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Juridification and the Indigenous Peoples in Brazil:
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Juridification and the Indigenous Peoples in Brazil: The Ambivalence of a Complex Process*

1 Introduction

It is possible to affirm the existence of a process of progressive juridification of issues involving Indigenous peoples in Brazil.¹ Rodríguez Barón, Dandler and Davis emphasize that in the last decades in this area, increasing “normative inflation”, with its inherent ambivalence, would be verifiable within the whole Latin American context.² They additionally point out that this process, also observable in the international sphere, would be the result of an increase of the political expression and influence of Indigenous movements in the Southern Hemisphere.³ Without wishing to delve deeply into the extensive legal literature that addresses this issue in the Brazilian context, the present analysis aims to describe, from an anthropological and sociological perspective, some fundamental aspects involved in the impact of juridification concerning Indigenous peoples in Brazil.⁴

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1 Juridification (*Verrechtlichung*, in German) will be focused on here from authors such as Jacques Commaille, Jérôme Pélisse, Bruno Jobert, Thierry Delpuech, Laurence Dumoulin, Claire de Galember and Jacques Chevallier, who allude to it using the French term *juridicisation*.

2 RODRÍGUEZ BARÓN (2015); DANDLER (2000); DAVIS (2000).

3 For a concise overview of Amerindian law in international law, see CASELLA (2017). For a more detailed analysis, see STAVENHAGEN (2002). As regards the rights of Indigenous peoples in Brazil, see, for example, AMATO (2014); HEMMING (2003 and 2019); VILLARES (2009) and VILLAS BÔAS FILHO (2003). On the impact of the Universal Declaration of Human Rights on Indigenous peoples, see PEREIRA and VILLAS BÔAS FILHO (2018).

4 Amidst the vast literature that examines the regulation of the interests of Indigenous peoples under Brazilian positive law, see for example: AMATO (2014); SOUZA FILHO

The process of juridification of Indigenous peoples' interests is extremely complex and marked by great ambivalence. Davis, for example, points out that despite the unmistakable advances made in this area (which, according to him, should not be overlooked), it is not possible to disregard the innumerable "obstacles and challenges" and "false beginnings and persistent frustrations" that characterize this process of juridification.⁵ This observation is important because there is a tendency among jurists to consider juridification as a progressive process of implementing guarantees that would only present positive dimensions. Thus, "legal common sense" – unable to perceive the complex and ambivalent character of juridification – can receive a very valuable contribution from an anthropological and sociological perspective.

The process of expansion and consolidation of legal regulation, despite its clear programmatic content in defense of Indigenous peoples, verifiable both in international law and in national legal systems, should not be viewed with excessive optimism because this would conceal its complexity and ambivalence.

First, it should be noted that the process of juridification for Indigenous peoples, in the terms in which it will be defined here, is experienced as the imposition of an exogenous normativity whose rationality greatly diverges from that which guides their forms of regulation and resolution of conflicts. Moreover, in several cases, state regulation of issues involving Indigenous peoples simply ignores their traditional uses and forms of regulation or is based on what Dumont calls "encompassing of contraries" (*l'englobement du contraire*).⁶ Referring to this situation, Davis notes that traditional legal regulation differs substantially from Eurocentric judicial systems which are

(2000); VILLARES (2009); and VILLAS BÓAS FILHO (2003). For a historical analysis that focuses on the legal regulation of Indigenous lands in Brazil, see HEMMING (1978, 1987, 2003, 2008) and LOSANO (2006). On Indigenous rights in international law, see for example: STAVENHAGEN (2002).

5 DAVIS (2000).

6 The notion of "encompassing of contraries" (*l'englobement du contraire*) proposed by DUMONT (1991) aims to make explicit hierarchy in the context of modern ideology, based on the idea of equality. According to Dumont, hierarchy would not have disappeared in modern societies. It would, in fact, be concealed by the myth of equality. However, the author shows that what we value is implicitly interpreted as the point of reference for a general category that encompasses different values. In this regard, see EBERHARD (2002) and LE ROY (1998). For a critique of the notion, see LUHMANN (2002).

based on written documents, legal professionals, legal processes against adversaries, and decisions in which there are clearly winners and losers.⁷

It is possible to affirm that Étienne Le Roy's "theory of multijuridism" (*théorie du multijuridisme*) provides significant analytical tools for the understanding of a decentralized approach to this problem.⁸ Emphasizing that law (*droit*) is only a specific type of juridicity (*juridicité*) – understood as a general and imposable form of social regulation – Le Roy's theory allows the autochthonous modes of regulation to gain progressive relief and, in this way, to be the object of effective consideration in research concerned with the intricate problems involved in the process of juridification (as will be defined below) of issues pertaining to Indigenous peoples. The "theory of multijuridism" also provides a critical viewpoint of the laudatory perspective of juridification, in order to make explicit the complexity and ambivalence inherent in this process.

Thus, using the "theory of multijuridism", the present article intends to focus on the complexity involved in the progressive process of juridification concerning Indigenous peoples under Brazilian law. Of course, this emphasis on state regulation does not imply a disregard of the importance of other forms of juridicity that actually exist and require attention. However, due to the asymmetry of forces that characterizes the relationship between Indigenous peoples and other social agents that interact with them, it is possible to affirm that in Brazil there would have been, historically and still today, the preponderance of what Le Roy designates as "imposed order" (*ordre imposé*).⁹

Therefore, in order to clarify the ambivalent character of the juridification process of Indigenous peoples' issues in Brazil, a brief conceptual outline of the phenomenon of juridification will be carried out. Then, three illustrative aspects of the ambivalence that characterizes its relationship with Indigenous peoples will be highlighted: (1) juridification as an expression of the supremacy of the "imposed order"; (2) the tendency to disregard autochthonous categories within the scope of the juridification process; (3) the asymmetry

7 DAVIS (2000).

8 On the "theory of multijuridism", see for example: LE ROY (1998, 1999, and 2007), EBERHARD (2002), and VILLAS BÔAS FILHO (2014b and 2015b).

9 LE ROY (1987, 1999). On land disputes, which assume enormous importance for Indigenous peoples, see for example: CUNHA/ BARBOSA (2018), LOSANO (2006), and VILLAS BÔAS FILHO (2003).

of forces between the agents who, through juridification, manage the law to satisfy interests which are contrary to those of Indigenous peoples.

2 Juridification: conceptual outline of a complex phenomenon

The discussion of the phenomenon of juridification or ‘juridicalization’ is quite broad and it is not intended here to restructure it in more detailed terms. This analysis will be based especially on authors such as Jacques Commaille, Laurence Dumoulin, Cécile Robert, and Bruno Jobert on “juridification of politics” (*juridicisation du politique*).¹⁰

The processes of juridification (*juridicisation*) and judicialization (*judicialisation*) are the subjects of special attention of Jacques Commaille’s “political sociology of law” (*sociologie politique du droit*), which associates them with the changes of what he calls the “legality regime” (*régime de légalité*) in contemporary Western societies. As Commaille and Dumoulin emphasize, although these two phenomena are often related, they cannot be confused.¹¹ Thus, in order to make explicit the specificities of these two processes, the main features that Commaille attributes to them, starting with juridification, will be presented below.

Commaille (2010b) emphasizes that juridification, observable in the most diverse domains, characterizes our societies. According to him, juridification tends to be accompanied by the process of judicialization of social and political issues. In the latter case, the ‘judicialization of politics’ reveals a shift in the treatment of certain issues from the political to the judicial arena through the increasingly frequent use of law as a resource by social players. In addition, issues relating to political players, especially concerning corruption, move into legal action.¹²

10 In this regard, the analysis will be based essentially on COMMAILLE (2006 and 2010a). For an analysis that focuses on the issues of juridification and judicialization in Jacques Commaille’s “political sociology of law”, see VILLAS BÔAS FILHO (2015a).

11 COMMAILLE/DUMOULIN (2009).

12 DUMOULIN/ROBERT (2010) 9–10 point out that “ce mouvement de juridicisation du social et du politique – dont témoignent la prolifération de la diversification de la règle de droit, la réglementation des pratiques de financement des partis politiques, l’essor du mouvement constitutionnaliste mais aussi l’émergence de ‘la question du droit [...] comme l’un des axes fondamentaux d’un débat politique rénové’ – s’accompagne d’un processus pa-

Delpuech/Dumoulin/Galembert highlight two meanings for the notion of juridification: a) the process by which social norms shared by a group are transformed into explicit legal rules. Therefore in this first meaning, juridification refers to the establishment of legal rules designed to regulate a particular relationship or social activity in order to ensure that observance of these rules be imposed by a court. In this signification, the notion is also associated, above all, with the increase of the proportion of legal rules in the regulation of social activity; b) and also with the progressive growth of the mechanisms of imposition of legal regulation, referring in this case also to the phenomenon of judicialization. In this latter sense, juridification expresses the increase of the “binding force” (*force contraignante*) of the legal rules, mainly by the possibility of appeals to instances, with the consequent restriction of autonomy left to agents.¹³

According to Delpuech/Dumoulin/Galembert, law-making instances often take social norms as reference when defining the content of certain legal rules.¹⁴ However, this law-making process does not consist merely of legislation based on social rules. It implies, sometimes, negotiations and struggles between social agents with diverse conceptions of the world, interests, and values. This approach considers that law holds a high degree of social legitimacy and that, therefore, the juridification of a social norm would result in a reinforcement of adherence to the law. Thus, as García Villegas (2014) observes, there would be a kind of “symbolic efficacy” inherent to law.¹⁵

Based on Bourdieu, Delpuech/Dumoulin/Galembert emphasize the legitimation effect produced by juridification. According to these authors, juridification symbolically distinguishes a norm from particular interests related to it, concealing everything that is arbitrary and contingent on it, in order to present it as neutral and universal.¹⁶ Referring to the expressive

rallèle de judiciarisation.” In this respect, see the distinction proposed by HIRSCHL (2006, 2008, and 2011) between *judicialization of politics* and *judicialization of mega-politics or ‘pure’ politics*.

13 DELPEUCH et al. (2014). CHEVALLIER (2008) 108 ff. refers to juridification (*juridicisation*) in terms of a “mouvement d’expansion du droit”. Therefore, he emphasizes the “normative inflation” that characterizes it.

14 DELPEUCH et al. (2014).

15 GARCÍA VILLEGAS (2014).

16 This issue is particularly highlighted by BOURDIEU (1986a, 1986b). For a more general analysis of this issue, see BOURDIEU (1991, 2012, 2015, and 2016); DELPEUCH et al. (2014).

analyses of Max Weber, Jürgen Habermas, and Niklas Luhmann, Delpeuch/Dumoulin/Galembert also point out that the juridification of an increasing number of domains of social life is a central aspect of the dynamics of the modernization of Western societies, relating to the emergence and expansion of the modern state.¹⁷

Therefore, Delpeuch/Dumoulin/Galembert (2014) consider that differentiation and complexity, characteristics of Western modern societies, provoke a growing demand for legal regulation. This is related, on the one hand, to the need to organize and regulate increasingly numerous domains of activity and, on the other, to the need to limit the negative externalities that they impose on each other.¹⁸

Moreover, it should be noted that the plurality of perspectives implies that multiple meanings are associated with the concept of juridification. This thus requires a precise definition of this concept. For example, Pélisse (2007) argues that juridification expresses a process of formalization based on the progressive extension of positive law to regulate social relations, especially outside the courts, while judicialization refers to increased recourse to judicial institutions and formal procedures for the resolution of conflicts.¹⁹

Emphasizing the significant confusion between the phenomena referred to by the terms juridification and judicialization, Delpeuch/Dumoulin/Galembert also seek to draw a boundary between them.²⁰ In this sense, they define juridification (*juridicisation*) as the proliferation of positive law, as observable through legislative and regulatory inflation, and the multiplica-

17 DELPEUCH et al. (2014).

18 DELPEUCH et al. (2014). Analyzing the paradoxical dynamics of the processes of juridification of social regulations, mobilize theoreticians from different traditions, referring especially to the theory of communicative action of Jürgen Habermas. It is worth noting that HABERMAS (1989) uses the term *Verrechtlichung* to describe the process of expansion and consolidation of positive law. It should be noted that DEFLEM (2008) and WHITE (1999), for example, point out that there is an evolution in Habermas' position in the process he described in terms of *Verrechtlichung*. The specialized literature on this question is monumental, which makes it pointless to seek to cite it here. For an analysis of juridification from a systemic bias, see TEUBNER (1987). On juridification in the literature available in Portuguese, see for example: O'DONNELL (2000), FARIA (2010), and VILLAS BÓAS FILHO (2009). For an analysis of juridification in the thought of Jacques Commaille, see VILLAS BÓAS FILHO (2015a).

19 PÉLISSÉ (2007).

20 DELPEUCH et al. (2014).

tion of legal forms of regulation of social relations. In this distinction, it is possible to affirm that one is faced with what Commaille/Dumoulin describe as a global phenomenon of expansion and mutation of legality.²¹ On the other hand, Delpuech/Dumoulin/Galembert define judicialization (*judicialisation*) as the progressive increase in the power of judges and courts.²² For this reason, Commaille points out that the term judicialization means to some authors a shift from the executive and legislative powers towards the judiciary to ensure the regulation of politics in the inner place of politics.²³

However, according to Commaille/Dumoulin, although judicialization can be broadly considered as a form of juridification, the relationship between these two phenomena is not linear, direct, or congruent.²⁴ On the contrary, as the authors point out, one cannot focus on judicialization as a direct expression of juridification, since the relations established between these phenomena are complex and depend on historical and national configurations and can thus assume concrete different articulations. Thus, alluding to Barry Holmström's analysis of the Swedish experience, Commaille/Dumoulin seek to highlight concretely the non-linear relationship between juridification and judicialization.²⁵

According to Commaille/Dumoulin, in the Swedish context, increasing judicialization was not due to juridification but rather to a kind of compensation arising from the reflux of the role of jurists in political life.²⁶ Therefore, it was the expression of the progressive scarcity of the influence of jurists on the state apparatus that would have, in compensatory terms, increased reinforcement of the courts as a kind of 'third power'. In this

21 COMMAILLE/DUMOULIN (2009).

22 DELPEUCH et al. (2014). For an analysis that focuses on judicialization in terms of a destabilization of the traditional "territories of justice" in the French context, see COMMAILLE (1999, 2009, 2015, and 2019). On judicialization in the French discussion, see ROUSSEL (2003).

23 COMMAILLE (2013). In this respect, see COMMAILLE (2009). It should be noted that it is especially in this way that Brazilian sociological literature is directed. In this regard, see for example: AVRITZER/MARONA (2014); CAMPILONGO (2000 and 2002); MACIEL/KOERNER (2002); NOBRE/RODRIGUEZ (2011); VIANNA et al. (1999 and 2007).

24 COMMAILLE/DUMOULIN (2009).

25 COMMAILLE/DUMOULIN (2009).

26 COMMAILLE/DUMOULIN (2009).

sense, judicialization derived, ultimately, from the ‘de-juridification’ of political life and the Swedish state apparatus.

Therefore, it is not possible to confuse or relate such phenomena in terms of subsumption or automatic reciprocal derivation. This observation is particularly important in a complex social context such as in Brazil. It is not inconceivable that in Brazil distinctive arrangements occur between such phenomena and, in addition, that they occur in a varied way when dealing with different issues. As pointed out, judicialization may in some cases result from juridification and, in others, as compensation, from ‘de-juridification’. However, *vis-à-vis* issues involving Indigenous peoples in Brazil, it seems possible to affirm the existence of a trend of judicialization driven by increasing juridification.²⁷

As mentioned, this paper focuses only on the ambivalent aspects of juridification, which does not of course disregard the importance of judicialization. The emphasis here on juridification stems only from the assumption (itself plausible, even if still calling for a more effective analysis) that, regarding issues involving Indigenous peoples in Brazil, there would be a tendency for the process of juridification to inflect on the process of judicialization. Therefore, it is necessary to analyze juridification prior to analyzing judicialization.

Several examples could be mobilized to illustrate this trend. Among them, the action promoted by the Panará Indigenous people for the repossession of their lands in the Iriri River region is emblematic. It was a declaratory action against the federal government, the National Indian Foundation (FUNAI) and the National Institute for Colonization and Agrarian Reform (INCRA) in 1994. The Panará Indigenous people had been transferred to the Xingu Indigenous Park which guaranteed the survival of its members. In the declaratory action of 1994, the Panará Indigenous people, two decades after their transfer and through the management of law, obtained the exclusive usufruct of an area close to the one that was occupied by them when the contact was made.²⁸

27 For a compilation of the expressive Indigenous legislation in Brazil, see for example: VILLARES (2008). Concerning the impact of the Federal Constitution on Brazilian legal order on this issue, see for example: AMATO (2014); LOSANO (2006); VILLARES (2009); VILLAS BÔAS FILHO (2003, 2006, and 2014a).

28 In this respect see HEMMING (2003); HEMMING et al. (1973); DAVIS (1977); and VILLAS BÔAS FILHO (2006 and 2014a).

However, this action depended first on the emergence of Indigenous peoples as new players who, in the clash of forces that took place in the “indigenist field”,²⁹ gradually began to use law to protect their interests. Secondly, it depended on the progressive juridification of historical claims of Indigenous peoples, especially with regard to their culture, language, social organization, and traditionally occupied lands, claims that were incorporated into the Brazilian Federal Constitution of 1988.³⁰

3 Juridification as an expression of the supremacy of the “imposed order” over “negotiated order”, “accepted order”, and “contested order” (a brief incursion into the typology of Étienne Le Roy)

It is worth noting that, with respect to Indigenous peoples, juridification as defined above expresses a progressive expansion of the Western “juridicity” (*juridicité*) as defined by Le Roy, on the autochthonous forms of social and legal regulation.³¹ According to Le Roy, in Western “juridicity”, the normative dimension of legal regulation is predominant, while in several traditional societies customs and habitus prevail.³² This means that the process of juridification, by creating an overlap of Western juridicity over Indigenous peoples, imposes on them a form of regulation distinct from that which they have traditionally developed.

It should be noted that, according to Le Roy, “juridicity” (*juridicité*), of which “law” (*droit*) is only a specific form of expression, is composed of “general and impersonal norms” (*normes générales et impersonnelles – NGI*), “conduct and behavior models” (*modèles de conduites et de comportements – MCC*), and “systems of durable dispositions” (*systèmes de dispositions durables – SDD*).³³ However, societies do not organize the foundations of their “juri-

29 Regarding the notion of “indigenist field” see VILLAS BÔAS FILHO (2014a, 2016a, and 2017).

30 This case illustrates the ambivalent nature of the legal process already mentioned because, as Eduardo Zimmermann pointed out in his commentary on the draft of this text, this is a situation in which a subaltern group used mechanisms of positive law to their advantage, notwithstanding their origin in Eurocentric judicial systems. Nancy Yáñez Fuenzalida also emphasized this point in her comments on my draft.

31 LE ROY (1987, 1999, 2013b, 2014, and 2017).

32 LE ROY (1998, 1999, 2007, and 2017).

33 LE ROY (1998, 1999, 2007, and 2017).

dicity” in the same way. There is, consequently, variability in the arrangements of the “foundations of juridicity”.

Le Roy proposes a comparative table that explains the possible arrangements experienced by these three “foundations of juridicity” in “four great legal traditions”.³⁴

Legal traditions	Main foundation	Secondary foundation	Tertiary foundation
Western / Christian	NGI	MCC	SDD
African / Animist	MCC	SDD	NGI
Asian / Confucian	SDD	MCC	NGI
Arab / Muslim	NGI	SDD	MCC

Le Roy (1987 and 1999) also recommends an “ideal-type” distinction to explain the different modes of conflict resolution, among which the following types of orders are indicated: a) “accepted order” (*ordre / ordonnancement accepté*), a dyadic mode of solution in which the disputes do not turn into conflicts once the parties manage to compromise on their claims; b) “contested order” (*ordre / ordonnancement contesté*), a dyadic mode of solution, in which conflicts end with the victory of the strongest or the most able; c) “negotiated order” (*ordre / ordonnancement négocié*), in which the intervention of a third party occurs for the solution of conflicts and in which legal norms are non-mandatory models; d) “imposed order” (*ordre / ordonnancement imposé*) which expresses the transformation of conflicts into litigation that are resolved through the application of positive law by a judge.³⁵ Rouland mobilizes this distinction, for example, in his analysis of alternative forms of conflict resolution.³⁶

Therefore, understood as an expression of a progressive expansion of the “imposed order”, the phenomenon of juridification is not something straightforward with respect to Indigenous peoples because it tends to impose an “arrangement of juridicity” and a form of conflict resolution that are external to them. This fact does not, however, deny the positive facet of

34 LE ROY (1999).

35 LE ROY (1987, 1999).

36 ROULAND (1988, 1995, and 2003).

the juridification process, but only stresses its complex and ambivalent character with regard to Indigenous peoples.

According to Davis and Dandler, in Latin America for instance, the juridification of Indigenous issues tended precisely to establish the “imposed order” as hegemonic in the resolution of conflicts.³⁷ Moreover, recovering what was said by Guillermo Arancibia López, Minister of the Supreme Court of Bolivia, Davis emphasizes something that is directly applicable to the Indigenous peoples in Brazil: the legal system suffers from a considerable degree of imposition, which means that very little attention is given to appreciating, analyzing, and consulting cultural values, local circumstances, or the specific factors involved in a dispute. There is a tendency to fix the “imposed order” to the detriment of others.³⁸

Incidentally, Rodríguez Barón based on Segato, observes that the emphasis on the demand for recognition of land rights has tended to divert the attention of Indigenous peoples away from the recognition of their own conflicts.³⁹ Thus, referring to the Argentine case, the author emphasizes that progress in the demarcation of Indigenous territories was not accompanied by the effective retrieval of the proper forms of conflict resolution and genuine self-government by Indigenous peoples. Segato highlights the same phenomenon in the Brazilian context.⁴⁰

37 DAVIS (2000), DANDLER (2000). Referring to the way in which the process of juridification ends concretely in judicialization, Davis points out that the differences between the written law and the social realities of Latin American countries are remarkable. While anthropologists increasingly perceive the multiple nature of legal systems in Latin America and the persistence of traditional, local, or village law regimes, the latter remain subject to national legal regimes and little known to judges and lawyers in most countries.

38 DAVIS (2000) 173. For an analysis of the “peasant rounds” (*rondas campesinas/rondes paysannes*) and their tensions with the official order in the Andean region, see PICCOLI (2011). This issue refers to discussions on legal pluralism. For an overview of the pluralistic discussion within the framework of legal anthropology, see, for example, BERTINI CHIRIBOGA/YÁÑEZ FUENZALIDA (2013); DUPRET (2003, 2005, 2010, and 2016); EBERHARD (2003); MOORE (2014); ROULAND (1988, 1995, and 2003); SIERRA/CHENAUT (2002); TAMANAHA (2000); and VANDERLINDEN (2009, 2013a, 2013b, 2013c, and 2013d). On inter-legality, see SANTOS (2002 and 2003). For a perspective that intends to order legal pluralism, see DELMAS-MARTY (2006). On the issue of juridicity, see LE ROY (1998, 1999, and 2013b) and VILLAS BÔAS FILHO (2014b and 2015b).

39 RODRÍGUEZ BARÓN (2015); SEGATO (2014).

40 SEGATO (2014).

4 The tendency to disregard autochthonous categories in the juridification process

In addition to this tendency to impose a form of conflict resolution (“imposed order”) which is largely foreign to the traditional forms of regulation among Indigenous peoples, the process of juridification also frequently leads to the disregard of Indigenous categories. Eberhard observes that:

“When we translate a cultural perspective different from ours, we do it through our own culture. To give just one example: in the case of the recognition of the rights of Indigenous peoples, the predominant view in the Western world transforms this demand into an anthropocentric demand for collective rights.”⁴¹

This problem is especially visible in land issues where frequently there is a kind of ‘translation’ of traditional concepts of land use and appropriation into a categorical system founded on a concept of property unknown to Indigenous peoples. It could be said that this is what Dumont refers to as “encompassing of contraries” (*l’englobement du contraire*).⁴² In fact, it should be noted that the ignorance and ethnocentrism of the ordinary jurist, in engendering a simplistic beaconing that nullifies all differences concerning the use and appropriation of land, contribute to producing situations of great injustice and, in addition, potential conflicts, since they either distort and misrepresent the Indigenous concepts or simply, disregarding them, impose on them an external concept (by mobilizing the “lack argument”).⁴³

This issue was evidenced, for example, in the trial of the “Raposa Serra do Sol” Indigenous Land by the Brazilian Supreme Court. The nineteen determinants for the recognition of Indigenous lands in the trial of this reservation, besides clearly restricting the autonomy of the Indigenous peoples of

41 EBERHARD (2008) 13.

42 DUMONT (1991).

43 In addition to MATTEI/NADER (2008) see EBERHARD (2002), LE ROY (1998), and VILLAS BÔAS FILHO (2015b, 2016a, 2016b, and 2016c). As Eduardo Zimmermann correctly observed in his comments on my text, it may be too much to ask lawyers and judges to become interpreters or legislators of a multicultural society. This is certainly true. However, a legal education that considers the elementary aspects involved in intercultural relations might contribute to mitigating (although not resolving) potential conflicts in this field. Of course, one cannot disregard the political and economic interests also involved in these issues.

Brazil, were crossed by great ethnocentrism and incomprehension of the Indigenous concepts about the use and appropriation of land. In this respect, it should be noted that the most shocking and absurd condition – not included in the enumeration but in the body of the decision – is the establishment of October 5, 1988 (date of the promulgation of the Federal Constitution of Brazil) as an arbitrary cut-off date for the recognition of lands occupied by Indigenous peoples. This decision expresses precisely the gross imposition of the Western concept of land use on Indigenous peoples.⁴⁴

In this regard, Le Roy's theory seems to be fundamental. Based on broad fieldwork carried out over decades between various African societies, especially among the Wolof of Senegal, and the development of a deep theoretical discussion that mobilized compelling authors of legal anthropology, Le Roy examines the plurality of land tenure regimes.⁴⁵ Based on his research, Le Roy criticizes the indiscriminate projection of the “paradigm of exchange” (*paradigme de l'échange*) for all societies.

Thus, problematizing classical interpretations such as those of Marcel Mauss and Claude Lévi-Strauss, Le Roy emphasizes the heuristic potential of the “paradigm of sharing” (*paradigme du partage*), especially for the understanding of communal land use.⁴⁶ This discussion, whose empirical horizons are African societies, can with due adaptations offer an important instrument of understanding (of a non-ethnocentric character) of the relation of Brazilian Indigenous peoples to their traditional lands. The complexity of such an approach cannot be resumed here. As a simple example of what is involved in the scope of this kind of approach, it should be noted that Le Roy observes that the difference between land tenure regimes can be expressed in two propositions.

First, Le Roy argues that land rights are the realization of different ways of thinking about space and social relations.⁴⁷ It follows that, in order to understand the distinctiveness of modern private property law, it is necessary to

44 On the question of translation in the context of interculturality, see EBERHARD (2008, 2009, 2010, 2012 and 2013). Concerning this arbitrary cut-off date for land claims, called “marco temporal”, see CUNHA / BARBOSA (2018).

45 LE ROY (2011, 2013a, 2014, and 2015). For an analysis of the book *La terre de l'autre*, see MÍGUEZ NÚÑEZ (2014).

46 LE ROY (2014).

47 LE ROY (2013a and 2017).

relate this invention to a “geometric representation” of the space that, by measuring the surface, gives it a use-value, an exchange value, and introduces it into the market. However, in order to understand the equally important originality of autochthonous, Aboriginal, or Indigenous land rights, which often reject the commercial use of land, it is essential to mobilize two other representations: “topocentrism” (in which a point is the center of attraction of social relations) and “odology” (“science of paths”, observed by the author among the hunter-gatherer peoples of the Republic of Congo, among the pastoralists of the African Sahel, and among Australian Aborigines and natives of Quebec).⁴⁸

Second, contemporary land tenure regimes combine originally distinct, sometimes competing, and often contradictory systems of law that are forced to adjust to one another. Thus, each regime of appropriation, as experienced by a specific group, constitutes a combination of devices of varied origins that rely on distinct rational choices. This brief allusion to the analysis proposed by Le Roy makes it possible to explain how useful it is for the critique of ethnocentrism that generally underlies the analyses made by jurists regarding the land rights of Indigenous societies.⁴⁹

5 The asymmetry of forces among the agents who, through the juridification process, manage state law to achieve gains contrary to those of indigenous peoples

Finally, in relation to the two preceding questions, there is the problem of the asymmetry of forces between agents who, through the juridification process, use state law to gain advantages contrary to those of Indigenous peoples. Although it is not a question of adopting an “instrumentalist” view of law, it is not possible to disregard the asymmetrical relations of forces that, in the legal field, guide what Bourdieu calls “competition for the monopoly of the right to say what is right” (*concurrence pour le monopole du droit de dire le droit*).⁵⁰ On this issue, Commaille referring to Galanter, emphasizes

48 Eduardo Zimmermann is right to point to the dilemmatic nature of this problem when he, in consonance with James Scott, asks how to reconcile local uses of land tenure with the standing legal orders and even with the structure of modern nation-states.

49 LE ROY (2011, 2013a, and 2014). See SIERRA/CHENAUT (2002).

50 BOURDIEU (1986b) 4. He criticizes both the “formalist” vision, which advocates an absolute autonomy of legal form in relation to the social world, as well as the “instrumental-

the need to consider that “the ‘players’ of justice do not have equal resources” (*les “joueurs” de justice ne disposent pas de ressources égales*).⁵¹ Because of the asymmetry of forces that characterizes the struggles concerning the rights of Indigenous peoples, the process of juridification might serve as an instrument of plunder against such peoples.⁵²

Mattei/Nader, through a historical-anthropological analysis, seek to point out how concepts such as “civilization”, “democracy”, “development”, “modernization”, and “rule of law”, can serve as support for the plundering of resources and ideas by the hegemonic Western capitalist countries.⁵³ Examining what they call “law’s dark side”, Mattei/Nader seek to demonstrate the increasing use of the “Rule of Law” idea to legitimize plunder.⁵⁴ In order to indicate a nexus of continuity between colonialism and neoliberal capitalism, they emphasize that the rhetorical use of the “Rule of Law” would serve as a “camouflage” of plunder by Western capitalist countries on a global scale.⁵⁵

ist”, which conceives law as a reflection or tool in the service of the dominating group. The first is associated with authors such as Hans Kelsen and Niklas Luhmann and the second to authors like Louis Althusser.

51 COMMAILLE (2007) 263; GALANTER (2006).

52 Hemming’s expressive analysis is full of examples in this regard. Referring to the context of drafting the Brazilian Constitution of 1988, HEMMING (2003) 348 remarks that “Brasília was full of vociferous lobbies, each clamoring for recognition in the Constitution. Some of these mounted threats to the Indian cause. [...] A far more serious threat came from the mining lobby.” DAVIS (1977) highlights the lobbying of large foreign mining companies in Brazilian legislation during the military regime. These companies played a central role in opening new mining frontiers affecting different Indigenous lands.

53 MATTEI/NADER (2008) define plunder as the theft of another’s property through force, especially in times of war (pillage) and also of appropriation obtained through fraud or force. According to the authors, it would be especially the second definition that would express what they call “the dark side of the rule of law”. Concerning the plunder of Indigenous communities, see also NADER (2002) and VILLAS BÔAS FILHO (2016a and 2017).

54 MATTEI/NADER (2008).

55 MATTEI/NADER (2008). In his comments on my paper, Eduardo Zimmerman pointed out that rhetorical use of the “Rule of Law” could also serve as camouflage for opportunistic rent-seeking behavior. This can obviously happen. However, due to the asymmetry of forces between Indigenous peoples and other social players with opposing political and economic interests, it is reasonable to assume that the rhetorical manipulation of the “Rule of Law” for plundering purposes tends to prevail. In this regard, see GALANTER (2006) and COMMAILLE (2007).

Mattei/Nader argue that the law, in its current configuration, legitimates the plunder carried out both in international and national contexts.⁵⁶ For the authors, the rhetoric of hegemonic countries would consist - by mobilizing the “lack argument” – in attributing to other societies the incapacity of an institutional and juridical organization comparable to that of Western countries.⁵⁷ Thus, in this perspective the “lack argument” is also used as rhetorical support for the transfer of Western law to other societies. The purpose of this text is not to critically discuss the thesis held by the authors. What is important to highlight here is the possibility of the instrumentalization of the process of juridification for the plunder of Indigenous peoples.

According to Davis, Dandler, and Hemming, in Latin America there would have been a tendency during the 1990s to adopt constitutional reforms or to promulgate new constitutions containing significant clauses regarding the rights of Indigenous peoples.⁵⁸ In the Brazilian case, there is an increasing production of infra-constitutional norms that, when regulating various issues, focuses on Indigenous peoples.⁵⁹ Therefore, it is possible to verify the existence of a juridification process, which in general terms, is favorable to Indigenous peoples. However, as Davis points out, these advances (which should not be underestimated) cannot hide the ambivalence of a complex process.⁶⁰

Several examples illustrate the instrumentalization of juridification for the plundering of Indigenous peoples’ rights in Brazil. Hemming, analyzing the Law of Lands of 1850, emphasizes the instrumentalization of positive law for the land plundering of Indigenous peoples in Brazil.⁶¹ Dandler, for

56 MATTEI/NADER (2008).

57 This argument was historically mobilized (and still is) in discourses that preach ‘inferiority’ of Indigenous societies. Concerning Brazilian history, see especially the expressive work of HEMMING (1978, 1987, 2003, 2008, and 2019). For a critique of such discourses, it is possible to refer to CLASTRES (2011). In this respect, see also VILLAS BÔAS FILHO (2016b). For a contrast between Laura Nader and Ugo Mattei’s “lack argument” and Étienne Le Roy’s idea of “logic of subtraction”, see VILLAS BÔAS FILHO (2015b). For an analysis that illustrates this issue very well in African societies, see LE ROY (2004).

58 DAVIS (2000); DANDLER (2000); HEMMING (2003).

59 For a compilation of such legislation, see, for example, VILLARES (2008).

60 DAVIS (2000). Declining to say that these ambivalences are not properly considered by those who, trapped by a formalistic and positivist vision like SOUZA FILHO (2000), believe in the panacea of a “rebirth of the Indigenous peoples to law”.

61 HEMMING (1987) 179-180 asserts emphatically that “the assault on Indian land was effectively codified in the Law of Lands of 18 September 1850. This was the basic property

example, mentions the Decree no. 1,775 dated January 8, 1996 which, in a way that was contrary to the interests of Indigenous peoples, disposed of the administrative procedure for the demarcation of their lands.⁶² Focusing on the period of military regime in Brazil, Davis (1977) indicates numerous examples in which the law was mobilized as a way of supporting agribusiness interests against Indigenous peoples.⁶³ Mattei and Nader, analyzing the use of the “Rule of Law” for the plundering of ideas, illustrate this practice alluding to a patent case involving the traditional knowledge of Kayapo Indians in Brazil.⁶⁴ More recently, a controversial constitutional amendment project (PEC 215) also serves as an illustration of the use of state normative production to support interests contrary to those of Indigenous peoples.⁶⁵ The current government in Brazil, in association with national and international groups, does not hide its interest in the exploitation of Indigenous lands. For this purpose, the Brazilian president, through a decree (MP 886), attempted to transfer the demarcation of Indigenous lands from FUNAI to the Ministry of Agriculture.⁶⁶

legislation of the Brazilian Empire. It defined private lands as those that were purchased, legally owned and occupied. This principle, which guaranteed colonists’ rights, ‘was of dire consequence for the natives. Indians were generally unable to take the necessary legal steps to consolidate their territorial rights. As a result, many of them came to lose their rights over such land, either from ignorance or inertia, or as a result of the astuteness or wicked initiatives of their neighbours.’ This same law awarded unoccupied lands (*terras devolutas*) to the state.”

62 DANDLER (2000).

63 DAVIS (1977).

64 MATTEI/NADER (2008) 86 affirm that “the Kayapo are only one example. [...] The best-known example is the Indian *neem* plant (the village pharmacy), traditionally serving many health purposes. Western scientists ‘discovered’ the active principle and then obtained a patent for oral hygiene use in Florida.” This case illustrates very well the distinction between the “paradigm of exchange” and the “paradigm of sharing” recommended by LE ROY (2014). In this respect, see also ROCHFELD (2014).

65 PEC n. 215/2000 proposes to include, among the exclusive competences of the Brazilian National Congress (in which there is intense agribusiness lobbying) the approval of demarcation of lands traditionally occupied by Indigenous peoples and ratification of already approved demarcations.

66 HEMMING (2019) 213 asserts that “in 2019, Brazil’s indigenous peoples faced a terrible unforeseen challenge. [...] the new president was deeply hostile to Indians, whom he regarded as an anachronistic impediment to progress. He and his ‘ruralist’ lobby in Congress openly coveted the vast indigenous territories and their natural resources of timber, minerals, and potential farmland.”

6 Conclusion

The adequate comprehension of a complex and multifaceted phenomenon requires the consideration of its constitutive aspects. My point is that juridification is a complex and ambivalent process with both positive and negative aspects. Therefore, juridification cannot be uncritically celebrated only as a form of recognition of the self-determination of Indigenous peoples and as an instrument for the maintenance of their traditional forms of legal regulation. This is certainly true, but it is just one aspect of this complex process.⁶⁷ Metaphorically, it would be possible to affirm that juridification is a Janus-faced process that, along with its positive dimension, also has a negative one. Hence, without disregarding the unmistakable positive dimension of this process which is generally emphasized, the present analysis has focused on the challenges involved in its negative dimension.⁶⁸

Thus, in order to highlight the complexity and ambivalence that characterize the process of juridification of issues related to Indigenous peoples in Brazil, a brief reconstruction of Jacques Commaille's conception of juridification was carried out. This reconstruction aimed to make explicit the theoretical reference mobilized here for the analysis of the phenomenon of juridification. Subsequently, with the aim of illustrating the ambivalent nature of this phenomenon in relation to Indigenous peoples, three questions were investigated: a) juridification as an expression of the supremacy of the "imposed order"; b) the tendency to disregard autochthonous categories in the scope of the juridification process; c) the asymmetry of forces between the agents who, through juridification, manage the law to satisfy interests contrary to those of Indigenous peoples. All these issues underscore the vulnerability of Indigenous peoples and the deviations of legal regulation

67 It is worth mentioning that, with respect to this complexity of juridification, the accurate considerations made by Eduardo Zimmermann about the implications of my analysis on issues such as citizenship and sovereignty are crucial. However, the treatment of these issues goes beyond the limits of my analysis.

68 For this reason, I consider that all the pertinent critical comments made by Nancy Yáñez Fuenzalida to the draft of my article do not invalidate my point. I even agree with almost all of her analysis regarding the importance of juridification for the recognition of Indigenous forms of legal regulation (which leads us to the question of the recognition of legal pluralism) and for the support of a potential counterhegemonic legal reaction on the part of Indigenous peoples. However, these were not the aspects that I sought to analyze.

in the Brazilian context, which, as Moser emphasizes, is characterized by self-imperialism.⁶⁹

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69 MOSER (2016).

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