

Indigenous peoples' rights and covid-19 in the Amazon: a comparative analysis between Brazil and Peru

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ABSTRACT

The aim of this article is to analyze, in a public comparative law approach made by a complex and critical perspective, the legislative initiatives related to the rights of indigenous peoples that have arisen in the context of the health crisis of Covid-19 in Brazil and Peru, focusing particularly on the common elements related to the protection of their lands. The hypothesis is that although significant legal norms have been produced for the protection of Indigenous Peoples in both countries, they have: 1) problems of applicability, and 2) problems of legitimacy. The conclusion of the article confirms the research hypothesis and also points to the problem of the time lapse of the new legal norms and to the problem of land in the Amazon, which remains an open geopolitical issue. The article is therefore divided into three parts: I – Amazon, Covid-19 and rights of Indigenous Peoples in Brazil and Peru; II – New legal instruments in Brazil and Peru; III – Between texts and contexts: rights of indigenous peoples in the Brazilian and Peruvian Amazon in comparative analysis.

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KEYWORDS

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Introduction

In the first half of 2020, the rapid spread of the new coronavirus disease (Covid-19) across the globe had a considerable impact on the dynamics of political and legal relations. Its characterization as a *Pandemic* by the World Health Organization (WHO) implied on the adoption of restrictive measures around the world, ranging from the ban on travel to the imposition of rigid lockdowns – as in China and Italy – to millions of peoples and for a long period of time. This is a large “world health crisis”, for which its real effects have not yet been fully accounted for, as the search for a possible cure remains in force. Indeed, the management of this crisis by the States has produced what can be called the “*politics of pandemic*”, or even, the “*law of pandemic*”, which are the result of the different responses adopted to face it.

It can be said that the health crisis had a direct or indirect impact on all societies of the globe. However, it is notable that there are certain communities which, due to social and biological conditions, are more acutely impacted. The Indigenous Peoples of the Amazon rainforest make part of these communities and register – until now – high rates of contagion and lethality due to Covid-19. Brazil and Peru are two states in South America that share a great border in the Amazon, where indigenous peoples of different ethnicities and cultures live. Both countries were – until October 2020 – among the fifteen hardest hit in terms of contagion and lethality worldwide – only Brazil being the third country in contagion and the second in deaths. Amazon rainforest was – and has been – a region particularly affected by the spread of the disease, and the Brazilian and Peruvian Indigenous Peoples who live in it directly suffer from a historically imposed *political and legal vulnerability process* in which, with the rise of the pandemic, is largely deepening.

Taking it in consideration, this article aims to analyze the legislative initiatives related to the rights of Indigenous Peoples that emerged in the context of the world health crisis in Brazil and Peru, focusing particularly on the common elements related to the protection of

their lands, from the beginning of the outbreak until October 2020. The study is made by a comparative public law methodology in a complex and critical perspective, dialoguing with a sociological perspective of law. The hypothesis to be investigated is that although certain legal norms have been produced for the protection of Indigenous Peoples in both countries, they have: 1) *problems of applicability*, which have boosted their judicialization; and 2) *problems of legitimacy*, which are related to the degree of adequacy to indigenous ways of life, intercultural dialogue and the participation of these peoples in the making-process of these norms. The article is therefore divided into three parts: I – Amazon, Covid-19 and rights of Indigenous Peoples in Brazil and Peru; II – New legal instruments in Brazil and Peru; III – Between texts and contexts: rights of indigenous peoples in the Brazilian and Peruvian Amazon in comparative analysis.

1. Amazon, Covid-19 and rights of Indigenous Peoples in Brazil and Peru

The Mexican anthropologist Rodolfo Stavenhagen starts one of his most important books, written in 1988¹, stating that “land” is a “complex problem” – *un problema complejo* – for Latin American Indigenous Peoples, essentially linked with the archaic agrarian structure of different countries and with the diverse agrarian reform and counter-reform processes that have taken place on the continent. After 30 years, his statement continues to make sense, especially when looking at the geopolitics of law in Amazon. Its cultural and biological richness and diversity has repeatedly been the subject of geopolitical and geo-economic disputes, most recently marked by the increase in *extractive activities*² and *mineral exploitation*. This characteristic deepens the dynamics of inequality and vulnerability of the peoples who live in the forest, among them, the Indigenous Peoples, who face the daily violation of territorial rights³.

Brazil and Peru are two cross-border countries that have large territories and indigenous populations in the Amazon. In Brazil, the Amazon area – legally called the “Legal Amazon” (*Amazônia Legal*) – corresponds to 5,034,740 km², equivalent to 59.1% of its total territory, in which around 170 ethnic groups live in 422 indigenous lands recognized by the Brazilian State. This is equivalent to 23% of the total Brazilian Amazon territory and 98.2%

¹ R. Stavenhagen, *Derecho Indígena y Derechos Humanos en América Latina*, (1988), Instituto Interamericano de Derechos Humanos, Ciudad de México, pp. 09: “A complex problem is that of the land of Indigenous Peoples, linked as it is to the general problem of the agrarian structure and to the various agrarian reform and counter-reform processes that have taken place in different countries of the continent”, my translation.

² Comisión Interamericana de Derechos Humanos (2019), *Pueblos Indígenas y tribales en Panamazonia*: situación de los Pueblos Indígenas y tribales de la Panamazonia, Organización de los Estados Americanos, pp. 14.

³ E. Heck, F. Loebens, P.D. Carvalho, *Amazônia Indígena: conquistas e desafios* (2005), *Estudos Avançados*, Universidade de São Paulo.

of the extent of indigenous lands throughout the national territory. In Peru, the Amazon comprises 782,826 km², equivalent to 60.9% of its territory. It inhabits 51 indigenous peoples spread in 2,851 “communities”, of which 2,158 are officially recognized by the Peruvian State⁴. These peoples have an active and indispensable role in the conservation of the forest *in situ* and in the improvement of agrobiodiversity in the Amazon, through the use of their respective traditional knowledge on land cultivation and conservation practices. Along with, they are *agents of socio-environmental sustainability*, not only for the Amazon rainforest, but for the entire planet⁵.

The Amazon region and its Indigenous Peoples have been particularly hit by the recent Covid-19 pandemic. The health emergency directly or indirectly impacts the management of indigenous lands and the guarantee of the territorial rights⁶ for their enjoyment, 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”⁷.

There are at least three factors that contributed to the intensification of contagion in these places that demonstrate the interference by States in guaranteeing the rights of Indigenous Peoples: 1) the continuous and permanent invasion of Indigenous lands by companies and individuals for mineral exploitation – which happens more incisively in the Brazilian Amazon; 2) the lack of State protocols for the delivery of food and essential goods to indigenous populations in their lands; and, 3) the precarious indigenous health systems in the region, which have problems with testing, tracing and controlling the pandemic.

The fact that both States do not have official data on the number of infected Indigenous Peoples is a major problem in formulating an adequate response regarding these populations. In effect, on the date of October 20th, 2020, according to official data from John Hopkins University, Brazil had 5,250,727 confirmed cases of covid-19, ranking third in the overall ranking of affected countries – behind the United States and India – and a total of 154,176 deaths – second in the world, just behind the United States – which represents a lethality rate of 2.9%. Peru, on the same date, had 870,876 confirmed cases – ranking eighth in the general ranking – with 33,820 deaths officially registered.

⁴ Comisión Interamericana de Derechos Humanos, (n. 3), pp. 201-206.

⁵ As states M.C. Cunha, M.W.B. Almeida, *Indigenous People, Traditional People and Conservation in the Amazon* (2000), 129 2 *Daedalus*, Cambridge.

⁶ The term “territorial rights” expresses the ownership by Indigenous Peoples of their lands, and also makes reference to other rights that are correlated to it, as environment, culture, intercultural dialogue, etc.

⁷ J.F.C. Tzay, *Rights of Indigenous Peoples: note by the Secretary-General A/75/185* (2020), United Nations General Assembly, pp. 5.

According to official data, Peru is the second country in the world and the first in the Americas in terms of *per capita* mortality, with 1.021 deaths per one million people⁸. However, there is no official government survey in both countries to collect data regarding the number of Indigenous Peoples infected by Covid-19⁹. The data, therefore, are recorded by the communities themselves and compiled by Non-Governmental Organizations. In Brazil, the *Instituto Socioambiental* records 37,219 confirmed cases, 856 deaths and 158 affected people as of October 20¹⁰. In Peru, the data from 20th August shows that at least 21.921 Indigenous Peoples have been infected by Covid-19, and 384 deaths, according to the data collected by Asociación Interétnica de Desarrollo de la Selva Peruana (Aidesep)¹¹.

In a Report published in September 2020 by the “*Plataforma Indígena Regional frente a COVID-19*”, it states out that “From a group of 13 countries considered, Brazil, Peru and Guatemala present the highest number of cases of contagion in indigenous populations, representing 72.5% of all cases in the region”¹².

Through data analysis, it is notable, therefore, that due to a variety of circumstances and political decisions, Amazonian Indigenous Peoples are in a context of epidemiological and social vulnerability regarding Covid-19. It directly affects the rights of Indigenous Peoples, especially the right to their land, but not only¹³. Indeed, it represents a contrast with the rights of Indigenous Peoples recognized in the constitutional sphere of both countries. It is important to emphasize that despite the expansion of the range of rights and the multilevel dynamics of protection for Indigenous Peoples – at the intranational, constitutional, regional and international levels – there is still a gap between constitutional determinations and their effectiveness – its *factual concretization*.

By all means, Brazil and Peru are two countries that have a high level of constitutional protection of the rights of Indigenous Peoples. The 1988 Brazilian Constitution dedicates the Chapter VIII (arts. 231 and 232) only for the rights of Indigenous Peoples, recognizing

⁸ The data can be found in the official Website of John Hopkins University: <https://coronavirus.jhu.edu/map.html>.

⁹ In Brazilian context, there is the data provided by SESAI (Special Secretary of Indigenous Health), but this data is characterized by sub notification, because it only takes in consideration the cases and deaths that happened inside Indigenous lands recognized by Brazilian State, leaving out several other peoples and individuals. For further information, see the survey of the “*Instituto Socioambiental*” available on its official website. In the Peruvian case, bulletins from the Ministry of Health do not specify the ethnic origin of coronavirus victims (<https://gestion.pe/peru/sin-datos-oficiales-indigenas-de-peru-hacen-su-recuento-de-victimas-de-covid-19-noticia/>).

¹⁰ As the disponible data of *Instituto Socioambiental* in the Website: <https://covid19.socioambiental.org/>.

¹¹ Data disponible in <https://www.actualidadambiental.pe/minsa-mas-de-21-mil-indigenas-fueron-contagiados-de-covid-19-en-la-amazonia/>.

¹² M.C. Kain, A. Martinez (Coords.), *Los Pueblos Indígenas ante la pandemia de covid-19* (2020) Tercer informe regional. Comunidades Resilientes. La Paz: Filac, (my translation).

¹³ In a complex perspective and a proficient dialogue with Interamerican Human Rights System, the rights of Indigenous Peoples can be conceived in an “essential core” approach, in which the right to land remains in its centrality and irradiated all other rights: rights of nature, cultural rights, right to water, among others. For a deepen analysis, see: M.P. Melo; T. Burckhart (2020), *Direitos de Povos Indígenas no Brasil: o ‘núcleo essencial de direitos’ entre diversidade e integração*, *Revista Eletrônica do Curso de Direito da UFSM*, v. 15, p. 1-28.

in it their social organization, customs, languages, beliefs and traditions, in addition to the original rights over the lands they traditionally inhabit (art. 231, § 2)¹⁴. It also recognizes the permanent possession of lands traditionally occupied by Indigenous Peoples and their right to exclusive enjoyment of the richness of the soil, rivers and lakes that make part of these lands (art. 231, § 2). The Constitution settles that their lands are inalienable and unavailable, and their rights on the land are imprescriptible (art. 231, § 2 °). The Constitution also recognizes Brazilian Amazon as part of the national heritage (art. 225, § 7 °).

In the legal sphere, the *Statute of the Indigenous* (Law n. 6.001/1973¹⁵) also established provisions that guarantee the right to land of Indigenous Peoples. Although the law predates the Constitution, it currently reinforces, in what is compatible, the constitutional text. In its article 2 it states that the Union, States and Municipalities must act to protect Indigenous communities and preserve their rights, by guaranteeing 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 Statute also established the mechanisms for regulating the right to land of Indigenous Peoples, set out in article 17 onwards.

In the Peruvian Constitution, however, the terms “Indigenous” or “Indigenous peoples/communities” are not expressly mentioned, but rather “peasant and native communities”¹⁶, as established in Article 88, in which includes the concept of “Indigenous Peoples”¹⁷. The Constitution established the State obligation in supporting agrarian development, in addition to guaranteeing property rights over land, either privately or communal, or even in any other associative form (art. 88). The text also guarantees the autonomy of these communities within the scope of their organization, in communal work and in the use and disposition over their lands, as well as regarding the economic and administrative issues. Ownership of their land is considered to be imprescriptible (art. 89). It is a constitutional duty of the Peruvian State to respect the cultural identity of the peasant and native communities (art. 89). The Constitution also points that the State must promote the sustainable development of the Amazon, through an appropriate legislation (art. 69).

In the legal field, Peru has a specific law on the right to prior and informed consultation¹⁸ related to legislative or administrative measures that directly affect them (Law n. 29785). And it also has the Law no. 28736 which specifies the protection of Indigenous or “Ori-

¹⁴ For an analysis on Indigenous Peoples Rights in Brazil, see: E.H. Kayser, *Os direitos de povos indígenas no Brasil: desenvolvimento históricos e estágio atual* (2010) Traduzido por Maria da Gloria Lacerda Rurack, Klaus Peter Rurack. Porto Alegre, Sergio Antonio Fabris, 2010.

¹⁵ Known in portuguese as “*Estatuto do Índio*”.

¹⁶ In spanish, “*Comunidades Campesinas y Nativas*”.

¹⁷ For an in-depth analysis of indigenous rights in Peru, ver: F. Ballon Aguirre (2004), *Derechos de Pueblos Indigenas*, Defensoria del Pueblo, Lima.

¹⁸ In Brazil, this right is only guaranteed by the text of Convention 169 of the International Labor Organization, which makes up the Brazilian legal system through the Decree n. 5.051/2004 and reaffirmed by Decree n. 10.088/2019.

nal” Peoples in a situation of initial contact – isolated. This last law recognizes the right to land of these peoples, restricting the entry into the lands of who do not belong to their own ethnic groups (art. 4, d), in the same way as it recognizes the intangible character of Indigenous reserves (art. 5) and the procedures to be adopted in the case of entering reserves (Exceptional Authorization of Entry, according to art. 6).

The historical vulnerability in the effectiveness of these rights, which was reported in detail in the recent report on the situation of Indigenous Peoples in South America, written by the former UN Rapporteur on the Rights of Indigenous Peoples in 2016¹⁹, deepens considerably in the context of the Covid-19 pandemic²⁰. It happens because in addition to the health crisis, both Brazil and Peru were already passing through a context of *multiple crises*: political, economic and social; in which, together with the *pandemic crisis*, produces a peculiar context of mistrust in institutions²¹ and, consequently, in the absence of a clear “risk communication” during the emergency, which results in the lack or difficulty of effectiveness of the existing legal provisions.

2. New legal instruments in Brazil and Peru

On March 11th, 2020, the World Health Organization officially declared the then “outbreak” of the new coronavirus as, in reality, a *pandemic*, reviewing its declaration made on January 30th of the same year in which it recognized the new coronavirus as a Public Health Emergency of International Concern (PHEIC)²². From a practical point of view, however, the international declaration of a “pandemic” does not represent a significant difference from an PHEIC, but it operates as a “warning” to States to take measures aimed at curbing the spread of the disease in which, at that moment, it already had community transmission in all continents.

On the American continent, the Inter-American Commission on Human Rights issued a historic resolution (Resolution 01/2020) on “*Pandemic and Human Rights in the Americas*”. The Resolution points out that the Americas are the continent in which the social

¹⁹ United Nations General Assembly, *Report of the Special Rapporteur on the rights of Indigenous Peoples A/HRC/33/42* (2016), Human Rights Council.

²⁰ As Boaventura de Sousa Santos points out, “[...] their bodies are more vulnerable due to socially impoverished living conditions due to racial or sexual discrimination that are subject to it. When the spring comes, vulnerability increases, which is more exposed to the spread of the virus and is found in places that never give medical attention: slums and poor settlements in the city, remote villages, internment camps for refugees, prisoners, etc.” (my translation). B.S. Santos, *La cruel pedagogía del virus* (2020), CLACSO, Buenos Aires, pp. 72.

²¹ In a pandemic context, delegitimizing political institutions is a central problem, because it turns difficult to create an adequate response from the political point of view if the population of a given State do not believe in the Institutions and the Public Authorities.

²² The denominations “Public Health Emergency of International Concern (PHEIC)” and “Pandemic” are technical categories of the World Health Organization Regulations, “Annex 2 of the International Health Regulations” (2005).

inequality is more evident, with a large lack of access to basic common goods such as drinking water, food and with populations suffering from environmental pollution and the lack of access to adequate housing. The Resolution further established the need of States in the region to develop “intersectional” policies that specify measures for “historically excluded or high-risk groups”, such as Indigenous Peoples²³. In its operative part, the Resolution brings a specific topic for “*Indigenous Peoples*” (items 54 to 57) recommending to the American countries to proceed with: 1) the dissemination of information about the pandemic in their specific languages; 2) unconditional respect for non-contacted and/or voluntarily isolated peoples; 3) take all actions to protect their rights, especially the right to health; and, 4) refrain from taking legislative and administrative measures that authorize extractive projects in indigenous territories during the pandemic.²⁴

At the internal level of the States, Brazil and Peru developed legislative responses to manage the pandemic and, in particular, to affirm the rights of Indigenous Peoples. The first legislative measures were taken in Brazil with the enactment of Law n. 13.979/2020, known as “*Quarantine Law*”²⁵, which provides measures to internally manage 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 carried out by the Brazilian Ministry of Health (through the Ordinance n. 188, of February 3rd, 2020). In Peru, two Presidential Decrees regarding the pandemic were promulgated on March 15th. The first (Emergency Decree n. 026-2020) established exceptional and temporary measures to prevent the spread of Covid-19 in the national territory; and the second (Supreme Decree n. 044-2020) declares the State of National Emergency due to Covid-19.

Since then, states have also enacted specific legislation regarding the rights of Indigenous Peoples.

In Brazil, the Law n. 14.021/2020 was promulgated on 7th July, enacting social protection measures for the prevention of contagion and the spread of Covid-19 in indigenous territories, and also creating the *Emergency Plan to Face Covid-19 in Indigenous Territories*. The aforementioned Plan aims to ensure access to the basic elements needed to maintain the health conditions of Indigenous Peoples and for the treatment and recovery of those infected (art. 4). Among the measures, under the responsibility of the Union²⁶, there is the need to guarantee universal access to drinking water (art. 5 °, I); free distribution of medicines, hygiene materials, cleaning and disinfection of surfaces to indigenous communities,

²³ As states the Preamble, III.

²⁴ Interamerican Commission on Human Rights, *Resolution n. 001/2020: Pandemic and Human Rights in the Americas* (2020).

²⁵ For an analysis of its content and processement, see: D. Ventura, F.M.A. Aith, D.H. Rached, *The Emergency of the new Coronavirus and the “Quarentine Law” in Brazil* (2020) *Revista Direito e Práxis*, Ahead of Print, Rio de Janeiro.

²⁶ Brazil, differently from Peru, is a Federation composed by three entities: Union, states and municipalities.

for those officially recognized or not, including in the urban context (art. 5, II and art. 9, II); participation of Multiprofessional Indigenous Health Teams (art. 5, III) and access to rapid tests (art. 5, IV); emergency supply of hospital beds (art. 5, V, a), with the acquisition and availability of ventilators and blood oxygenation machines (art. 5, V, b). It also sets the provision of internet points in indigenous territories in order to facilitate access to information, avoiding the displacement of indigenous people to urban centers (art. 5, VIII) and the preparation and distribution of information material on the symptoms of Covid-19 through accessible language (art. 5 °, VI and art. 3 °).

The Plan also specifies quarantine measures for professionals who enter indigenous lands (art. 5, III) and, likewise, establishes that the isolation and quarantine measures applied to Indigenous Peoples must take into consideration their epidemiological vulnerability and the characteristics of their community life (art. 5, § 2). In addition, the National Law also lays down a specific chapter that concerns with “Food and Nutritional Security”, in which states the Union’s obligation to provide food, through the distribution of assistance food baskets (art. 9, § 3). Likewise, the National Law also establishes a specific chapter for “Indigenous Peoples isolated or in recent contact”. In this part, it specifies that only in case of imminent risk, exceptionally and through a specific plan articulated by the Union, any type of approximation for the purposes of preventing and combating the pandemic will be allowed (art. 11). The Law obliges the Federal Government to prepare, within 10 days, a contingency plan for outbreaks and epidemics specific to each Indigenous Peoples (art. 11, II), and the suspension of activities near the areas with occupation of isolated Indigenous Peoples (art. 11, IV). However, it allows the remain of religious missions in place through the approval of the responsible medical service (art. Art. 13, § 1°).

In the regulatory scope, it is worth mentioning three regulations issued by the Fundação Nacional do Índio (FUNAI, federal authority responsible for Indigenous Peoples): Normative Instruction no. 9/2020, Ordinance no. 413/2020 and Ordinance no. 419/2020. The regulations contrast one with each other regarding the protection of the territorial rights of Indigenous Peoples. The Normative Instruction no. 9, of April 16th, 2020, determines a new regulation regarding the attribution of the *Declaration of Recognition of Limits of Private Rural Properties*. With the change brought up by it, FUNAI may issue the document only for indigenous lands already recognized, ratified or regularized by the presidential decree – according to the administrative procedure – without mentioning the use or experience on the land. However, the ordinances n. 413 and 419, published respectively on March 13th and 17th, 2020, determine temporary measures to prevent infection and spread of the new coronavirus within the scope of FUNAI. They suspend the granting of new authorizations to accessing Indigenous lands, except for those necessary for the continuity of the provision of essential services to communities (art. 3, § 1 of Ordinance 419/2020). More recently, the Provisional Measure n. 1005, of September 30th, 2020, edited by the Brazilian President of the Republic, states the establishment of protective sanitary barriers in Indigenous areas. Its objective is to control the transit of people and goods in these areas in order to avoid the contagion and spread of the covid-19. Those health barriers are made up of federal civil servants or active-duty military personnel.

In Peru, the Legislative Decree n. 1489, published on May 10th, 2020, determines actions for the protection of Indigenous and Original Peoples within the framework of the health emergency of Covid-19²⁷. In its Preamble, the decree recognizes the vulnerability of the Indigenous Peoples of Peru and the need to establish programs, actions and mechanisms that may allow their attention and facilitate food assistance during the emergency. The purpose of the decree is to establish actions in four different axes (according to art. 2): I – guarantee and compliance with linguistic rights; II – promote the provision of public services in the mother tongue; III – guarantee of articulation mechanisms with public entities that provide services for indigenous care; and, IV – to safeguard the life, health and integrity of Indigenous Peoples, especially those who are in isolation and / or initial contact (art. 2, a, b, c and d).

The Decree lays down the need for the central government to act in partnership with local governments to implement culturally appropriate intervention strategies for the protection of Indigenous Peoples in the following areas: I – health response; II – territorial control; III – supply of essential goods and products; IV – information and alert; and V – protection of Indigenous Peoples in a situation of isolation or in a situation of initial contact (art. 4.3, a, b, c, d, and e). Regarding the territorial control, the Decree imposes the need to identify fluvial and land control points in regions with a massive concentration of Indigenous communities for the implementation of control actions (art. 5.2, a and b).

Likewise, the decree imposes the suspension of the processes of authorizations for accessing indigenous territories, except for cases strictly related to guaranteeing the health and safety of these peoples (art. 9.1). In those cases, protocols and procedures also established by this Decree must be directly followed (art. 10, a, b and c). Emphatically, the Decree also determines the need for pertinence and cultural adequacy in services and actions related to the emergency of Covid-19 (art. 6); the need to translate all the information related to the emergency, under the responsibility of the Ministry of Culture (art. 8); the strengthening of the functions of protecting agents within the framework of the emergency (art. 12); the means of financing the indicated actions (art. 13); and intersectoral coordination to comply with the provisions of the Decree, with the Ministry of Culture being directly responsible (art. 7).

In Peru, the actions related to intercultural adequacy and to Indigenous Peoples in the situation of isolation and in the situation of initial contact had already been, more timidly, established within the scope of the Ministry of Culture through Resolution n. 109-2020, promulgated on March 25th, 2020. It should also be mentioned that the Ministry of Health of Peru enacted, on May 21st, 2020, the Ministerial Resolution n. 308-2020, in which it approves the entitled “*Plan de Intervencion del Ministerio de la Salud para Comunidades In-*

²⁷ Although it bears the name of “Legislative” Decree, it is a rule issued by the Executive Branch, by the President of the Republic, in view of Law no. 31011/2020, which delegates to the Executive Branch the power to legislate on various matters regarding to the emergence of Covid-19.

digenas y Centros Poblados Rurales de la Amazonia frente a la Emergencia del Covid-19". The latter is a Technical Document that states measures to reduce adverse effects in the context of the pandemic in the Peruvian Amazon.

3. Between texts and contexts: rights of Indigenous Peoples in Brazilian and Peruvian Amazon in a comparative perspective

The historical problems regarding Indigenous lands and rights both in Brazil and in Peru directly affects the effectiveness of the new legislations that are aimed at protecting these Peoples and their territorial rights during Covid-19 pandemic. This observation remains valid today with the advent of the world health emergency, and deepens in a context marked by *multiple crises* – political, economic and social. It is possible to state that the contexts of crisis – and, specially, multiple crises – are characterized, to a large extent, by the weakening of constitutional guarantees of certain rights²⁸, particularly those rights that in “stable times” already had weak guarantees.

Taking this in consideration, a careful analysis of the processes of elaboration and application of the new legislative initiatives related to the protection of Indigenous Peoples, especially those aimed at protecting their territories, may identify at least two problems that, however, are closely intertwined: 1) *the problem of applicability*; and, 2) *the problem of legitimacy*. The *problem of applicability* concerns precisely its lack, a problem reported by Amazonian indigenous communities and also by the national and international press of both countries²⁹. It inexorably boosted the process of judicialization of Indigenous Peoples' rights in both countries. The *problem of legitimacy*, on the other hand, concerns the lack of participation of indigenous representatives in the process of drafting standards, the degree of adequacy in Indigenous way of life, intercultural dialogue and also the non-inclusion of Indigenous lands that have not yet been administratively recognized by the State in the Public Policies, generating legal uncertainty.

²⁸ For a deepen analysis, see: L. Ferrajoli, *Le garanzie costituzionale e i diritti fondamentali*, (2007) 1 *Teoria Politica*.

²⁹ T. Hansen, *How covid-19 could destroy Indigenous communities*, BBC (30 July 2020), in: <https://www.bbc.com/future/article/20200727-how-covid-19-could-destroy-indigenous-communities>; Y.S. Praeli, *'It's taking away our wise men': COVID-19 hits Peru's Indigenous People hard*, *Montagobay, Mongabay News* (26 August 2020), in: <https://news.mongabay.com/2020/08/its-taking-away-our-wise-men-covid-19-hits-perus-indigenous-people-hard/>; L. Franco, *Indigenous Peoples of Amazon, unprotected from the Covid-19 Pandemic*, *Atalayar* (16 September 2020), in: <https://atalayar.com/en/content/indigenous-peoples-amazon-unprotected-covid-19-pandemic>. N. Calapucha, *Amazonian Indigenous Peoples and COVID-19: 'We're not waiting for help as we know it'll never arrive'* (*Amnesty International*, 9 August 2020), in: <https://www.amnesty.org/en/latest/news/2020/08/pueblos-indigenas-amazonia-covid19/>. See also: M. Barbosa; S. B. Marchioro, *Covid-19 in Brazilian Indigenous People: a new threat to old problems* (2020) 53 *Revista da Sociedade Brasileira de Medicina Tropical*.

The “judicialization of politics”³⁰ has become a common practice in most of the countries of the globe and, particularly, in South America. The ineffectiveness of the legal and constitutional provisions implies on the judicialization of the rights of Indigenous Peoples, in many cases as the only way in guaranteeing their rights. In Brazil, due to the actions and omissions of the Federal Government in the management of the pandemic, especially with regard to Indigenous Peoples, the *Articulação dos Povos Indígenas do Brasil* (APIB³¹), and six more Brazilian political parties, filed a lawsuit in the Supreme Federal Court (*Arguição de Descumprimento de Preceito Fundamental*, ADPF n. 709). It claims that the actions and omissions of the Federal Government are causing a “true genocide, which could result in the extermination of entire ethnic groups” and, therefore, require the immediate adoption of actions aimed at combating the pandemic among the Indigenous population³².

The ADPF n. 709 was filed on July 1st and its precautionary measure was granted on July 8th – one day after Law n. 14.021 entered into force³³. The precautionary measure determines actions in two areas: related to Indigenous Peoples in isolation from recent contact and to Indigenous Peoples in general. Regarding the first group, the need for actions is determined for 1) the installation of sanitary barriers; and 2) installation of situation rooms – to the monitoring – with the participation of Indigenous communities and the *Ministério Público* (D.A. Office), *Defensores Públicos* (Public Defender’s) and the *Conselho Nacional de Justiça* (National Council of Justice). Regarding the second group, the determinations are: 1) the need for emergency evacuation of land invaders is stated; 2) the extent of application of these actions on lands that have not yet been administratively recognized as indigenous territories; and 3) the elaboration and monitoring of a Work Plan for Indigenous Peoples³⁴ to be and applied by the Federal Government³⁵.

³⁰ For a critical analysis of this process, see: R. Hirshl, *The Judicialization of Politics*, (The Oxford Handbook of Political Science, Oxford University Press 2009).

³¹ Articulation of Indigenous Peoples of Brazil.

³² Supremo Tribunal Federal (2020), *Arguição de Descumprimento de Preceito Fundamental n. 709*, Reporter: Min. Roberto Barroso, access in: <http://portal.stf.jus.br/processos/detalhe.asp?incidente=5952986>.

³³ It is necessary to mention that this law was vetoed by the President of the Republic, Jair Bolsonaro, on 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 obligation to buy ventilators and blood oxygenation machines for these communities. The Brazilian Congress, however, intervened to overturn these vetoes. According to: ‘Senado Federal, Congresso derruba vetos de Bolsonaro à lei que protege indígenas na pandemia’, *Senado Notícias* (19 ago 2020), in: <https://www12.senado.leg.br/noticias/materias/2020/08/19/congresso-derruba-vetos-de-bolsonaro-a-lei-que- protege-indigenas-na-pandemia> ; J. Oliveira, *Bolsonaro veta obrigação do Governo de garantir acesso à água potável e leitos a indígenas na pandemia*, *El País Brasil* (09 July 2020), in: <https://brasil.elpais.com/brasil/2020-07-08/bolsonaro-veta-obrigacao-do-governo-de-garantir-acesso-a-agua-potavel-e-leitos-a-indigenas-na-pandemia.html>.

³⁴ The elaboration of the referred Plan was later rejected by the Brazilian Supreme Court, as it was considered “very vague” and “out of date” in a Court decision made in ADPF n. 709. Indeed, it resulted in the aforementioned Provisional Measure of n. 1.005/2020. According to: Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental n. 709*, op. cit.

³⁵ According to: Supremo Tribunal Federal, *Arguição de Descumprimento de Preceito Fundamental n. 709*, op. cit.

In Peru, to date, two actions have had important repercussions. The first was filed at the First Civil Court of the Loreto Court – an Amazonian Peruvian state that has the largest indigenous population. It is an *Accion de Amparo* made by the *Organizacion Regional de Pueblos Indigenas del Oriente* (ORPIO), with the support of Rainforest Foundation Norway, against the Ministry of Health, Ministry of Culture and other Ministries. The action points to the inefficiency of the aforementioned Resolution n. 308/2020 in its implementation at the Department of Loreto and requires, among other measures, the implementation of control and surveillance measures and mechanisms in the areas of access to indigenous lands. The lawsuit was admitted by the Loreto Judiciary Court on September 8th, 2020³⁶. The second action was promoted in Peru by *Organizacion Nacional de Mujeres Indigenas Andinas y Amazonicas del Peru* (ONAMIAP)³⁷, with the support of EarthRights International, at the *Corte Superior de Justicia* (Superior Court of Justice), Lima, against the Ministry of Culture. Filed on July 30th, 2020, the petition specifically addresses the “*problem of legitimacy*”, pointing to the vulnerability of the constitutionally protected content of the fundamental right to prior consultation of Indigenous Peoples, enshrined in arts. 6 and 7 of Convention 169 of the International Labor Organization and also by Law no. 29785, in the face of the Covid-19 pandemic³⁸. The lack of participation of Indigenous Peoples in Peru during the process of elaborating the norms related to their protection during the pandemic represents a problem of legitimacy of the norms and political institutions of the country.

Likewise, the *Organizacion Regional de Pueblos Indigenas del Oriente* (ORPIO) had also warned the fact that the Legislative Decree n. 1489, issued by the Executive Branch, is not clear regarding the indigenous lands that are still in administrative process for their recognition³⁹. It also calls into question the legitimacy of the rules issued during the pandemic context in Peru.

In Brazil, the “problem of legitimacy” was also faced by the Federal Supreme Court. It determined the need for these peoples to participate in the construction of a fruitful intercultural dialogue⁴⁰ and the respect for ILO Convention 169 and indigenous legislation prior to the pandemic. However, the action of the President of the Republic in vetting important provisions of the aforementioned Law no. 14.021/2020, as well as the attempts of its government to “deregulate” FUNAI’s functions and duties during the pandemic – through the

³⁶ Orpio, *Poder Judicial admite demanda de amparo apresentada por ORPIO, que exige salud para las comunidades indígenas victimas del Covid-19*, (Orpio, 8 september 2020), in: <http://www.orpio.org.pe/?p=2024>.

³⁷ National Organization of Indigenous Amazonian Women of Peru.

³⁸ EarthRights, *ONAMIAP inicia accion judicial contra el Gobierno Peruano por poner en riesgo a los Pueblos Indigenas durante la pandemia del Covid-19, 30 July 2020*, in: <https://earthrights.org/media/onamiap-demanda-amparo-gobierno-peruano-pueblos-indigenas-covid-pandemia/>.

³⁹ Indeed, the administrative processes for the recognition of Indigenous Lands are slow both in Brazil and in Peru and, not infrequently, they keep for more than 20 years in analysis.

⁴⁰ In the decision made by the Supremo Tribunal Federal, (n. 33).

aforementioned Normative Instruction no. 09/2020 –, and the inclusion of the Draft Law n. 191/2020 – which is currently being discussed in the Chamber of Deputies and aims to regularize the exploitation of mineral resources, hydrocarbons and the use of water resources in Indigenous Lands⁴¹ – can be considered problematic in terms of political and legal legitimacy.

Indeed, problems of applicability and legitimacy call into question the constitutional values and international agreements in both countries. The continuous-actions – and omissions – by the Federal Executive Branch against the rights of Indigenous Peoples impact, in the same way, the constitutional values and international treaties signed by the Brazilian and Peruvian State. Those are, therefore, problems that remain in force and deepen in a context of multifaceted crises.

Conclusions

The pandemic caused by the new coronavirus has deepened the dynamics of the crisis in Brazil and Peru, which make it possible to speak of a *multifaceted pandemic crisis*. Indeed, the condition of political and legal vulnerability of Indigenous Peoples in both countries has bluntly deepened because of the pandemic and the high numbers of contagion among Indigenous Peoples. It directly impacts the dynamics of management of Indigenous lands – especially the role of Indigenous Peoples as actors in *socio-environmental sustainability* – and the original right over their own lands. The hypothesis of this article, therefore, remains confirmed, since 1) the *problem of applicability* and 2) the *problem of legitimacy* are projected as common features of the new legislative norms issued by the States in the face of the pandemic.

However, it should also be emphasized that in addition to these two problems (*applicability* and *legitimacy*), another one is still noteworthy: *that of time*. It is observed that the norms enacted – either by legislative or administrative means – by the States regarding Indigenous Peoples' rights have had a considerable period of time since the respective promulgation of the “State of Emergency” in both countries. They were enacted 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 been spread throughout Indigenous territories of Brazil and Peru. This is particularly a factor that can help to understand both the ineffectiveness and illegitimacy of the norms and their consequent judicialization processes.

⁴¹ For further details, see: D.F. Rocha, M.F.S. Porto, *A vulnerabilização dos Povos Indígenas frente à Covid-19: autoritarismo político e a economia predatória do garimpo e da mineração como expressão de um colonialismo persistente* (2020) FIOCRUZ, Rio de Janeiro.

One of the consequences of the delay of the political response in Brazil was the complaint made to the International Criminal Court (ICC) against the current President, Jair Bolsonaro. The petition was signed by *UniSaude Union Network*, and argues that the President's actions and inactions constitute the crime of "inciting genocide", through the promotion of systematic attacks on Indigenous Peoples. The lawsuit is currently being analyzed by the Court. In Peru, one of the consequences of the delay in a political response is the worsening distrust of the Indigenous Peoples towards the Peruvian State and the fall in popularity of the then President of the Republic, José Manuel Saavedra – who during the pandemic was the target of an impeachment process, in which, however, he was acquitted.

It clarifies that the aforementioned "politics of pandemics" and "law of pandemics" produced in the context of Covid-19 pandemic find deep difficulties for its application, reproducing the "old problems" related to the applicability of Indigenous Peoples' rights in Brazil and Peru. The *old new problems* are directly related to the "problem of applicability" and the "problem of legitimacy" that follows on the historical and troubled affirmation of Indigenous Peoples' rights in Brazil and Peru.

In addition, it is possible to conclude, as already evidenced at the beginning of the work, that the land is still an ongoing and "problematic" issue for the Indigenous Peoples of the Amazon. And this is particularly a central element for understanding the vulnerability of Indigenous Peoples' rights in this part of the globe. Although the legal norms produced in Brazil and Peru get to respond to the precarious situation in which Indigenous Peoples find themselves in these countries in facing the pandemic, the "loopholes of the law", the "restrictive interpretations", the "legal deregulation" in the operational field of instructions and resolutions, and the political inability to articulate the response and control access to land in the Amazon demonstrate that the "land issue remains in force", as an open constitutional and geopolitical issue, which directly impacts on the rights of Indigenous Peoples.