INDIGENIST MISSIONARY COUNCIL – CIMI
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National Secretariat – Brasília – DF – Brazil

CALL FOR INPUTS: 'INDIGENOUS JUSTICE SYSTEMS AND HARMONISATION WITH THE ORDINARY JUSTICE SYSTEM'
SR IP Report to the Human Rights Council 2019

Contribution from CIMI – Conselho Indigenista Missionário - Brazil

1 - Please describe the significance of indigenous justice systems for indigenous peoples and their exercise of collective rights, including self-determination, culture, customs and spiritual traditions.

Certainly, describing the importance of indigenous justice systems for indigenous peoples is a very difficult task, considering that in Brazil there are hundreds of peoples and the specificity of each one must always be considered. Generally, it is important to bear in mind that several indigenous justice systems (and languages) have been dismantled throughout history. It is worth emphasizing all the assimilationist policies imposed by the State and the violence applied by the Indigenous Protection Systems (SPI) the period of the military dictatorship in Brazil. Only in 1988, with the new Federal Constitution, integrationism was broken, as the constitution recognized, among others, the right to language, culture and social organization. Unfortunately, the distance between the letter of the law and the reality of the indigenous peoples is enormous.

In Brazil, the system of rights and justice of indigenous peoples still does meet the standards by the Federal Constitution. Even though the 1988 constitution guarantees the right to multiculturalism and legal pluralism, including in justice systems, the implementation of the relevant constitutional rights remains a notorious debt with indigenous peoples.

Still, considering that every culture is dynamic and that self-determination is carried out from the inside out, indigenous peoples maintain their own justice systems in their traditional ways, exercising them in a way that is intrinsically connected with culture, customs, and traditional spiritual values. In short, all of this composes social organization and is directly related to the collective rights of each indigenous people, either internally, in conflict resolutions within the community, or in the relationship with the state that must recognize traditional structures in the access to legal procedures to guarantee these rights.

2- What national legal provisions establish recognition of indigenous justice systems?

Our constitution provides harmonically the right of indigenous peoples to their own systems of justice in Articles 231 and 232. The heading of the latter recognizes indigenous peoples' right to "their social organization, customs, languages, beliefs and traditions, and their original rights over lands they traditionally occupy, and it is up to the Union to demarcate, protect and enforce all their assets", while the latter guarantees that indigenous people are entitled to claim them: The indigeous peoples, their communities and organizations have an autonomous standing to calim their rights and interests in courts, with the intervention of the Prosecutor's Office in all acts of the proceedings.

The Statute of the Indian (Law # 6011, of 1973), prior to the Federal Constitution of 1988, was in fact legally absorbed by the new constitutional regime, but is now interpreted accordin to the new principels of indigenist policy brought by the constitution. In this sense, Article 57 of this law guarantees the possibility of applying the indigenous justice system by combining cultural liberality, self-determination and judicial autonomy. In other words, it is tolerated the application, by tribal groups, according to their own institutions, of criminal and disciplinary measures against its members, provided that they are not of a cruel or infamous nature, in any case the death penalty is prohibited.

Convention 169, of the ILO, internalized by Brazil in 2004, also regulates the matter in its Article 9: To the extent that this is compatible with the national legal system and with internationally recognized human rights, the methods traditionally used by the peoples concerned for the prosecution of crimes committed by their members shall be respected. In addition, in case involving non-indigenous or different indigenous peoples Article 10 of ILO Convention 169, provides that: 1. When criminal sanctions are imposed by general legislation on members of the above-mentioned peoples, their economic, social and cultural characteristics shall be taken into account. 2. Types of punishment other than incarceration should be given preference.

It should be added that Article 12 of ILO Convention 169 guarantees the right to speak a nateive language in courts, as follows: The peoples concerned should have protection against the violation of their rights and be able to initiate legal proceedings, either personally or through its representative bodies, to ensure the effective respect of those rights. Measures should be taken to ensure that members of such peoples are able to understand and make themselves understood in legal proceedings, interpreters or other effective means to facilitate their participation in proceedings if necessary.

3- Are there restrictions on the exercise of indigenous jurisdiction and if so, which are these restrictions? Can indigenous jurisdiction be exercised over non-indigenous individuals?

According to our legislation, indigenous jurisdiction is fully constitutional, as described above. The first restriction concerns general human rights principles, as seen in Article 57 of the Indian Statute. Hence, the penalties applied by indigenous peoples to their members will only be tolerated if they are not cruel or infamous. In addition, the dominant non-indigenous justice system has reservations and resistance to the traditional form of conflict resolution, with a cultural restriction of hegemonic society, which also reverberates through dominant legal culture, with clear elements of prejudice and vassalage.

Finally, this jurisdiction could only be used in conflicts or situations involving indigenous, interethnic or intra-ethnic, but never between Indians and non-Indians, unless there is an agreement of wills, at the risk of incurring in what is prohibited in bis in idem. Brazil. However, it is recalled that, although there is constitutional and infraconstitutional legislation - and supralegal, as is the case with ILO Convention 169 - this right of indigenous peoples in practice is little recognized by the State.

4- Please provide examples of how jurisprudence of the ordinary justice system has referred to matters relating to the indigenous justice systems.

As an example of how we still owe to indigenous peoples, to this day we see the judiciary denying indigenous peoples and their communities the right to be a party to judicial proceedings where the object discussed in a case relates to their territory or other right, under the pallium of the orphan logical tutelage. This system was in force until October 5, 1988. The tutelary system, coupled with assimilationist politics, annihilated the natives' rights and lasted until the promulgation of our current Political Charter. However, this old regime remains very present, in practice, in the predominate judicial reasoning, and is still de facto applied, even after more than 30 years of its revocation. Unfortunately, although there are exceptions where indigenous people have legitimate standing in the judicial procedures that affect their rights, there are many cases that are contrary to this principle. To mention two of the Supreme Court: ARE 803.462, which counts as current Rapporteur Rosa Weber, (Terena People of Mato Grosso do Sul) and RMS 29.087, whose Rapporteur is Judge Gilmar Mendes. Both cases still await reanalysis in the Supreme Court.

It is worth mentioning a paradigmatic case, in a positive way, in which the Federal Appeals Court in Roraima decided, based on the aforementioned legislation, that the criminal conviction determined by the council of leaders and tuxauas was

legally valid and that the State could not interfere, since the double jus puniendi (double jeopardy) is expressly forbidden (Case # 0090.10.000302-0).

In addition, on rare occasions, the right of indigenous people to speak their own language and to have an interpreter has been respected, and there is no record that there is a judicial proceeding and files translated into the indigenous language. Often prejudices embedded in an integrative vision were applied by the judiciary to deny rights.

There were also rare cases involving non-indigenous persons where imprisonment was refused in relation to other types of punishment, as in the case of imprisonment in an indigenous agency facility near the village. Examples are Tenharim case, (number 0002869-52.2014.8.04. 4400, Court of Justice of the State of Amazonas); or, by analogy to house arrest, in the same village, for example, Guarani Kaiowa case (2007.60.02.002575-5 JF / MS), Enawene Nawe (HC 415348 STJ) and Pankarare 0569516-07.2010.8.26.000 TJ / SP), Tupinambá da Serra do Padeiro (1120-45.2016.4.01.33001 JFBA).

5- How do the jurisdictions between the ordinary justice system and the indigenous justice systems cooperate and coordinate and how is this regulated?

This relationship is very imprecise, since there is still a lack of understanding and cooperation between the parties, especially in Brazil's legal system. There is no dialogue and much less interest on the part of the Brazilian authorities in promoting indigenous traditional justice, beyond the letter of the constitution.

Nevertheless, as a point of contact between the two systems. It can be said that some indigenous peoples of Brazil have been struggling to create their Protocols of Free Prior and Informed Consent, so that in cases where they are affected mainly by works being heard according to their own culture, this is the case of the Wajapi people, Munduruku, Krenak, etc.

6- Are the decisions by indigenous justice systems subject to appeals in, and review by, the ordinary justice system?

Yes, they, like any act of the executive, legislative and even the judiciary that subject to the dominant legal system. It is very different from what happens in countries like Colombia, where a decision taken within the indigenous justice system has national validity. However, it is not written anywhere in our legal system, but, in a general way, in the Brazilian justice system, that any act that defies any provision of law is subject to judicial revision.

However, it is worth mentioning that many situations and decisions that pervade the indigenous justice systems do not even come to the knowledge of the ordinary justice system, considering the vastness of the Brazilian territory and the ethnic diversity that exists. On the other hand, since there is not sufficient data for a deep analysis on the elaborated question, it can be said that cases that threat the life and / or the human dignity end up being judged by the ordinary justice system.

Then, certain that in the event of a collision, there would be immediate action by the State of Brazil in the sense of repression, invading the indigenous jurisdiction. A very clear example of this is the marriages that occur in some people between a minor girl and a child of legal age, in which case the marriage is legitimate for the Brazilian state, it is presumed rape.

7- What measures are in place to strengthen cooperation and coordination between the ordinary and indigenous justice systems? Is there any joint entity consisting of both ordinary and indigenous justice representatives?

There is no action in the sense of cooperation and there is nothing known by us to represent such cooperation.

8- How is it ensured that the accused are not tried in both the customary and ordinary justice system (double jeopardy)?

The State of Brazil has a precedent, mentioned above, that did not allow the double jeopardy (conviction), recognizing that the conviction of the community is lawful and binding. The judiciary discussed the case after the community convicted the accused. The courts of Brazil, in two instances, determined that if the indigenous community has already convicted the accused, the justice of non-Indians could not intervene, since, according to the judges, it would lead to a double *jus puniendi*/double jeopardy. (no. 0090.10.000302-0).

One important issue that prevents the enforcement of several rights is the fact that there is no criminal procedure, from the investigation through the end of the proceedings, to require the authorities to identify the accused as an indigenous person in order to guarantee their rights. specific rights and repel double conviction.

9- What financial and technical assistance is provided by the State to the administration of indigenous justice systems?

No such policy exists. Such an absence consists of a historical debt that the State of Brazil has with the indigenous peoples.

10- Are there measures in place to ensure that indigenous justice systems are in line with international human rights standards and respect the rights of women, children, persons with disabilities and LGBT persons?

There is no measure, no policy and no public funding to contribute to indigenous justice systems.

11- What are the main challenges faced by indigenous peoples in terms of accessing the ordinary justice system?

There are many challenges. One of them is to break with the orphanage tutelary regime. Although the tutelary regime was an issue at stake in the drafting of the Federal Constitution of 1988, when the Brazilian State recognized this regime. However, eventually the Constitution brought in Article 232 that "the Indians, their communities and organizations have an autonomous standing before courts in the defense of their rights and interests", leaving in the past the noxious integrationist thrust. However, Brazil did not institute policies that would enforce in practice this right, as already mentioned above. Many times, indigenous personas are not accepted as legitimate parties to defend their own rights in court.

Another challenge is to break with prejudice and the hegemonic view of the cultural and legal systems of non-indigenous peoples over indigenous peoples. In addition, there is a need for a policy of awareness and training of State agents, such as Union advocates, Attorneys General, State and Federal Public Defenders, Lawyers, civil society organizations and, in particular, the judicial system as a whole, especially its judges.

Finally, public policy aimed at this end.

12- Please describe how legal aid and the right to interpretation are provided in the ordinary justice system for indigenous victims, witnesses and those accused of having committed a crime.

Nowadays, indigenous people, as vulnerable groups, rely on public and / or private lawyers to carry out their defenses within the ordinary justice system. Most commonly, it is the Public Defender's Office and the Federal Attorney's Office of FUNAI - National Indian Foundation, liaised to the Federal Attorney General's Office, who carry out indigenous defenses in criminal cases.

Concerning the right to interpretation, it is for the judiciary to determine whether or not there is a need for the appointment of an interpreter. Such a decision, in general, is fraught with prejudices and is based on arbitrary criteria based on the ill-fated assimilationist view, which was already abandoned by the Federal Constitution of 1988. The interpretation of the mainstream legal system frequently prevails over the indigenous system itself, in each community, of each people, which leads to occurrence of many injustices due to lack of commitment and ignorance of the other, delegitimizing otherness.

13 - Are indigenous or non-indigenous experts called to give testimony during court proceedings involving indigenous persons in the ordinary justice system? Please give examples.

During the proceedings, legal assistance may ask for indigenous or non-indigenous experts to strengthen their theses, but it is worth noting that in the face of structural prejudice against indigenous peoples, most often non-indigenous people have much more value than that of an Indian.

As far as anthropological evidence is concerned, they are allowed as a means of seeking in the intelligence of this science, mechanisms to make people understand the agent and the context of possible illicit acts. In other words it is used to create a bridge that can connect the judiciary with the reality of certain indigenous people, seeking links that erase prejudices. This may occur ex officio, but it is often achieved after some legal dispute, which pervades all instances of the judiciary.

It is worth mentioning the Appeal in Habeas Corpus 86.305, in the STJ (Superior Court of Justice), which calls for the carrying out of anthropological expertise, as well as the presence of an interpreter in all acts of the case, be it for the accused or for the witnesses and the language of the defendants. The lawsuits were denied by the Federal Regional Court of the 4th Region and now awaits judgment in the STJ.

14- In relation to indigenous persons facing criminal penalties in the ordinary justice system, how are their economic, social and cultural characteristics taken into account and how is preference given to methods of punishment other than prison?

Although the Indians have special legislation on the criminal matter, due to cultural specificities, this is hardly respected.

First, as mentioned earlier, indigenous people have the right to be punished by their own people (Article 57 of the Indian Statute and ILO Convention 169). Considering the necessary imprisonment of an indigenous person by the Brazilian

State, she or he has the right to the attenuation of the sentence and to be arrested or detained at the official Indigenous agency (FUNAI) station nearest to the respective village in a semi-liberty regime (article 56 and sole paragraph of Statute of the Indian). Still, in case of absence of these stations nearby, the most appropriate would be imprisonment in the community area itself, including by analogy to house arrest (as in the mainstream justice system).

It should again be emphasized that there is no form of identification of the indigenous person at any stage of the criminal proceedings or at the time of arrest, which prevents these special indigenous rights from being applied. Thus, they are thrown into common prisons and mixed with common prisoners, suffering all sorts of cultural prejudice and debasement.

15- Are indigenous peoples overrepresented in pre-trial detention and prisons compared to the non-indigenous population?

As stated above, there is no form of identification of the indigenous person imprisoned, so there is no reliable data that can actually demonstrate how many indigenous people are being incarcerated in Brazil. The Institute of the Sisters of the Holy Cross, through the Advisory and Defense of Rights, supported by the law on access to information, conducted a survey, questioning state by state on the number of indigenous men and women arrested. In addition to the lack of any pattern in the response, it was clear the discrepancy in relation to the official data presented by INFOPEN, which can be concluded, however, is that the percentage of indigenous prisoners in relation to the total indigenous population is much higher than percentage of non-indigenous prisoners in relation to the national population. Attached to this note is a relevant report of the Federal Public Ministry concerning indigenous prisoners in 2018.

16 - What measures are in place to ensure that places of detention respect cultural and religious practices and culturally adequate health services?

At the end of December 2018, the National Penitentiary Department (DEPEN) issued a Technical Note (attached) with recommendations and guidelines for the treatment of indigenous prisoners. The institutions had 30 days to provide information to DEPEN on whether or not they met the deadlines, which expired at the end of January 2019. Otherwise, there are no other measures or policies in this regard.

17- Please indicate and give examples of how the ordinary justice has provided remedies and reparation for successful indigenous petitioners.

We can cite cases of house arrest or community arrest, when not in a FUNAI station, near the village, in criminal law or habeas corpus to respond to cases in freedom and cases such as the aforementioned that determined the elaboration of anthropological expertise for the benefit of the indians.

There are cases where the Indians are to be summoned and even heard in the community itself, with the obvious displacement of the justice system to the village - but they are no more than rare cases.

There are also cases of recognition of the right of the indigenous community to take part in legal proceedings that discuss some of their rights, especially when discussing land rights - but hardly, since it does not happen officially, but after much dispute in the scope of the process and appeals to the higher courts.

Still, there are already some cases where indigenous individuals, when part in the proceedings, manage to convince the judge that their right should prevail. Bute these represent specific cases that discuss demarcation of lands of traditional occupation.

Annexes:

1- Report on Indigenous Prisoners - Federal Prosecution Service, 2018

2- Technical Note nº19 / 2018 COPMD / COGAB / DIRPP / DEPEN / MJ - Guidance for the treatment of indigenous prisoners

3- Circular Letter 62/2018 DIRPP / DEPEN / MJ - request for information on the treatment of indigenous prisoners