Linguistic minorities in court: the exclusion of indigenous peoples in Brazil

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Abstract. *The main purpose of this study is to demonstrate how Brazilian Courts have contributed to the process of destruction of indigenous languages in Brazil. The history of Brazilian indigenous populations, just as in other countries, is a history of violence, persecution and murder. Only recently Brazil has adopted laws that would enable effective protection of the Indians and their culture.*
However, the strict interpretation of these laws, adopted by Brazilian Courts, is resulting in restrictions of the rights of the Indians, among them, the right to express themselves in their own language. This situation reached a climax in the recent Verón case, in which Indians who witnessed a homicide were prevented from testifying in their own language, because they were also able to express themselves in Portuguese. As I will demonstrate, there is scientific evidence that such ruling, if it had been enforced, would have potential to cause misunderstandings and misinterpretation of the report provided by the witnesses.
At the conclusion, I seek to demonstrate how other countries, notably Canada, Ireland and Australia, are dealing with this situation more adequately than Brazil, ensuring linguistic diversity and the protection of Indians and their culture.

Keywords: *Indians, linguistic diversity, Courts.*

Resumo. *O objetivo principal do presente estudo é demonstrar como o Poder Judiciário brasileiro vem contribuindo para o processo de destruição e inutilização das línguas indígenas no Brasil. A história das populações indígenas brasileiras, do mesmo modo que em outros países, é marcada pela violência, pela perseguição e pelo assassinato. Apenas muito recentemente o Brasil adotou normas que permitiriam a efetiva proteção dos índios e de sua integridade cultural.*
Contudo, a interpretação dessas normas, feitas pelas cortes brasileiras, tem sido marcada pelo conservadorismo que redunda na restrição de direitos dos índios, dentre os quais o direito de se expressar em seu próprio idioma. Essa situação atingiu o ápice no recente caso Verón, no qual índios que testemunharam um homicídio foram impedidos de prestar depoimento em seu próprio idioma, ao argumento de que também eram capazes de se expressar em português. Conforme se argumentará, há evidências científicas de que tal determinação judicial, caso tivesse sido cumprida, teria potencial para acarretar enganos e má-interpretação do relato fornecido.

Ao final, procura-se demonstrar como outros países, notadamente, Canadá, Irlanda e Austrália, têm tratado esse problema de modo mais adequado que o Brasil, garantindo a diversidade linguística e a proteção dos índios e de sua cultura.

***Palavras-chave**: Índios, diversidade linguística, tribunais.*

Introduction

Unlike Spanish America, the indigenous population in Brazil is small, both in numbers and in representation.[1] The current situation stems from successive processes of exclusion. After the 'discovery' of the country by Portuguese sailors, settlers had no compunction about murdering the natives, both directly and by promoting the existing intertribal conflicts. The strong religiosity of the Portuguese people, visible from the very first document about Brazil, the letter from Pero Vaz de Caminha, which referred to "the souls of the Indians to convert," was not enough to curb the greed of the colonizer. The indigenous peoples were enslaved. With the advance of colonization and the constant presence of Europeans in Brazil, the hostility between the indigenous people and the colonizers became increasingly acute, culminating in fighting and killing on a large scale. The introduction of exotic diseases, against which the Indians had no natural defenses, also contributed to the massive reduction of indigenous populations in colonized areas. Noting the elusive nature of the newcomers, who frequently did not comply with their commitments, the Indians increasingly turned against the colonizers, generating a considerable number of wars (Almeida, 2010). As the colonization process demanded the occupation of new territories, the Indians were evicted from their lands, a process that extends to the present day.

Panorama of Brazilian indigenous rights in the twentieth century

The indigenous peoples who survived in Brazil until the twentieth century could be classified, in a simplified way, into one of the following groups: a) those who were located in very sparsely populated areas, who were able to maintain their cultural roots, since the area occupied by them was not of interest to the people surrounding them; b) those who occupied areas of agricultural interest, who were expelled or had their territories greatly reduced, although several of these groups remained in those regions or near them, preserving, even if only partially, their cultural traditions; c) those who occupied areas of urban interest, who were physically and culturally decimated, in a process that has been euphemistically called "acculturation". Therefore, it is possible to say that, in general terms, the size of the indigenous communities in Brazil is inversely proportional to the economic interests of non-Indians in Indian property.

This is a curious and sad conclusion to reach, since all versions of the Brazilian Constitution[2], since 1934, have guaranteed to the indigenous peoples the ownership[3] of their

[1] According to 2010 data, 896.000 people declare themselves as Indians in Brazil. Only 8 ethnicities, however, have more than 20.000 people.

[2] As a country with little democratic tradition, Brazil has had, since its independence, 7 Constitutions, which alternated between usually shy moments of democracy and moments of frequently violent dictatorship.

[3] To be more precise, indigenous people do not have the ownership of their land, but only the exclusive tenure. The property rights are reserved for the federal government. Anyway, this is of little importance to the present discussion.

lands[4]. Therefore, it is not the lack of laws that afflicts the indigenous communities, but the lack of implementation. Even now under the current 1988 Constitution, there are many cases of murders of Indians related to land disputes.

In the 1970s, the indigenous peoples began to organize themselves politically, demanding, among other things, the guarantee of their lands. In 1973, a law came into force, which regulated the rights of indigenous peoples, receiving the name of the Indigenous Statute, number 6.001/73. This statute, however, took for granted that the Indians should be "integrated into their own national community". This means, in other words, that the Indians' rights were guaranteed in a transitional situation, as long as they remained Indians[5]. The Brazilian State goal was to abolish this condition by turning Indians into non-Indians, through the so-called "integration" process.

It is a fact that the approval of the Indian Statute in 1973 meant a move forward in its day in the protection of indigenous peoples. Nevertheless, behind declarations of harmony, culture preservation and integration, the purpose of the Act was to make Indians become non-Indians, "progressively and harmoniously". Thus, they would become part of the "national community", which was nothing more than the non-indigenous society. Even though it has brought important standards for the protection of Indians, the Indian Statute has not preserved the most important right, which is the right to continue to exist as an Indian. It did not recognize that the Indians, as such, are already part of the national community, which is pluralistic. It preferred to stimulate the phasing-out of the indigenous cultures.

It is true that the 1973 Brazilian legislator was not entirely detached from international ideas in the field of traditional communities. The International Labor Organization (ILO), which has embraced the discussion and adopted conventions in this matter, had at this time the 107 Convention still in effect, which was concerned with the protection *and integration* of indigenous and other tribal and semi-tribal populations in independent countries[6]. Although adopted by the ILO, the Convention goes beyond the issue of labor, establishing general rules about indigenous peoples. The convention called for the gradual integration of indigenous peoples in the life of their respective countries, despite the prohibition of "artificial assimilation of these populations". The integration should be oriented by the development of the dignity, social usefulness and individual initiative of the peoples. Dignity and "social utility" were at the same level of importance, demonstrating the importance of working as an element to integrate indigenous peoples. The idea behind the formula, one can argue, is simple: Indians, as Indians, are useless, but if they become workers, they will then have "social utility."

Thus, if the 1973 Brazilian law was not ahead of its time, it was not far behind. Only in 1980 does the ILO go on to discuss a new Convention to protect the right to be and the right to remain an Indian. The new version of the Convention was approved as number

[4]The constitutional text of 1934 was: "Article 129 – The tenure of indigenous lands in which indigenous peoples are found is to be respected, but the indigenous peoples do not have the right to sell them".

[5]Statute 6001/73, Art. 1º – "This act regulates the legal status of Indians or aborigines and indigenous communities, in order to preserve their culture and to integrate them progressively and harmoniously, into the national community".

[6]Article 2: 1. Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries.

169 and was adopted in 1989, being ratified and adopted in Brazil by Presidential Decree 5.051 in 2004[7].

While the ILO was discussing the 169 Convention, Brazil was working to approve its first democratic constitution in over 20 years. The indigenous peoples, already a politically organized group, actively participated in the discussions. The new 1988 Constitution brought significant advances in addressing the issue, by acknowledging their social organization, languages, beliefs and traditions of the indigenous peoples, without even mentioning the possibility of integration. The 169 ILO Convention was ratified and incorporated into Brazilian law in 2004, reinforcing these rights by providing that the responsibility of governments is to protect the rights and respect the integrity of communities[8]. It is up to them to define their own development priorities, including the right to remain exactly as they are and to refuse the public policies intended for them[9].

The 169 ILO Convention largely met the wishes of the indigenous groups, demanding that the countries guarantee them the right to their traditionally occupied land, prior consultation about the public policies that affect them and the right to keep their traditions.

The problem is that, for reasons difficult to pinpoint, Brazilian courts refuse to apply the Convention. It is not an explicit refusal, or a rationally debated controversy. The Convention is simply ignored. To paint this scenario properly, in a survey of all the decisions adopted by the Brazilian federal courts[10], which address indigenous issues, while there are 1,209 decisions containing the word "Indian" only 8 contain the words "169 ILO Convention". Furthermore, not all of these eight rulings are concerned with indigenous peoples and none of them is from the Supreme Court or the Superior Court of Appeal. The situation is even worse if we focus our attention on the United Nations Declaration on the Rights of Indigenous Peoples. The 169 ILO Convention is a binding norm in Brazil but, even so, it is ignored. The United Nations Declaration, a document, in many ways, more advanced than the ILO Convention, was considered by the Supreme Court in the trial of the case "Raposa Serra do Sol" as a "soft law", and not binding on Brazil.

Therefore, Brazilian courts effectively apply the Statute of 1973 to the indigenous peoples. It is easy to find, nowadays, rulings using prejudiced expressions, such as acculturation, integration, forestry, civil incapacity etc., which were used in 1973. It is also common for judges to deny rights to Indians or indigenous peoples by simply denying them the indigenous condition. Brazilian courts have stated, more than once, that if someone can read or speak Portuguese, is able to vote or if he even knows how to ride a motorcycle, then he is not an Indian and, therefore, is not entitled to any legal benefits derived from

[7] According to the ILO, only 20 countries have ratified the 169 Convention. They are Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Venezuela.

[8] Article 2: 1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

[9] Article 7: 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

[10] Available at http://www.jf.jus.br/juris/unificada/

this condition. In addition, it is not necessary, according to the Brazilian Judicial system, to produce any anthropological evidence for the judge to decide if someone is an Indian or not. If the judge concludes, through his own experience (or, better maybe, through his own prejudice), that the Indian is integrated into the surrounding culture, he can be treated as if he were not an Indian, by the simple use of the formula "Indian already integrated to non-indigenous society"[11].

The linguistic problem

Although the exact number of indigenous languages spoken in Brazil by the time of the arrival of the Portuguese sailors is unknown, scholars estimate around 1,200 different languages[12]. Initially, the Jesuit evangelists sought to learn the indigenous languages and convey the gospels to the Indians in their own languages.

Over time, however, the need to strengthen the colonization made Portugal try to reinforce the identity of the colonial territory and the linguistic variety was perceived as an obstacle. In 1701, the Portuguese crown recommended that priests should teach the Portuguese language to the Indians. In 1757, in the context of the reforms conducted by the Marquis of Pombal, the Indian Directory[13] was published, the first official document of the Portuguese State in which the explicit purpose of "civilizing" the Indians can be found. The Directory stated that Indians should be persuaded to work, to farm their lands, to abandon what was classified as "idleness", to trade goods they produced and to adopt many other behaviors consistent with the mores of the colonizer, particularly the ones regarding the indigenous languages, as stated in the Directory:

> It has always been the practice among all Nations which conquered new domains, to introduce their own language to the conquered peoples, because this is one of the most effective ways to banish the rustic barbarity of their ancient customs, and experience has shown that the introduction of the language of the Prince also introduces affection, reverence, and obedience to the same Prince. This prudent system, used worldwide, was not implemented by the first conquerors, who only established a language they called 'general'; this invention was truly heinous and diabolical, and deprived the Indians of all those factors that could civilize them, and they remained in barbaric subjection until today. To banish this abuse will be one of the main concerns of the Directors and their respective Settlements, to establish the use of the Portuguese language, by not consenting, in any way, that boys and girls who attend school and all those Indians who are capable of instruction in this area, use the language of their own nations, or the one called 'general', but only Portuguese, in accordance to what His Majesty has recommended in reiterated orders, which until now were not observed, to the complete spiritual and temporal ruin of the State.

This integration process has contributed enormously to the squandering of the national languages heritage. As Inês Virginia Prado Soares (2013) observes, the state apparatus was consciously used to promote monolingualism.

[11] It is possible to exemplify this situation with rulings from the Supreme Court such as HC 30113, Justice Gilson Dipp, DJ 16.11.04 and HC 25003, Justice Paulo Medina, DJ 1/12/03. The Supreme Court, ruling the HC 85198, Justice Eros Grau, J. 17.11.05, stated that the production of an anthropological evidence is not mandatory for the judge.

[12] See Rodrigues (1986)

[13] Available, in Portuguese, at http://www.nacaomestica.org/diretorio_dos_indios.htm.

Nowadays, although there is some disagreement among scholars about the distinction between indigenous languages and dialects[14], studies indicate that there are still some 274 indigenous languages in Brazil; even so it is regrettable that so many languages have been definitively lost since the beginning of colonization.

Besides the languages that are already extinct, Seki (nd) points out that currently only 25 of the surviving indigenous languages have more than five thousand speakers. According to UNESCO data, in Brazil 12 languages have recently become extinct, 45 are in serious danger of extinction, 19 in serious risk of extinction, 17 are in risk and 97 are vulnerable. This means that 190 of the 274 languages are under serious threat of disappearing in the short run.

The disregard for indigenous languages can also be observed in other situations. There are very few public policies to preserve these endangered languages, all of them with insufficient funding. Also, as Ana Valéria Leitão (1993) points out, until 1991, the Indigenous Statute, although having been adopted in 1976, with versions in English and French, had not been translated into a single indigenous language.

Brazilian legislators have not been very effective or sensitive towards this situation. Even though the 1988 Constitution granted indigenous people the right to keep their traditions (article 231), several Latin American Constitutions have clearer positions related to the protection of linguistic diversity. The Mexican Constitution, for example, guarantees the Indians the right to preserve and enrich their languages (art. 2). The Constitution of Paraguay (art. 140) considers the country as bilingual, recognizing Guarani as an official language. The Constitution of Bolivia goes further and states that all official documents shall be drawn up in at least two of the 37 languages recognized as official: Spanish and 36 distinct indigenous languages (art. 5).

Therefore, in Brazil, while the indigenous languages are protected, they at the same time are limited to their own communities, which aggravates the danger of "linguistic invasion", as the Ministry of Education has pointed out[15]:

> Another cause that explains the disappearance of indigenous languages is sociolinguistic displacement. This happens when, in situations of bilingualism, the dominant language occupies, little by little, the communicative territory of the dominated language. (...) The problem, however, is that due to social pressure against the use of indigenous languages, their speakers start using Portuguese in different environments. When this happens, for example, within the family environment, the indigenous language weakens, because it loses strength and speakers: children will grow up speaking Portuguese. Religious practices with songs and prayers "imported" are one of numerous other ports of entry through which the official language will expel the indigenous language from its traditional territories and grow within the community. These "linguistic invasions", after some time, may cause an indigenous language to disappear. It disappears because it no longer has reason to exist. It disappears because its use becomes virtually inexistent, because it no longer has important functions within the community. In general, the loss of an indigenous language occurs so rapidly that its speakers hardly even realize that it is indeed happening. It is quite common that in three generations a

[14] About this problem, see Moore (2013).

[15] National Curriculum for indigenous schools, prepared by the Ministry of Education in 1998. Available at http://www.dominiopublico.gov.br/download/texto/me002078.pdf.

> community traditionally monolingual in an indigenous language becomes bilingual (Portuguese/indigenous language) and then goes back to being monolingual again, only this time, monolingual in Portuguese.

The linguistic exclusion of indigenous peoples in the judicial system

In 2010, the UN released a report stating that a third of the population living in extreme poverty in the world, estimated at 900 million people, is composed of indigenous people. In all countries, indigenous people are in a worse socioeconomic situation than the non-indigenous population[16].

Brazil is no exception. Indigenous communities nowadays reflect the history of exploitation that pervaded their contact with the colonizers, having very limited access to education, health, sanitation or other basic amenities. In particular, the lands granted to the Indians are usually insufficient for the maintenance of their way of life and production, which are not the capitalist ones. Despite all this, what we want to highlight in this article is not the social exclusion of the indigenous peoples, but that this exclusion happens also in the Judicial system. The Brazilian Judiciary has consolidated conservative interpretations, which are prejudicial to indigenous peoples. This is unfortunate, considering the role that the Judicial system should play as the guardian of fundamental rights. Two of these forms of exclusion are related to the linguistic issue: exclusion of the indigenous identity and the prohibition to speak their own language.

Exclusion of the indigenous identity

According to the Indigenous Statute of 1973, the rights of the Indians are derived from the sole condition of being an Indian. However, the Statute considered the indigenous condition as transitory, destined to be extinct as soon as all the Indians were "progressively and harmoniously integrated to the national community". For this reason, the so-called "integrated Indians" have no rights at all. As this condition of "integration" is quite ambiguous, in every judicial decision related to indigenous rights, Brazilian Courts consider as a preliminary question whether the person concerned is or is not an Indian.

The Federal Prosecutors Office, which is constitutionally assigned as the defender of the collective rights of indigenous peoples[17], advocates that the indigenous identity must be defined according to the 169 ILO Convention, which states that "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply". If there is any doubt about the indigenous condition, after the use of the self-identification criterion, the Federal Prosecutors Office argues that it is mandatory for the judge to require the production of an anthropological report. The anthropologist is the technically qualified professional to evaluate the cultural understanding that the Indian or the indigenous group has about its own condition and the situation submitted to the court.

[16]It is necessary to stress that the Indian is only "poor" by the parameters of good life set by the majority of capitalist society. This does not necessarily mean that, from the Indian perspective, he can be considered poorer than a non-Indian.

[17]The Prosecution Office in Brazil, both in federal and state levels, is a very unique institution. Besides its traditional role of criminal charge, the Prosecutors are also responsible for the defense of civil society's collective rights. The Prosecution Office has become, over time, the main institution in the judicial defense of the environment, the public finances, the indigenous communities, the rights of consumers, among others. Also, Prosecutors have the same status and functional prerogatives as judges.

Despite this, Brazilian Courts have decided, in a considerable number of cases, that it is possible to assign or deny someone the indigenous condition through the analysis of various elements included in the lawsuit. Among those elements is the knowledge of the Portuguese language. Here are some examples:

> Indian convicted of the crime of trafficking narcotics, illegal association and possession of a firearm. It is not necessary to conduct an anthropological examination designed to measure the degree of integration of the patient into society if the judge affirms his full liability on the basis of assessment of literacy, fluency in the Portuguese language and the level of leadership exercised in the gang, among other elements of the conviction. (Supreme Court, Habeas Corpus 85.198, Justice Eros Grau, 2005).

> It is not essential to carry out an anthropological survey, if it is clear that the defendant, despite being an Indian, is integrated into the society and habits of the civilization. If the elements of the case are sufficient to remove any question about the defendant's non-liability, such as fluency in the Portuguese language, degree of education, skills and resourcefulness to drive motorcycles and to participate in criminal activities, such as attending the meetings of traffickers, there is no need to elaborate an anthropological report. For the application of art. 56, sole paragraph, of Statute n.º 6.001/73, which is intended to protect the Indians, it is necessary to check the degree of integration of the Indian into the national community. If evidence shows, in such a case, that the defendant is integrated into society, he is not entitled to the special semi-freedom regime provided for in the Indian Statute. (Superior Court of Appeals, Habeas Corpus 200301544950, Justice Gilson Dipp, 2004).

Such cases occur in the inferior courts as well. In a ruling with only a few pages, the Justice Court of the State of Mato Grosso stated that "the indigenous person who understands and speaks perfect Portuguese, who studied up to the 5th grade, who works and has his/her working papers is properly integrated into society, therefore, subject to the ordinary laws applied to all citizens"[18]. As we can see, the degradation of indigenous traditions, including their language, caused by the surrounding society, is used to deny the indigenous peoples their own status and the rights that would stem from it. As we have demonstrated, the indigenous culture has been destroyed since the discovery of Brazil by the colonizers by means of mandatory work and cultural assimilation. The Indians have not willingly destroyed their culture. At present, the same non-indigenous society that is responsible for the destruction of the indigenous culture uses this destruction as an argument to deny rights to the indigenous peoples. Judges do not have the professional ability to determine, without the help of an anthropologist, if an Indian can or cannot understand the wrongfulness of his acts and if his indigenous background played a part in the criminal act. The simple fact that someone can speak a language or ride a motorcycle should be considered useless for such purposes.

The prohibition of indigenous languages in court: the Veron case

Another way in which Brazilian Courts have contributed to the destruction of the indigenous culture and especially the indigenous linguistic culture, is by disregarding or even forbidding the use of indigenous languages in court.

[18]Criminal Case 2010.019022-1/0000-00, Judge Dorival Moreira dos Santos, 2010.

It is not uncommon for a suspect of Indian origin to be denied the assistance of a translator during procedural acts, because of the alleged understanding of the Portuguese language. This situation has already been considered by the Supreme Court, which ruled in the following terms:

> If the "Indian can read, vote, and is integrated into the civilization, speaking Portuguese fluently" as found by the judge, the presence of an interpreter in the procedural acts is not necessary. (Habeas Corpus 79530, Justice Ilmar Galvão, 1999)

The explicit argument that denies Indians the right to translation is an appeal to the traditional theory of procedural invalidation, which provides that the annulment demands proof of harm[19]. Thus, in the case mentioned above, the Supreme Court stated that "the absence of the interpreter did not cause harm to the defendant, who understood everything and was understood by the others".

From the strict point of view of procedural theory, the argument is not false, if one could prove that the indigenous condition did not play any part in the situation on trial. The problem is that, if one reads the entire ruling, it becomes clear that the real intention is to deny the indigenous identity to the accused, without offering a detailed consideration of reality. There are many references in the decision that support this conclusion, such as "we are not facing an isolated or not integrated Indian" and "the defense merely invokes the absence of a psychological and anthropological report, without providing the slightest hint that the defendant has an incomplete mental development". It is important to stress that those words, that mistake the indigenous condition for incomplete mental development, are not the isolated words from a sole judge, but terms from the Supreme Court.

Of course, the indigenous condition has nothing to do with mental development. The anthropological report has no relation to the mental condition of the defendant, as indigenous people are not handicapped. The aim of the report is to check the understanding the Indian has about the crime that he is charged with, according to his own culture, and to determine if the indigenous condition played any part in the commission of the crime. This is an important tool to assist the court in assessing the defendant's liability.

Rulings like these are the result of two different, but closely related, prejudices: the first is that the indigenous culture is inferior to European culture and the second is that an Indian is an Indian only if he is isolated from the exterior world, i.e., only if he matches the stereotyped pre-Columbian image of an Indian, a stereotype that has remained unaltered for the last five hundred years. The only Indian accepted by the Brazilian Courts is the kind of person who would fit the folkloric description depicted in a textbook.

The prejudiced rulings adopted by the Supreme Court are reflected in the lower courts. One can highlight the recent Verón case, a murder trial conducted by a Federal Court in São Paulo.

Chief Marcos Verón, 72 years-old, was a leader of the indigenous group Guarani-Kaiowá, in the city of Dourados, Mato Grosso do Sul. In 2003, he was beaten, kidnapped and murdered by a group of four armed men, whose aim was to expel the indigenous group from what they considered to be their land[20].

[19]This theory is often referred to in French: *pas de nullité sans grief*.

[20]The situation of violence against the Guarani-Kaiowá group in Mato Grosso do Sul is neither new nor ended with the murder of chief Verón. Recently, in 2012, the group was resisting a court order that ruled they must leave their traditional lands. In this context, they said that it would be better to decree the

The man suspected of being the mastermind of the crime, a highly influential local farmer, had his trial moved to São Paulo. When it started, in 2010, the federal prosecutors requested that the Indians who had witnessed the crime could address the court in their own language, Guarani[21]. The federal judge rejected this request, pointing out that the Indians were able to express themselves in Portuguese. The Federal Prosecutor insisted, requiring that the judge, before questioning the witnesses, should ask in which language they would express themselves better, Guarani or Portuguese, and then, conduct the inquiry in the appointed language. This request was also denied.

The judge considered that all Indians who could express themselves in Portuguese should do so. The argument on which the ruling was based was an extension of the thesis from the Supreme Court, as transcribed: if someone speaks Portuguese, there is no reason to appoint a translator.

The prosecutors, then, had no option, since this decision could not be immediately appealed. They left the room, which forced the suspension of the trial. It was a very radical decision, but the only one that could preserve the linguistic rights of the group[22].

The Federal Judges Association (AJUFE) considered this an act of disrespect towards the court. AJUFE issued a strongly-worded statement in which they mentioned that "linguistic diversity may have been protected, but society certainly was not". The association said that the abandonment of the trial, on "the pretext of defending the rights of indigenous witnesses and victims to express themselves in their language," was a "disrespectful and authoritarian attitude, against the public interest and the interest of the Indians". It was, in short, "a whim of the Federal Prosecutor"[23].

The statement is, at the very least, problematic. Linguistic diversity is treated as a superfluous right, as if its defense was a total and complete absurdity. Unlike the Association, the head of the Federal Prosecution Office endorsed the attitude of the Prosecutor. The Vice-Federal Prosecutor General, Deborah Duprat, stated[24]:

> The lack of knowledge about indigenous issues in Brazilian Courts is clear in the case of the trial for the suspect of murdering the leader Marcos Veron, who was moved from Mato Grosso do Sul to São Paulo, seeking an impartial jury. The judge in the case forbade the indigenous people to express themselves in Guarani because they had responded to a simple question in Portuguese. This is the greatest example of prejudice, because speaking a language does not mean that the Indians share the same understanding and codes of conduct as the non-indigenous people. Especially in an environment that is completely different and incomprehensible to

extinction of the group. This statement was interpreted as a threat of mass suicide. The situation took momentum within the national media and there were protests from non-indigenous people in several cities, even far from the site of the conflict. Thousands of people changed their last names on Facebook to Guarani-Kaiowá. There were so many changes that Facebook forbade the name.

[21] When the right to speak their own language is intended for Indians accused of crimes, it is often seen as a delaying maneuver. In the Verón case, the right was intended for eyewitnesses who were also related to the victim. They did not have, therefore, any interest in delaying the trial.

[22] The decision to abandon the trial was made by Federal Prosecutor Vladimir Aras, whom I thank for providing the account of the events of the trial. His report is also available on his blog http://blogdovladimir.wordpress.com/2010/05/06/o-caso-veron-e-o-direito-a-diversidade-linguistica-ao-lado-das-vitimas/.

[23] The statement is available at http://www.conjur.com.br/2010-mai-12/ajufe-sai-defesa-juiza-procurador-abandonou-juri.

[24] Available at http://www.brasildefato.com.br/node/5164.

> them, such as the court, it was necessary to allow them something familiar, like their language. (...) As soon as I knew about the facts, I contacted the colleagues to congratulate them for their attitude. I think it was the right thing to do in respect for the Indians present to the trial.

After the interruption of the trial, the Federal Prosecutors issued an injunction against the decision to the Federal Court of the 3rd Region. The Court denied the injunction order, arguing simply that there is no law that obliges the judge to ask the witness in what language he expresses himself best. Also, according to the ruling, the best possible communication is the one that "enables the most perfect understanding by the receiver of the message sent". So, if the judge speaks Portuguese and the witness does too, the best communication will be in Portuguese[25].

The ruling of the Federal Court was based on formal interpretation and its arguments are grounded in common sense, without any mention of linguists or researchers of language. However, it can equally be responded to through the use of common sense: a person may know how to communicate in a language other than his native language, but he may not be able to do it with the same fluency and richness of detail. If the speaker is not able to transmit the message adequately, it is impossible to imagine that it will be "the most perfect communication" just because the communication happens in the language spoken by the receiver. One has also to take into consideration that those people witnessed a traumatic event and may not be able to talk about it clearly in a foreign language. Besides these arguments, there are also technical ones. The anthropologist Marcos Homero Ferreira Lima conducted research into the Kaiowa group, in which he stated:

> It is often said, in the border region, that Kaiowa Indians are "integrated", because they have the ability to use the Portuguese language. (...) The expert report found that the Kaiowa communicate in Portuguese as their second language. For this reason, they do not understand some communicative situations, which can lead to total incomprehension when talking to non-indigenous people. The difficulties of dialogue exacerbate if the non-indigenous individual involved in the dialogue does not know how to negotiate meanings, breaks rules of the interaction, uses vocabulary incompatible with the understanding of the Indian, maintains social distance and/or seems aggressive. Communication becomes even more difficult when the topic does not belong to the universe of understanding of the Indian, is rather abstract or is not part of his everyday life. (...) The implication is that a non-Indian must be aware of the relevant linguistic aspects that come into operation in the interaction between indigenous and non-indigenous people, speaking Portuguese. The non-observance of certain precautions potentially prevents understanding between indigenous and non-indigenous people.

The research demonstrates that the Guarani-Kaiowa Indians, even the ones who can speak Portuguese, have a variety of difficulties that can create contradictions between the idea expressed and the speaker's perception of the world. Among those difficulties, the anthropologist lists low capacity for selection and production of grammatical structures, low understanding of the multiple meanings of words, difficulty in grasping meaning from the context, low potential for nonverbal communication, especially for gestures and embarrassment when looked directly into the eyes. Regarding discursive competence, which is essential for a witness, the anthropologist states:

[25]Injunction 2010.03.00.027550-8/MS, Judge Nelton dos Santos, 2012.

> Regarding discursive competence, namely how the speaker organizes his ideas, gives coherence and cohesion to the phrases and makes the speech intelligible, one can notice some characteristics of the Kaiowa group. First, the Kaiowa hierarchize and classify the events of the world in a very particular way, differently from western culture. For this reason, their narrative does not follow the linear and cartesian scheme used by non-Indian speakers of Portuguese. Another peculiarity is that their narratives often fail to consider the prior knowledge of the listener.

Thus, there are scientific bases for the claim that the Indians should be heard in their own native language. The imposition of testimony in Portuguese has the potential to lead to misunderstandings and, therefore, to have a detrimental effect on the final ruling.

The statement of the Federal Judges Association was also mistaken in another aspect: that the Guarani-Kaiowa people did not feel disrespected by the decision of the Federal Prosecutors. On the contrary, the daughter of the murdered victim, Valdenice Verón, stated[26]:

> "I am very angry, very sad. They want to censor my language. Don't I have the right to speak, express and defend myself in my own language?" (...) In an emotional and angry testimony, Valdelice Verón regretted that people "with so much education," do not know how to respect differences, as guaranteed by law. "Where is the education of those people who can judge a people as different as us, Indians?" She concluded: "Censoring our language will end our history and our Guarani-Kaiowa people".

The end of the story is bittersweet. When the trial was rescheduled, the indigenous witnesses simply refused to speak Portuguese, forcing the use of a translator, just as the Federal Prosecutors had wanted. They had achieved, by their own persistence, the right that the Judiciary had previously denied them. Thus, against the wishes of the court, multilingualism was protected.

However, the result of the trial, although unrelated to the linguistic issue, was not good. The jury, by a majority of a single vote[27], found the defendant not guilty of the murder charge but still sentenced him for kidnapping, torture, participation in an armed gang, battery and procedural fraud, which resulted in a total sentence of twelve years in prison, a very lenient penalty considered the heinous nature of the crime.

Even so, there is no doubt that Brazilian courts should allow Indians the kind of consideration that they have in other countries. The protection of multilingualism is an obligation that Brazil has to fulfill, in respect of both its Constitution and its International commitments. The international experience reported below should inspire improvements in Brazil.

Conclusion: what we can learn from Canada, Ireland and Australia

From the foregoing, it is evident that Brazilian Courts have adopted prejudicial rulings against the indigenous peoples. With no technical background, courts decide cases related to these peoples disregarding their history, their culture their language ability and their aspirations.

There are many decisions refusing indigenous status to plaintiffs, defendants and even witnesses, with the sole purpose of denying them the (very few) benefits guaranteed by

[26] Available at http://www.adital.com.br/site/noticia_imp.asp?cod=47614&lang=PT
[27] In Brazil, juries decide by a majority opinion, not by an unanimous one, like in the US.

law. In the situation in which Indians are defendants, their claim for their rights is frequently characterized as a maneuver intended to delay the procedures.

As we have seen in the Verón case, this jurisdictional prejudice exceeded the limits of the ruling, reverberating in a statement from the Federal Judges Association. It stated that the attitude of the Federal Prosecutor, to leave the court because the Indian witnesses were not allowed to speak in their own language, was "whimsical" and "disrespectful". The Association made it very clear that it viewed the linguistic rights of the indigenous peoples as of secondary importance.

There are, therefore, two problems: the appropriate treatment of indigenous issues and the protection of linguistic minorities in Court. For each of these problems, it is possible to find examples in other countries, which demonstrate better solutions.

In the matter of the appropriate treatment of cases involving indigenous people, the Criminal Code of Canada states that the judge should consider the possibility of imposing alternative penalties, different from imprisonment[28] on indigenous people who commit crimes.

The Supreme Court of Canada has interpreted this rule very broadly in the Ipeelee case[29], stating that it contains more than a principle of criminal sentence, urging judges to use different methods to determine an appropriate sentence if the criminal is an Indian. The ruling affirms:

> The enactment of s. 718.2(e) is a specific direction by Parliament to pay particular attention to the circumstances of Aboriginal offenders during the sentencing process because those circumstances are unique and different from those of non Aboriginal offenders. To the extent that current sentencing practices do not further the objectives of deterring criminality and rehabilitating offenders, those practices must change so as to meet the needs of Aboriginal offenders and their communities. Sentencing judges, as front line workers in the criminal justice system, are in the best position to re-evaluate these criteria to ensure that they are not contributing to ongoing systemic racial discrimination. Just sanctions are those that do not operate in a discriminatory manner.

The ruling reaffirms the application of the *Gladue principles*[30], which require the judge to consider, at the time of the criminal conviction of an Indian, the systemic background that might have led him to commit the offense. These factors should include the history of colonialism and expulsion and how this history continues to be reflected in poverty, low educational levels, unemployment and high rates of alcohol and drug abuse and suicides. The judge must consider the offender's indigenous status when setting the penalty as well as the types of sanctions that are appropriate.

It is interesting to notice that the Ipeelee case involved Indians that had been repeatedly convicted of criminal offenses (long-term offenders), some of them committed with violence. They had already been punished with lighter penalties, including imprisonment. Those Indians, in Brazil, would certainly have been considered "integrated to the society" and, therefore, as having no right to criminal benefits.

[28] Art. 718.2 (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[29] R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433.

[30] R. v. Gladue, [1999] 1 S.C.R. 688.

The Canadian Supreme Court took into consideration the indigenous peoples as they are today and as they have changed throughout history, including the pernicious influence of the surrounding society. So-called "integration" was not considered as a factor in order to deny criminal benefits, but as a reinforcement of the argument that the judge should benefit the defendants when imposing the penalty. In addition, regarding the issue of protecting Indians in judicial procedures, the Canadian experience is much more adequate than the Brazilian, as Canadian courts take into consideration the factors that contributed to the felony, even if the defendant has committed prior offenses.

Regarding the issue of protecting linguistic diversity, besides the examples of several Latin American countries already mentioned, it is appropriate to mention how the issue is dealt with in Ireland, although not in an indigenous context. All inhabitants of Ireland speak English, but a small number of them have Irish as their native language[31]. According to the Irish Times, Irish is not even among the ten most spoken languages in the courts of Ireland.

Nevertheless, being a language linked to the history of the Irish people, it is recognized by the Constitution of 1937 as the first official language of the country. Based on this provision, in 2003 the "Official Languages Act" was adopted. It guarantees every person the right to be heard, before any court, in Irish, using, if necessary, a translator[32].

Even if the party is able to speak English, it is his right to choose to speak in this language or in Irish, even if the judge himself does not speak Irish. Furthermore, if a public agency is a party in the proceedings, it has the duty to speak in the language chosen by the other party[33]. Specifically in the case of witnesses, the "Official Languages Act" states that "notwithstanding any other provision of this section, a person shall not be compelled to give evidence in a particular official language in any proceedings".

Finally, there has been a great deal of research in Australia into the communication problems of aboriginal people within the criminal justice system[34]. There is strong evidences that, although most Indigenous people in Australia speak English, their comprehension of the language is not the same as that of someone who speaks Standard Australian English. These differences can lead to misunderstandings and necessitate the presence of an interpreter who can explain to the court these peculiarities. A word-by-word translation is not enough to prevent problems in communication.

Cook points out that, as far back as 1959, the Supreme Court of the Northern Territory, in R. v. Ab-original Dulcie Dumala, noticed that Aboriginal witnesses tended to be suggestible and to answer questions in a way they thought more likely to be acceptable to the questioner Cooke (2009: 27). This early consciousness of the problem created a supportive

[31] According to Pierce (2000: 1140), the population of Irish speakers is about 20,000 to 80,000 people, all of which also speak English.

[32] 8. (1) A person may use either of the official languages in, or in any pleading in or document issuing from, any court. (2) Every court has, in any proceedings before it, the duty to ensure that any person appearing in or giving evidence before it may be heard in the official language of his or her choice, and that in being so heard the person will not be placed at a disadvantage by not being heard in the other official language. (3) For the purposes of ensuring that no person is placed at a disadvantage as aforesaid, the court may cause such facilities to be made available, as it considers appropriate, for the simultaneous or consecutive interpretation of proceedings from one official language into the other.

[33] (4) Where the State or a public body is a party to civil proceedings before a court. (a) the State or the public body shall use in the proceedings the official language chosen by the other party (. . .).

[34] See, for example, Cooke (2009) and Cooke (2002).

context for research into the role of the interpreter and his importance in ensuring a fair trial. Nowadays, there are guidelines, issued by the Courts, to instruct judges on how to deal with such situations. Although some problems are still reported, they have mostly to do with the lack of uniformity in the guidelines or with their interpretation. There is no question about the importance of the interpreter's work. The discussion is, therefore, at a much higher level. For example, the Australian Criminal Justice has created many commissions that study the best ways of providing effective interpreters for Aboriginal people (Hale, 2011).

Linguistic diversity, therefore, is not a superfluous legal right that can be forgotten if the pragmatic circumstances make its implementation hard. Linguistic diversity is an important heritage, to be respected and cultivated by the state. Regrettably, Brazil is doing very little to preserve indigenous languages. Instead, it has actually done a great deal to marginalize them, even in spaces that are traditionally regarded as being places of tolerance and respect, such as the Courts. Brazilian judges should appoint interpreters and anthropological experts in all lawsuits involving indigenous people, in order to make sure they are being adequately comprehended. But this is not enough. As Cook points out, lawyers should be properly instructed on how to deal with these clients; yes/no questions should be avoided; judges should learn about the process of interpreting and not insist on a literal translation or on a poor expression in Portuguese (2009: 34). Conducting an appropriate communication process is essential to ensure the fairness of the judgment.

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