruction of biomes and their populations, including the Amazon, for the expansion of agribusiness. The country is ruled by a ruralist elite that has been perpetuating itself for centuries in the government, and which finds in the current federal government support in figures that enhance environmental destruction and use growth and progress as a justification, above everything, above everybody. The progressive idea is the assimilation of indigenous peoples in the cities, being removed from their native lands, which has violently increased agrarian conflicts with the natives, who have been attacked, tortured and murdered. The request for dialogue with the Federal Government is irrelevant, and there is currently a refusal to even discuss with the other powers about the demarcation of indigenous lands. The annihilation scenario was aggravated by Covid-19 pandemic.

## **2. A Cry for Help: Indigenous Hypervulnerability To The COVID-19 Pandemic**

The first case of indigenous contagion with Covid-19 was that of a 20-year-old girl from the Kokama ethnic group who works as an indigenous health agent and lives in the village of São José, in Amazonas. The infection occurred in one of the DSEI - Special Indigenous Sanitary District<sup>7</sup> by a doctor who was returning from vacation and already had symptoms, with the health professionals of this unit not having been placed in quarantine.

Although we are all susceptible to the contagion of the new coronavirus, indigenous populations are hypervulnerable. There are precarious social, economic and health factors that amplify a potential contamination of these peoples, such as the community co-existence of the villages and the division of domestic utensils among them. There is great difficulty in accessing public health services, geographical issues of distance between villages and hospitals

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<sup>7</sup> In 1999, the indigenous health subsystem of the Unified Health System was created, which started to be organized in 34 Special Indigenous Health Districts (DSEI). The subsystem of the Unified Health System created to serve indigenous health suffers from a lack of structure and resources to treat more severe complications such as Covid-19.

and unavailability or insufficiency of health teams and instruments that prevent immediate assistance (SANTOS; PONTES; COIMBRA, 2020, p. 3).

Another problem related to indigenous contagion is related to the underreporting of official data by the Federal Government, which fails to reflect the real extent of this community's pandemic. The disintegration of the data occurs mainly due to the lack of demarcation and homologation of indigenous lands, preventing the knowledge of which ethnic groups have been most affected by the pandemic.<sup>8</sup> APIB - Articulation of Indigenous Peoples of Brazil, an entity representing indigenous peoples in Brazil, is the one who, in parallel with the government, has been formalizing an independent survey of cases. For the entity, the number of indigenous deaths and contaminated by Covid-19 is higher than that notified by SESAI - Special Secretariat for Indigenous Health, which is the federal government agency linked to the Ministry of Health.<sup>9</sup>

The situation reverberates beyond the lack of assistance.<sup>10</sup> The Brazilian State was responsible for other attitudes that spread the virus to the indigenous community, such as the conduct that allowed contaminated health professionals to enter villages, the non-prohibition of land grabbers and prospectors from entering indigenous lands during the pandemic, increasing the indexes of invasions and agrarian conflicts, and the preventive abstention from contamination of indigenous people who had to travel to urban centers to seek emergency assistance.

The creation of the Covid-19 Contingency Plan prepared by SESAI brought generic measures, without detailing actions necessary to the specific context of each indigenous group, putting indigenous people at risk when they released a technical report recommending to the Indians the isolation of those who were contaminated at home, but they did not need to be

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<sup>8</sup> Data survey from independent organizations has pointed out the Xavante, Kokama and Terena ethnic groups as the most affected

<sup>9</sup> Up to May 1, 2021, SESAI reported 47,576 confirmed cases of Covid-19 among indigenous people, and 661 deaths, while APIB confirmed 53,329 cases of contamination, and 1,059 deaths. Available at: COVID-19 and the Indigenous Peoples (socioambiental.org). Accessed on: May 3, 2021.

<sup>10</sup> In March 2020, FUNAI - Fundação Nacional do Índio, suspended assistance actions by cutting basic food baskets on indigenous lands, increasing violence, malnutrition and vulnerability to Covid-19. It did not execute the Covid-19 budget by receiving more than 11 million in emergency resources for the protection of indigenous peoples and spending less than half (39%). Available at: COVID-19 and the Indigenous Peoples (socioambiental.org). Accessed on: May 3, 2021.

hospitalized, omitting the fact that in the villages the housing is shared which rises risk of contamination.<sup>11</sup>

Indigenous populations complained about the Ministry of Health's delay indeciding what measures could be taken to prevent the spread of Covid-19. More than a year after the start of the pandemic, very little has been done. In this scenario, the Articulation of the Indigenous Peoples of Brazil (APIB) and six other Political Parties, filed an action in the Supreme Federal Court of Action for Failure to Comply with Fundamental Precept No. 709, seeking answers to governmental omissions regarding the fundamental rights and guarantees of indigenous peoples during the Covid-19 healthcrisis.

### **3. Indigenous Life And Supreme Federal Court: The Mirror of Justice And Some Conclusions**

Since the colony, the law recognized that the Indians were masters of their lands. Although the theological and legal dispute of the sixteenth century asked who the Indians were, why they were not in the Bible and whether they were descendants of the Jews because they were also worshipers of the bath, Spain and Portugal entered into the legal consensus that the Indians were lords of their lands. Being in possession and ownership in the law, however, did not prevent the colonization, expropriation of these lands and the indigenous genocide that occurred in Brazil in phases.<sup>12</sup>

Starting in the 19th century, when eastern Brazil had already been colonized and the indigenous populations of this area practically extinct, the 1910s highlighted colonization in southern Brazil, when Germans and Italians installed what they called “civilization” there. In the 1940s, already under the Presidency of Getúlio Vargas, the center-west had an accelerated assimilation, becoming up to this day a center of battle for the Guarani, Kaiová and Terena peoples. The Amazon was not the focus of colonization until 1970, when the Military Dictatorship, especially after the AI-5 and the 1970s, initiated a colonization plan in the region.

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<sup>11</sup> Technical Report 4/2020 from SESAI guided health professionals to treat respiratory syndromes without taking the test to prove the coronavirus. Informe ignored the community coexistence of the indigenous tribes.

<sup>12</sup> The ideas contained in this paragraph and in the following ones were extracted from an interview by anthropologist Manuela Carneiro da Cunha, entitled “Daily life of indigenous peoples in present-day Brazil”, 2017. Available at: Manuela Carneiro da Cunha: Daily life of indigenous people in present-day Brazil - YouTube . Accessed on: May 4, 2021.

FUNAI - Fundação Nacional do Índio (National Indian Foundation), created in 1967 by the military and part of the colonization plan, was associated with the Ministry of the Interior, whose developmental goal was the road construction plan along the north and northeast of Brazil. The last stage of indigenous assimilation (invasion) started there.

The 1988 Federal Constitution is a milestone in Brazilian indigenous history. Before it, indigenous politics and indigenous legislation were assimilationist, in the sense of the eternal search to bring the Indians to what was considered the true civilization. Darcy Ribeiro<sup>13</sup> demonstrated in his work that this idea did not work. When the Indians were culturally assimilated in the cities, they became the fifth or sixth population, being completely surrendered to the peripheries of society. The Constituent Assembly changed this idea of cultural assimilation to the idea of coexistence, with fundamental rights and guarantees for indigenous peoples provided for in a specific chapter of the Constitution.<sup>14</sup>

ADPF 709 is a victory. Only with the Federal Constitution of 1988 did indigenous peoples become subjects of rights and had the right to postulate their interests recognized in court. With ADPF 709, for the first time, indigenous people were able to go to the Federal Supreme Court and postulate, in their own name and defending their own right, through their own lawyers, a constitutional jurisdiction action.

ADPF 709 postulates the intervention of the Federal Government in the protection of indigenous peoples through two distinct plans: the Sanitary Barriers Plan containing measures to protect and promote the health of isolated and recently contacted indigenous peoples, extremely vulnerable to Covid-19, and a General Plan for Confronting and Monitoring Covid-19 containing measures aimed at the health of indigenous peoples in general.

In theory, the Sanitary Barriers Plan for isolated indigenous peoples has effectively advanced. The General Plan for urgent Coping, however, took more than a year after the request made at the Supreme Federal Court for ratification. Only in March 2021, after the presentation of the fourth version of the plan, Minister Roberto Barroso partially approved it, considering it a precarious version and which did not correctly comply with the determinations previously

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<sup>13</sup> Anthropologist, historian, sociologist, writer and Brazilian politician, his work focused on indigenous people and education in Brazil.

<sup>14</sup> Chapter VIII “Dos Índios”, Title VIII “Da Social Order”.

made by the Court to the Federal Government. For Barroso, there was a “profound disarticulation” on the part of the bodies involved in formulating the document.

Still, the partial approval occurred with reservations, among which was that the Ministry of Justice and Public Security should indicate, within 48 hours, those responsible for detailing and carrying out the actions of access to drinking water and sanitation. The decision opened the deadline for the Ministry of Justice to coordinate and present a Plan for the Execution and Monitoring of the General Plan, which details the actions to be taken, highlighting seven points: distribution of basic foods; access to drinking water and sanitation; health surveillance and information; comprehensive and differentiated assistance; availability of personnel; equipment and infrastructure in general; governance regarding the execution of the plan.

As for the approval of the part of the Plan that deals with the isolation of indigenous lands by invaders, the STF did not approve it. It determined a new Invasion Isolation Plan to be presented by the Ministry of Justice and the Federal Police, with the Federal Police being responsible for preparing the plan's planning and execution. Barroso welcomed the request for priority vaccination of indigenous peoples from unapproved lands and those who live in the city without access to SUS, placing them on an equal footing with the indigenous peoples in the villages when determining the suspension of FUNAI Resolution 04/2021 that established “hetero-identification criteria” for assessing the self-declaration of identity of indigenous peoples. The measure had been criticized by several civil society organizations as an undue and unconstitutional restriction on the rights and identity of the original peoples, with direct consequences for the immunization policy of these populations.<sup>15</sup>

Forgotten, legal victory is the last hope of these peoples. The words of a Yanomami shaman that *“All this destruction is not our mark, it is the footprint of the whites, the trail of you on earth”* clearly represents the current situation of the indigenous community in Brazilian territory. The indigenous land of Arariboia, the last corner of the forest in Maranhão, territory of the Guajajara, Kaapor and Awa-Guajá ethnic groups, cannot count on state protection. Those who protect what remains of those original lands are the “Guardians of the Forest” who look

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<sup>15</sup> The manifestation of the following entities were essential to the revocation of the FUNAI Resolution, which denounced to the STF the unconstitutionality of Resolution 04/2021, claiming to be excluding indigenous people not inhabited. The National Human Rights Council requested in the action that the entire self-declared indigenous population should receive the policy contained in the Plan of the Union, without leaving out people who are not living in villages.



for loggers and other invaders and report them to the authorities. In the words of Laércio Guajajara, killed in 2019 after an ambush in the Land of the Governor, "they want to kill everyone who is to keep our land to produce soy, sugarcane, biofuel that they want to produce. They want to take the oil they have inside the land, gold. We are a deterrent to them."<sup>16</sup>

The state's omission has hurt since long before the pandemic. The pandemic arrived to complete the indigenous extermination. The Supreme Federal Court, like the "guardians of the forest", acts in the face of omissions, as if the law and justice were shields of protection and means of reparation for the countless executive and legislative failures that we have perpetuated against these minorities for centuries. ADPF 709 is an activist judicial response to these omissions. This is because the Court opted, in the face of a situation of complete governmental omission, to expand the constitutional meaning and scope in order to determine that a demand from an extremely vulnerable social layer be urgently met, in order to protect the right to life.

The idea of judicial activism is associated with a broader and more intense participation of the Judiciary in the realization of constitutional values and purposes, with greater interference in the space and in the performance of the other two powers. The activist stance was manifested, in the present case, in view of the imposition of conducts on the Public Power, notably in matters of public policy related to indigenous people, whose proportion of mortality due to Covid-19 exceeds that of non-indigenous people by 16%.

The Supreme became, in fact, the last "guardian of the promises", an expression created by Garapon<sup>17</sup> "expecting everything from justice, a total justice, in which the judge should not be content to say what is fair, but it must instruct and decide, approach and keep distances, reconcile and resolve, judge and communicate". Justice, in fact, is "a scene that offers an inexhaustible reservoir of images and meanings in which a restless democracy seeks its foundations", and that "allows democracy to represent itself in the two senses of the term, that of understanding and that of putting themselves on the scene, offering "a world that becomes

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<sup>16</sup> Sayings made by Laércio Guajajara to the documentary "The most threatened tribe in the world", from the NGO Survival International. Available at: [The most threatened tribe in the world - Films from Survival International \(survivalbrasil.org\)](https://www.survivalinternational.org/films/the-most-threatened-tribe-in-the-world). Accessed on: May 11, 2021.

<sup>17</sup> Garapon, 1999, p. 24.



obscure for itself and for a society that is blind in its projects, the opportunity to look in the front.”<sup>18</sup>

In the case of the Covid-19 pandemic and the indigenous community, it is as if the colonizer again presented the Indian with “the mirror” of Justice, with the promise that it would be worth the gold, and distract him to enable the invasion of his lands. Justice, in this case, is only a means of purchase and distraction, behind which there is a power of action and execution capable and eager to destroy. The Supreme has been the last hope of these peoples, the lifeline and “the means of making visible an invisible population, abandoned to its own fate, of which it has been embracing hopes, pointing out enemies and fixing anguish”, as well said by Garapon when defining “the new scene of democracy” in his book *Le Gardien de Promesses* (1999, p. 49). Between mirror and lifeline, we are left with the perception that, for the Brazilian indigenous communities, unfortunately, the glass is about to break.

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<sup>18</sup> Garapon, 1999, p. 48.

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