CEUB
EDUCAÇÃO SUPERIOR
ISSN 2237-1036

REVISTA DE DIREITO INTERNACIONAL
BRAZILIAN JOURNAL OF INTERNATIONAL LAW

How the indigenous case of Xukuru before the Inter-American Court of Human Rights can inspire decolonial comparative studies on property rights

Como o caso do povo indígena Xukuru ante a Corte Interamericana de Direitos Humanos pode inspirar um estudo comparado decolonial sobre direitos de propriedade

Flavianne Fernanda Bitencourt Nóbrega
Camilla Montanha de Lima

VOLUME 18 • N. 1 • 2021

CHALLENGING THE INTERNATIONAL LAW OF IMMUNITIES:
NEW TRENDS ON ESTABLISHED PRINCIPLES

Sumário

doi: 10.5102/rdi.v18i1.7313

How the indigenous case of Xukuru before the Inter-American Court of Human Rights can inspire decolonial comparative studies on property rights*

Como o caso do povo indígena Xukuru ante a Corte Interamericana de Direitos Humanos pode inspirar um estudo comparado decolonial sobre direitos de propriedade

Flavianne Fernanda Bitencourt Nóbrega**
Camilla Montanha de Lima***

Abstract

This paper develops a decolonial comparative analysis of the concept of property rights, taking into consideration the decision of the Inter-American Court of Human Rights, ruling on collective property rights of indigenous people for the first time against Brazil (case Xukuru People *versus* Brazil, 2018). For this purpose, the innovative method of decolonial comparative law, promoted by Ralf Michaels and Lena Salaymeh at the workshop organized by Max Planck Institute for Comparative and International Law on 2020, was used to comparatively analyse private property rights and the collective property right in the Brazilian legal system from a decolonial perspective. The Xukuru indigenous case clearly shows the diverse problems and conflicts that arise when using the concept of property right based on a strong Eurocentric tradition. The challenges of registering an indigenous property in Brazil were identified in this context as a dysfunctional colonial model of private right that obstruct the exercise of collective property in Brazil. Thus, the decision of the Inter-American Court of Human Rights that introduces the concept of collective property rights in Brazil can inspire a decolonial approach in the domestic legal system and serve as learning process for other legal systems that are confronting similar problems.

Keywords: Inter-American Court of Human Rights; Decolonial Studies; Comparative law; Indigenous people Xukuru.

Resumo

Este artigo desenvolve uma análise comparativa decolonial do conceito de direitos de propriedade, levando em consideração a decisão da Corte Interamericana de Direitos Humanos, que julgou pela primeira vez os direitos coletivos de propriedade dos povos indígenas contra o Brasil (caso Povo Xukuru versus Brasil, 2018). Para tanto, o método inovador de direito comparativo decolonial, promovido por Ralf Michaels e Lena Salaymeh no workshop organizado pelo Instituto Max Planck de Direito Comparado e

* Recebido em 01/01/2021
Aprovado em 13/05/2021

** Professora Adjunta de Teoria Política e do Estado do Departamento de Direito Público Geral e Processual - Faculdade de Direito - Universidade Federal de Pernambuco (UFPE). Doutora em Direito pela UFPE, com período sanduíche na Bucerius Law School. Pesquisadora visitante do Instituto Max Planck de Direito Privado e Comparado de Hamburgo. Mestre em Ciência Política e em Direito pela UFPE. Bacharel em Direito.
E-mail: flavianne@gmail.com

*** Doutoranda em Direito pela UFPE.
E-mail: camillamontanha@gmail.com

Internacional em 2020, foi utilizado para analisar comparativamente os direitos de propriedade privada e o direito de propriedade coletiva no Sistema jurídico brasileiro a partir de uma perspectiva decolonial. O caso indígena Xukuru mostra claramente os diversos problemas e conflitos que surgem quando se usa o conceito de direito de propriedade baseado em uma forte tradição eurocêntrica. Os desafios de registrar uma propriedade indígena no Brasil foram identificados neste contexto como um modelo colonial disfuncional de direito privado que impede o exercício da propriedade coletiva no Brasil. Assim, a decisão da Corte Interamericana de Direitos Humanos que introduz o conceito de direitos de propriedade coletiva no Brasil pode inspirar uma abordagem decolonial no ordenamento jurídico interno e servir de aprendizado para outros ordenamentos jurídicos que enfrentam problemas semelhantes.

Palavras-chave: Corte Interamericana de Direitos Humanos; Decolonialidade; Direito Comparado; Povo indígena Xukuru.

1 **Introduction:** the decolonial comparative analysis proposal to rethink property rights for indigenous people

This paper analyses the concept of collective property from the perspective of decolonial comparative law, by taking into consideration the case of the Xukuru[1] indigenous people *versus* Brazil, which was recently judged by the Inter-American Court of Human Rights on 5th February 2018. This is a paradigmatic case for the Latin American judicial system because it is the first decision by the Inter-American Court of Human Rights against Brazil in relation to indigenous peoples' rights and it is innovative regarding the Western concept of property rights.

We use the case of the Xukuru indigenous people in Pernambuco, who live in the Northeast of Brazil, as a decolonial proposal for rethinking property rights; we comparatively analyse private property rights and the collective property right in the Brazilian legal system. It is important to highlight that there is a peculiarity regarding the constitutional framework of property rights of indigenous people in Brazil, as the ownership of the indigenous land belongs to the Federal Union, while the indigenous people have the permanent possession of their ancentral territory and the right to the exclusive use of surface resources. Diferently, the land rights in Brazil for non-indigenous traditional people, like the "quilombolas", has a different constitutional regulation of their collective property rights, which has been vastly discussed in the literature[2].

Quilombolas and indigenous people are considered traditional people who "need their territory to keep alive their ancestrality as a community"[3]. The fact that indigenous people in Brazil are not guaranteed the property of lands they occupy, but only permanent possession, reveals also the character of the Federal Government's colonial tutelage towards indigenous people.

Due to the challenge regarding the exercise of property rights by indigenous people in Brazil, the selection of the case Xukuru people *versus* Brazil, ruled by the Inter-American Human Rights Court, emerges as a fruitful metodological strategy to pave the way for a decolonial comparative analysis. The collective and the private property rights shares some common characteristics that justify the comparative analysis. The novelty here is to bring the decolonial approach. The decolonial comparative law is a new field of research under development at the Max Planck Institute for Comparative and International Law, since 2019. In our case, the legal comprehension of indigenous property rights

[1] Although the decision ruled by the Inter-American Court of Human Rights refers to the indigenous people living in the cities Pesqueira and Poção, of the state of Pernambuco, as "Xucuru" people spelled in the second syllable with the letter "c", they call themselves Xukuru do Ororubá, spelled with the letter "k" in the second syllable. Adopting "Ororubá" to not to be confused by non-Indians and with another indigenous people, the Xukuru-Kariri that majority of whom live in the Municipality of Palmeira dos Índios, in the state of Alagoas, and also in Paulo Afonso, in the states of Bahia and Caldas, in the state of Minas Gerais. This was the reason why, we refer to the sentence of the Inter-American Court, the spelling of "Xukuru" with the letter "k" in the course of this paper. Cf. SILVA, Edson. Índios: desafios das pesquisas as reflexões históricas. *In:* NETA, Francisca Maria; PEIXOTO, José Adelson Lopes. (orgs.). *Ecos do silêncio:* o saber e o fazer da pesquisa. Recife: Libertas, 2018. p. 29-46.

[2] LEUZINGER, Márcia Dieguez; LYNGARD, Kylie. The land rights of indigenous and traditional peoples in Brazil and Australia. *Revista de Direito Internacional,* Brasília, v. 13, 2016, p. 419-439. p. 426.

[3] BORBA, Gabriel de Oliveira. O processo legislativo como garantia para a obtenção do consentimento prévio das comunidades quilombolas de Alcântara. *Revista de Direito Internacional*, [S.L.], v. 17, n. 3, p. 29-37, 20 abr. 2021. Available in: http://dx.doi.org/10.5102/rdi.v17i3.7547. p. 30.

by the Inter-American Human Rights System make the decolonial comparative analysis possible.

Therefore, our research embodies the innovative approach of the Decolonial Comparative Law, promoted and discussed by Ralf Michaels and Lena Salaymeh at the first workshop co-organized by Max Planck Institute for Comparative and International Law in Hamburg, Germany, with the University of Witwatersrand, Johannesburg, South Africa, on 2020. At this meeting, we refined our methodological approach. The idea was to include decolonial eyes on comparative analysis that traditionally was built in colonial and universality basis. Thus, this new Max Planck Institute's Research Area, named Decolonial Comparative Law[4] both identifies:

> how the matrix of coloniality structures prevalent understandings of law and offers decolonial alternatives. […] Conventional comparative law rests on epistemic assumptions that emerge from the modernity/coloniality matrix and this has implications for a number of core presumptions or practices in comparative law: […] viewing modern law as superior to precolonial and anticolonial legal traditions. Decoloniality seeks to overcome the center-periphery structure. Rather than organizing comparative law around the objective of unifying or "modernizing" law, we advocate using comparative law to decolonize legal thinking and to create conditions for legal pluriversality. A decolonial analysis reveals the coloniality within conventional comparative law and thereby helps move beyond it.

Daniel Bonilla Maldonado[5] emphasizes the role of the critical academic of law on questioning the modern comparative law. Traditionally, paradigmatic comparativists scholars compare rules, principles and institutions, considering law as an autonomous system, committed with liberal values standardized in Western World. According to Bonilla Maldonado[6], legal hybridization can create space for resistance and emancipation. The example of rights of nature at the Constitution 2008 of Ecuador is a legal hybridization that transform the modern comparative law, creating a new figure in between modern law and indigenous precolonial law. The critical comparative law, post-colonial studies and the Third World Approaches to International Law (TWAIL), even been internally diverse, could build the possibility for a decolonial comparative law in the future? This was one of the relevant questions brought by Ralf Michaels, during the First Workshop of Decolonial Comparative Law[7].

In our research proposal, the property right legal category could gain from a precolonial (decolonial) view of the indigenous meaning of ancestral territory (communal property) in comparison with the private modern law universalized regulation. As a decolonial comparative analysis on property rights, we will use here the expression "territory" to refer to the international human rights comprehension of communal property rights of indigenous people, that we classify as a decolonial terminology; while the expression "land" will refer to the expression universalized in modern private law, that we classify as a colonial word.

For this purpose, we organized the paper in six topics. Firstly, we had introduced the methodology of decolonial comparative law and identified the object of the analysis. At the second topic, we presented the historical presumptions that are relevant for comprehending the problems that the Xukuru people faced during the process of 'territorialization' in order to identify the challenges of registering an indigenous property in Brazil. At this topic, we detected and highlighted the dysfunctional colonial model of private right that is obstructing the exercise of collective property. Afterwards, we analysed the process of recovering the territory, the bloody struggles involving deaths of indigenous leaders that led to the decolonial demand for the property right to be brought before the Inter-American System of Human Rights. Later, we investigated the practical experience of Brazilian law that is influenced by European references, which have a strong colonial influence in turn. Subsequently, we discussed the definitive case of the Xukuru people as a decolonial proposal, through which one can suggest changes in order to incorporate the collective property right into the Brazilian legal system. Finally, we pointed out the problems of the Bra-

[4] MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW HAMBURG. *Decolonial Comparative Law.* Available in: https://www.mpipriv.de/decolonial. Access in: 9 May 2021.

[5] BONILLA MALDONADO, Daniel. *Legal Barbarians:* Identity, Modern Comparative Law and the Global South, Cambridge University Press, 2021.

[6] BONILLA MALDONADO, Daniel. Modern Comparative Law and the Construction of the legal barbarian. *In:* DECOLONIAL Comparative Law Workshop. Org. Max Plack Institute for Comparative and International Private Law Hamburg and University of Witwatersrand, Johannesburg, 6-7 October 2020.

[7] MICHAELS, Ralf. Ralf. Discussant of the paper Modern Comparative Law and the Construction of the legal barbarian. In: DECOLONIAL Comparative Law Workshop. Org. Max Plack Institute for Comparative and International Private Law Hamburg and University of Witwatersrand, Johannesburg, 6-7 October 2020.

zilian infra-constitutional legislation with reference to private property rights, which are effectively obstructing the collective property right of the indigenous peoples.

Once our decolonial comparative analysis is concluded, the indigenous case of Xukuru people clearly showed the diverse problems and conflicts that arise when using the concept of property right based on a strong Eurocentric tradition, which is inadequate for indigenous peoples. We hope that these reflections here will serve as learning for other legal systems that are confronting similar problems.

2 Historical perspective of the Xukuru people's case: territorialization and the challenge of registering the indigenous property in Brazil according to the colonial model of private law

The unique process of historical territorialisation of the indigenous people in the Northeast Brazil is a necessary path to understand the legal hybridization related to the indigenous territory demarcation. As we mentioned before, legal hybridization can be interpret as a way for resistance. The critical comparative studies suggests the option of evaluating it as positively, when we identify a space for emancipation[8].

The Portuguese colonial expansion arrived at the ancestral territory of the Xukuru indigenous people in the Serra mountain range around 1654, which is called "Serra do Ororubá" nowadays. The colonial invasions resulted in deaths of indigenous people because of the illnesses brought by the colonizers, conflicts that resulted in combats, incorporating the Indians[9] into the religious missions and exploiting them as a native labour force[10].

It is important to highlight that the indigenous peoples in the Northeast of Brazil were organized into missionary settlements. This colonial model of organization into villages represented initially destructing the culture of diverse indigenous peoples. On the other hand, paradoxically, the division into villages (aldeamento) became the 'locus' of ethnic survival for some of the indigenous groups who had survived and resisted[11]. The Xukuru people is an exemplary case of this non-passive resistance to the process of colonization. This model of "villages" territory demarcation typical of Northeast countryside is interpreted in this paper as a legal hybridization experience in decolonial comparative law that created a space for indigenous emancipation.

We identify the settlement here as this process of social reorganization that was imposed by the European colonists on the native peoples of Brazil, which established a new relationship between the indigenous peoples and their territory. The second movement of territorialization began in the 20th century, when the lands were donated and the old missionary settlements were recognized as belonging to the indigenous communities and they became controlled by the State's indigenous organ. One should still mention the movement of territorialization which had begun in the decade between 1970 and 1980 as mobilizations of the indigenous peoples who were not recognized by the governmental organs or who did not have their territory demarcated[12].

After the period of enslaving the indigenous peoples, those peoples were assimilated[13] with greater force

[8] BONILLA MALDONADO, Daniel. The Critical Academic of Law: Resistance and Emancipation. *In:* LEGAL Barbarians: Identity, Modern Comparative Law and the Global South, Cambridge University Press, 2021.

[9] "Indian" is a colonial expression used by the Portuguese colonizers to refer to the indigenous people, natives of Brazil. When the europeans "discovered" America, they nominated the natives as Indians.The Doctrine of Discovery (MILLER, Robert J.; RURU, Jacinta. An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand. *In:* SILVA, Denise; HARRIS, Mark (ed.). *Indigenous People and the Law.* 2015), in which the ethnocentric ideas of European supremacy overcame other cultures, is strongly verified in the Brazilian legal system. Today, the word "Indian" is still found in legal norms, state bureaucracy and judicial decisions in Brazil. In opposition, we use the expression "indigenous people" as a decolonial word to refer to the natives in America.

[10] SILVA, Edson. *Xukuru:* memórias e história dos índios da Serra do Ororubá (Pesqueira, PE), 1959-1988. 2. ed. Recife: UFPE publisher, 2017. p. 139.

[11] MEDEIROS, Ricardo Pinto de. História dos povos indígenas do Sertão Nordestino no Período Colonial: problemas, metodologia e fontes. *Clio Arqueológica*, Recife, n. 15, p. 205-233, 2002. p. 209.

[12] OLIVEIRA, João Pacheco de. Uma etnologia dos índios misturados? Situação colonial, territorialização e fluxos culturais. *Mana*, [S.L.], v. 4, n. 1, p. 47 to 77, abr. 1998. FapUNIFESP (SciELO). http://dx.doi.org/10.1590/s0104-93131998000100003.

[13] The assimilation of the Brazilian indigenous peoples can be understood as a process that causes the disintegration of native indigenous peoples through the fact of accepting the Indians into the Brazilian society as if they were not indigenous: thereby sacrificing

into the national workforce at the beginning of the Brazilian Republic and specifically when the 20th century commenced. One should point out that the Service for Protection of the Indians and Localization of the National Workers (SPI) was created in 1910, when it was presided over by Lieutenant Colonel Cândido Rondon, which represented the formal establishment of an indigenous State policy on the lines of the assimilating model[14].

When the Service for Protection of the Indians and Localization of the National Workers was created, the Xukurus had already distinguished themselves with political movements for requesting that a post of the SPI should be installed in Pernambuco. Although the government agency had an assimilating policy, it also gave assistance to the indigenous peoples in the role of protection, which combined aspects of the Indians' civil capacity as much as the collective administration of their assets. The Brazilian Civil Code of 1916, which was in force during that period, made it conditional that the Indians' civil capacity should depend upon the degree to which these Indians had assimilated into the civil society. In 1967, during the period of Brazil's military dictatorship, the SPI was abolished and replaced by the National Indian Foundation of Brazil (FUNAI), which encompassed among other functions the protection of indigenous peoples the role of protection for the indigenous peoples[15].

Until the political re-democratization in Brazil and until the end of the military dictatorship in the country (1964 to 1985), the legislation and indigenous policy of the Brazilian State was dedicated to a mono-cultural and individualistic concept of indigenous rights which was essentially associated with the State's colonial practice[16].

From 1970 onwards, the Xukuru people began appearing in the struggles for recognition of their ancestral territory in a movement that encompassed other indigenous peoples in northeastern Brazil. During the decade commencing in 1980, the leaderships of the indigenous peoples and of the Xukuru people brought their claims to the Constituent Assembly and they succeeded in protecting their rights which were expressly provided for in the current Constitution of the Federal Republic of Brazil that was promulgated in 1988.

It was established in Article 67 in the Act of Transitory Arrangements (ADCT) that the federal government (Union) should conclude the demarcation of indigenous territory within the period of five years starting from the Constitution's promulgation.

However, this period was not complied with for most of the indigenous peoples. We have the Xukuru people in this context, whose process of demarcating the territory was started in 1989 but it was only concluded in 2005 - sixteen years afterwards - with many legal problems, violence and deaths.

One important aspect that confounded this process was related to the registration's rejection of the indigenous property by the notarial system, even after the federal government published the decree of approving the demarcation in 2001. The official of the Land Registry in the town of Pesqueira in the State of Pernambuco, where the Xukuru people's indigenous territory are situated, refused to register the decree that approved the indigenous people's territory by adjudging a legal action that aroused doubt[17], based on a limitation of the national private Law, as an obstacle to registering the collective property.

The notarial registration of the indigenous territory in the Land Register was only made in 2005 and the annotation about the decision by the Inter-American Court of Human Rights, which condemned Brazil for violating the due process clause and for unjustified delay in legalizing the property, was only registered in the Land Registry after 2018.

In this context of violating rights, we have identified the actions of recovery that were initiated by the Xukuru people for recuperating their ancestral territory. Thus, the approval of the territory that they inhabit was

their ethnic identity and consciousness of their origins. SCHADEN, Egon. Antropologia: Aculturação e Assimilação dos Índios do Brasil. *Revista Do Instituto De Estudos Brasileiros,* v. 2, p. 7-14, 1967. Available in: https://doi.org/10.11606/issn.2316-901X.v0i2p7-14.

[14] SANTOS, Cecília MacDowell. Xucuru do Ororubá e Direitos Humanos dos indígenas: lutas pela terra-segurança e Estado no Brasil. In. BENVENUTO; Andréa Almeida Campos *et al. Direitos Humanos*: debates contemporâneos. Recife: Ed. Do autor, 2009. p. 29.

[15] SANTOS, Cecília MacDowell. Xucuru do Ororubá e Direitos Humanos dos indígenas: lutas pela terra-segurança e Estado no Brasil. In. BENVENUTO; Andréa Almeida Campos *et al. Direitos Humanos*: debates contemporâneos. Recife: Ed. Do autor, 2009. p. 30.

[16] SANTOS, Cecília MacDowell. Xucuru do Ororubá e Direitos Humanos dos indígenas: lutas pela terra-segurança e Estado no Brasil. *In:* BENVENUTO; Andréa Almeida Campos *et al. Direitos Humanos*: debates contemporâneos. Recife: Ed. Do autor, 2009. p. 33.

[17] The action of "arousing doubt" is an appeal proper of the notary process.

insufficient to guarantee the pacific possession of the territory. It was necessary to recognize the link between religious, political, moral and cultural prejudices and the territory, which "permits overcoming the contradiction between the historical objectives and the sentiment of loyalty to the origins, by transforming the ethnic identity into an effective social practice which was culminated by the process of territorialization.[18]".

The Brazilian State did not pay attention to this process of territorialization, nor to the relationship of the indigenous peoples with the territory that they inhabit. The entire process of demarcating the Xukuru territory and those of the other Brazilian indigenous peoples is regulated by the classic structure of a Europeanized right of hegemony, without taking into consideration a pluralistic identity of the indigenous peoples in the disputes of legal theories about the process. The Brazilian civil law still has a perspective of indigenous assimilation into a mono-cultural, Eurocentric and individualistic concept[19].

In this way, the civil law of European inspiration did not find an adequate solution to the challenges that the traditional peoples faced in the case of the Xukuru indigenous people. On the contrary, the rules of the Brazilian civil code served as the motive to arise doubts to obstacle the notarial registration of Xukuru collective property rights, already approved by the Federal Government after a complex process of indigenous territory demarcation. Even after implementing the registration in the Land Registry in 2005, the situation was not resolved because conflicts still existed with the non-indigenous occupants in the area of the indigenous territory and the necessity of removing[20] these individuals. Once again, the private law rules were insufficient for removing the third-party intrusions.

Thus, the property right that was registered in the Land Registry did not succeed with fulfilling its classic function as foreseen in the private law, which is the right of claiming the matter from the person who is holding it unjustly. The exercise of exclusion over the indigenous territory, which should enable removal of those third parties who would intend to use it, enjoy it and benefit from it, was not realized in practice. On the contrary, one observed opportunistic utilizations of legal actions, based on the individual property right, for the intruding third parties to remain in the indigenous territory that had already been demarcated. That is the case of the Didier farmers who obtained a favourable decision from the Brazilian Courts, which was passed as an executory sentence against the Xukuru people for remaining in their territory[21].

The decision about the case that the Inter-American Court made in 2018 focussed on the necessity of removing the intruding non-indigenous individuals from the territory. In the legal brief that was presented to the Inter-American Commission in 2011, the Xukuru people had already highlighted the search for quiet possession of the territory apart from formally exercising the right. The request of the Xukuru people was preoccupied with the practical implications and the functionality of a quiet possession in the sense of maintaining a routine without threat and without violations to the physical and psychological integrity of its members, which implies not violating their right to life and the possibility of exercising their cultural and religious traditions[22]

All of the procedures for demarcating the Xukuru people's indigenous territory, apart from exacerbating a reasonable period for concluding it, were marked by deaths during the process of recovering the territory of the Xukuru people; among which was the assassination of the Chief Francisco de Assis Araújo, who was better known as Chief Xicão.

[18] OLIVEIRA, João Pacheco de. Uma etnologia dos índios misturados? Situação colonial, territorialização e fluxos culturais. *Mana*, [S.L.], v. 4, n. 1, p. 47-77, abr. 1998. FapUNIFESP (SciELO). http://dx.doi.org/10.1590/s0104-93131998000100003.

[19] LIMA JÚNIOR, Jayme Benvenuto; CUNHA, Luís Emmanuel Barbosa da. *O Caso do Povo Xukuru frente ao Sistema Interamericano de Direitos Humanos:* o caminho pela Comissão Interamericana de Direitos Humanos. In the press. p. 15-16.

[20] Removing the intrusion signifies withdrawing what or who is causing the intrusion. It is a term that is frequently utilized for withdrawing illegal occupants from recognized and regularized areas such as the indigenous lands, environmental reserves, Afro-Brazilian rural settlements or those of other peoples and traditional populations. (BRASIL, 2019, p. 18).

[21] CASTILHO, Ela Wiecko Volkmer de; CASTILHO, Manoel Lauro Volkmer de. *A colonialidade do poder na reintegração de posse do imóvel Caipe.* In the press. p. 1-18.

[22] LIMA JÚNIOR, Jayme Benvenuto; CUNHA, Luís Emmanuel Barbosa da. *O Caso do Povo Xukuru frente ao Sistema Interamericano de Direitos Humanos:* o caminho pela Comissão Interamericana de Direitos Humanos. In the press. p. 16.

3 The bloody struggle of the Xukuru people for recovering their territory and its impact on reviving the collective property rights demand before the Inter-American Court of Human Rights.

The disputes about the territory of the Xukuru indigenous people in Ororubá date from colonial times. It is a region in the interior of Brazil's Northeast with a dry climate that is also strongly characterized by disputes about water and especially by the fertility of the territory in the swamps of Ororubá, which were inhabited by the Xukuru's ancestors. The Xukuru's territory were invaded over the course of time by the tenant farmers and traditional families who formed the oligarchy in the town of Pesqueira, in Pernambuco. In 1850, the Law of Lands eventually legitimized these usurpations by the large rural estate owners when it declared the abolition of the Settlement of Cimbres, where the Xukuru people of Pernambuco were living[23]

In 1989, at the beginning of the process for formally demarcating the Xukuru people's territory, FUNAI conducted an agrarian survey, the result of which showed the structure of large rural estates owned by the non-indigenous people who were occupying it. The small leaseholders, i.e., those persons whose land occupied less than 100 hectares, represented about 11% of the territory. Meanwhile, the possessions of 100 to 500 hectares included almost 19 % of the indigenous territory and the possessions of more than 500 hectares constituted almost 20 % of the indigenous territory. Thus, about 11,000 hectares (corresponding to 39% of the possessions with more than 100 hectares), corresponded to only 32 private properties that had been inserted into the indigenous territory[24]. The Mayor of Pesqueira, the Councillors of Pesqueira, the Municipal Secretaries and their relations, as well as a Senator of the Republic, were among the principal non-indigenous occupants of the Xukuru's territory[25].

During this period, a structure of institutionalized violence against the Xukuru people was identified, which was exercised by the owners of large rural estates and reinforced by the State's controlling organs. It was observed that FUNAI, the Federal Public Prosecutor Office (MPF), the Federal Police, the Judiciary Power and the Land Registry of property locally created legal obstacles to protecting the original rights of the Xukuru indigenous people[26] Thus, the initial passiveness of FUNAI when the demarcating process began, as well as the criminalization of the Xukuru people by the Federal Police and the Federal Public Prosecutor Office, associated with the negation of the indigenous peoples' existence by the local Judiciary in the actions that were taken by the leaseholders against the Xukuru people, caused an increasing advance of the non-indigenous occupiers into the ancestral territory of the original people, which embittered the conflicts that already existed. In disbelief of the action of the State's organs, which locally perceived the indigenous people as an enemy and which shared an anti-indigenous vision with the political power of the large rural estates, the Xukuru people themselves autonomously initiated the recovery of their ancestral territory.

This process of claiming the Xukuru people's indigenous territory became known as "the recoveries", which had the Chief Francisco de Assis Araújo, who was known as Chief "Xicão" as its leading figure. When the Federal Constitution was promulgated in 1988, which foresaw protection of the indigenous peoples' original rights over the territory which they traditionally occupy, the Xukurus initiated the recoveries of the territories that were subject to the dominion of the region's farmers. The first area to be recovered was in the 'Pedra d'Água' region at the end of the 1990s: an area that had been occupied by the Indians at the start of 1960s but was in the possession of 15 tenant farmers from the Municipal Council of Pesqueira as lands that were the property of the federal government (Union) which had been ceded to the town of Pesqueira[27].

[23] SILVA, Edson. *Biografia:* O Povo Xukuru de Ororubá. Available in: https://osbrasisesuasmemorias.com.br/povo-xukuru-do-ororuba/. Access in: 10 Aug. 2020.

[24] ALMEIDA, Manoel Severino Moraes de et al. O caso Xukuru: lacunas e omissões da sentença proferida pela corte interamericana de direitos humanos. *Revista do CNJ,* Brasília, v. 3, n. 2, p. 67-75, Jul./Dec. 2019. p. 69.

[25] FIALHO, Vânia. *As fronteiras do ser Xukuru*. Recife: Massangana / Joaquim Nabuco Foundation, 1998. p. 4.

[26] LÔBO, Sandro. MINICURSO. *O Sistema Interamericano de Direitos Humanos e o Caso do Povo Xukuru:* entre implementação e impacto. Federal University of Pernambuco (UFPE) - PROExC on Web. Recife, 10 May 2019.

[27] SILVA, Edson. História Xukuru, história indígena no nordeste: novas abordagens. *Mnemosine Revista,* v. 1, n. 2, p. 64-83. Jul./Dec. p. 2010. p.-71-76.

It was through the mobilization of the group by their ethnic reaffirmation in the process of the recoveries that the Xukuru re-established the pride in their identity and demarcated the spaces of their existence, not only on the physical level but also symbolically. One should point out the protagonism of the Xukuru people and their leaders in the national indigenous movement, as well as their role in strengthening the indigenous movement in Brazil's Northeast[28].

Nevertheless, the mobilization of the Xukuru people for recovering and demarcating their territory was characterized by an exacerbation of the social conflicts. Already in 1989, at the start of the legal and administrative process of recognizing the fact that the land was indigenous territory, the conflict between the non-indigenous invaders, these farmers and local politicians was established in a visible manner. This tension culminated in diverse assassinations, persecutions and even criminalization of the indigenous leaders[29].

In this sense:

> "The physical and interpersonal violence against the Xukuru is set within the framework of an intense polarization in the struggle for territory and it shows that the farmers are the principal aggressors of the Xukuru people, which extends to their leaders and supporters. This polarization resulted in the assassinations in 1992 of José Everaldo Rodrigues Bispo, who was the son of the priest and medicine man Zequinha; in 1995 of the FUNAI's Public Prosecutor Geraldo Rolim da Mota Filho, who was killed by the farmer Theopombo; in 1998 of Francisco de Assis Araújo Chicão Xukuru, who was killed by the farmer José Cordeiro, known as Zé de Riva; in 2002 of Francisco de Assis Santana, known as Chico Quelé"[30]

With the assassination of the Chief Xicão, which occurred on 20th May 1998 and who had led the process of agrarian regularization in the territory, the Xukuru people were stimulated to struggle for reconquering their traditional territory[31].

Thus, the relationship that the Xukuru people had with their territory was intensified on the spiritual level after the death of Chief Xicão and it strengthened the ethnic identity by demonstrating social cohesion and overcoming the difficulties. Their dead are 'planted' or buried with the sacredness that the Xukuru people have for their ancestral territory. They were not interred or entombed as in the colonial tradition. In that way, "That relationship of sacredness which the indigenous peoples have with the territory goes beyond the aspects of agrarian regulation: it is orientated to the spiritual belief of linkage with their ancestors, whom they also call the 'enchanters' or 'brothers of light'[32] ".

The Inter-American Court of Human Rights subsequently recognized that these recoveries were a significant step towards effectively establishing the fact of this property right of the Xukuru people, which had been postponed for years by the actions of the State's organs that were acting locally and creating legal insecurity.

On 10th October 2002, the Cabinet of Legal Assessors to the Popular Organizations (GAJOP), the Council of the Indigenous Missionary (CIMI) and the National Movement of Human Rights - Northeastern Region (MNDH-NE) brought the case of the Xukuru people to the Inter-American Commission of Human Rights (IACHR). On 16th October of the same year, the IACHR received the petition and on 29th October of 2009 the Report of Admissibility no. 98/09 was approved. The Report of Merit no. 44/15 was approved on 28th July 2015 and the case was submitted to the Inter-American Court of Human Rights (ICHR) on 16th March 2016. The Inter-American Commission concluded in the submission of the case to the IDH Court that:

> "Brazil violated the property right as well as the right to personal integrity, to the guarantees and to the legal protection that is foreseen in Articles 21, 5,

[28] FIALHO, Vânia. Parecer antropológico: faccionalismo Xukuru. *In.* PLANTARAM" Xicão: Os Xukuru do Ororubá e a Criminalização do direito ao território" Manaus: PNCSAUEA/UEA Edições, 2011. p. 53 and 92.

[29] ALMEIDA, Manoel Severino Moraes de et al. O caso Xukuru: lacunas e omissões da sentença proferida pela corte interamericana de direitos humanos. *Revista do CNJ,* Brasília, v. 3, n. 2, p. 67-75, Jul./Dec. 2019. p. 68-72.

[30] COUTO, Luiz et al. Os Xukuru e a violência. *In:* FIALHO, Vânia; NEVES, Rita de Cássia Maria; FIGUEIROA, Mariana Carneiro Leão (Org.). *"Plantaram" Xicão*: os Xukuru do Ororubá e a criminalização do direito ao território. Manaus: PNCSAUEA/UEA Edições, 2011. p. 113.

[31] ALMEIDA. Manoel Severino Moraes de et al. O caso Xukuru: lacunas e omissões da sentença proferida pela corte interamericana de direitos humanos. *Revista do CNJ,* Brasília, v. 3, n. 2, p. 67-75, Jul./Dec. 2019. p. 71.

[32] FIGUEIROA, Mariana Carneiro Leão. Um olhar antropológico acerca do processo criminal que teve como vítima o cacique Xicão Xukuru. In. Plantaram" Xicão: Os Xukuru do Ororubá e a Criminalização do direito ao território" Manaus: PNCSAUEA/UEA Edições, 2011. p. 183.

> 8 and 25 of the American Convention in relation to Articles 1.1 and 2 of the same instrument."[33].

The sentence in the case of "Case of the Xukuru indigenous people and its members versus Brazil" was passed by the Inter-American Court of Human Rights on 5th February 2018, when the Inter-American Court declared in their official summary that Brazil is*, ipsis litteris*:

> "Internationally responsible for violating the law that judicially guarantees a reasonable period, which is prescribed in Article 8.1 of the American Convention on Human Rights, as well as for violating the laws of legal protection and of collective property, which are prescribed in Articles 25 and 21 of the American Convention, to the detriment of the Xukuru indigenous people and their members [...][34]"

The Inter-American Court determined at the end of its sentence in the Xukuru case that:

> "The state must guarantee the collective property right of the Xukuru indigenous people over their territory in an immediate and effective manner, in such a way that they do not suffer any invasion, interference or damage that is perpetuated by third parties or by the State's agents, which depreciates the existence, the value, the use or the enjoyment of their territory.[35]".

Based on the aforementioned explanation, the Court determined that the Brazilian State should respect the collective property of the Xukuru people. However, the collective property right has still not been prescribed by Brazil's legal system in the standards of internal private law.

In Brazilian legal system, we can identify the collective property title prescribed for "quilombolas" (Federal Constitution 1988, Transitory Disposition 68), but for indigenous people it is a challenge the legal recognition of property rights. Those barriers related to the Brazilian model of ancestral territory demarcation and the land registration as a Federal Government ownership, with the permanent communal possession for the indigenous people, will be explored in topic 6. The Xukuru case is an opportunity to revive this demand for indigenous collective property rights protection in Brazil.

The idea of collective property rights, which can be found in Article 14 of Convention 169 of the International Labour Organization (ILO), in International Treaties of Human Rights[36] and in the consolidated jurisprudence of the Inter-American System of Human Rights (Mayagna Sumo Awas Tigni versus Nicaragua in 2001, Moiwana versus Suriname in 2005 and Yakye Axa versus Paraguay in 2005), did not have a strong impact on the Brazilian jurisdiction in the subject of indigenous peoples.

On the other hand, we can identify some advance of Brazilian Supreme Court, regarding the application of decisions of the Interamerican Court of Human Rights for quilombola's people. On February 8, 2018, the Brazilian Supreme Court decided about the constitutionality of Decree the No. 4,887 / 2003 , which deals with the demarcation of the territory of quilombola's peoples, just few days after the sentence of the case Xukuru People vs. Brazil, ruled by the Inter-American Court of Human Rights, which occurred on February 5 of 2018. In the judgment of the action of the concentrated control of constitutionality, neither jugdes of the Supreme Court mentionated the Xukuru case. However, the vote of the judge Rosa Weber conducted a dialogue with the existing jurisprudence of the Inter-American Court on communal (collective) property of indigenous peoples, citing the Mayagna (Sumo) Awas Tingni vs. Nicaragua, and the Moiwana vs. Suriname , involving a descendent community of escaped slaves[37].

Although the Brazilian state is a signatory of the American Convention on Human Rights since 1992 and it accepts the voluntary jurisdiction of the Inter-American Court of Human Rights since 1998, the col-

[33] INTER-AMERICAN COURT OF HUMAN RIGHTS Case of the Xukuru people versus Brazil. Sentence of 5th February 2018. 2018, p.1. Available in: http://www.corteidh.or.cr/docs/casos/articulos/seriec_346_por.pdf. Accessed on 24th July 2020.

[34] INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of the Xukuru indigenous people and its members versus Brazil. Sentence of 5th February 2018. Official resume issued by the Inter-American Court, p. 1. 2018. Available in: http://www.corteidh.or.cr/docs/casos/articulos/resumen_346_por.pdf. Accessed on 24th July 2020.

[35] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Caso do povo indigena Xucuru e seus membros e seus membros vs. Brasil.* Sentença de 5 de fevereiro de 2018. Resumo oficial. 2018. Available in: http://www.corteidh.or.cr/docs/casos/articulos/resumen_346_por.pdf. Access in: 24 Jul. 2020.

[36] The example of Article 21.1 of the American Convention of Human Rights, the Articles 1 to 3 of the Declaration of the United Nations about the Rights of Indigenous Peoples and the Articles 1 to 5 of the American Declaration about the Rights of Indigenous Peoples.

[37] BRAZIL. Supremo Tribunal Federal. *Ação direta de inconstitucionalidade 3.239* Distrito Federal. Available in: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI3239RW.pdf. Access in: 12 May 2021.

lective property right was still not covered by adequate regulation in the infra-constitutional legislation which prescribed the property right.

Thus, that Xukuru case is paradigmatic for being the first condemnation of Brazil by the Inter-American Court of Human Rights in the indigenous matter, in order to rethink property right of the original peoples. The confronted problems permit one to reflect definitively upon the insufficiency and non-functionality of the institutes of private law, which were used strategically in the domestic law against the indigenous people.

4 The Eurocentricity in the Brazilian legal experience: a strong colonial tradition

It is interesting to ascribe the experience of the Brazilian legal practice, which has a strong colonial tradition, to the European and North-American law, with scant reference to the experiences of Latin America which has similar problems. The decision of the Brazilian Federal Justice in 1998 (subsequently confirmed by the Regional Tribunal in 2003) in favour of the landowners Didier[38] for recovering the Caípe village (with 300 hectares), which lies within the Xukuru territory, reveals this colonial posture of negating the ancestral relationship of the people to the territority. The judiciary recognized the civil possession by the landowners of the large rural estates inside the indigenous territory on the basis of a register of private property from 1969, although its successive chain was not legitimately proved.

The arguments that supported the judicial decision opted for the prevalence of the civil law's rules versus the Xukuru people, which were apparently Indian pretences because there is a high degree of miscegenation and they should not be considered as a "pure race". One observes the recourse to the doctrine of assimilation from the Brazilian colonial period, which apparently extinguished the indigenous people and integrated them into the civilized society. Besides that, the doctrine of discovery[39], which entails the ethnocentric ideas of European supremacy over the other cultures, was strongly verified in the actions against the Xukuru people.

The decision by the Inter-American Court of Human Rights in 2018, in the case of Xukuru versus Brazil, questioned these decisions by the Brazilian Judiciary. It highlighted the urgency of exercising the collective property right by the Indigenous People over the totality of their territory and it reinforced the Inter-American jurisprudential understanding about the necessity of removing the non-indigenous intrusion with the payment of benefits in good faith.

Concerning that aspect of colonialism, Virgilio Afonso Silva[40] already pointed out that there is a deficit in South America and notably in Brazil with integrating the Brazilian legal system with other countries of the region, which he called the absence of transnational constitutional dialogue between the tribunals of South America's different countries.

Brazil knows little about what occurs in the neighbouring countries in the majority of cases, in the sense of what their tribunals decide. The Brazilian Supreme Constitutional Court, named Federal Supreme Court (STF), makes many more references to the decisions of the Federal Constitutional Court of Germany and to the US Supreme Court, while neglecting the obligatory and binding jurisprudence of the Inter-American Court concerning the matter. In relation to the legal training in Brazil, most of the references are made to Europe and to the United States of America, although the judges have apparently read many foreign works and jurisprudences. Thus, it should be pointed out that there is a strong Eurocentricity not only in the legal system but also in the Brazilian legal training[41].

We are also highlighting the Eurocentricity of the Brazilian Civil Code of 1916, which was in force until 2002. This legislation, which called the Indians 'silvícolas' or forest-dwellers, was drawn up under the supervision of Clóvis Bevilaqua, who had a strong affinity with the German body of jurisprudence. He was part of the modernist republican movement that was called the School of Recife in Pernambuco, which emphasized

[38] Action of reintegrating possession no. 0002697-28.1992.4.05.8300 (Brazilian Federal Justice).

[39] MILLER, Robert J.; RURU, Jacinta. An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand. *In:* SILVA, Denise; HARRIS, Mark (ed.). *Indigenous People and the Law*. 2015.

[40] SILVA, Virgílio Afonso da. Integração e diálogo constitucional na América do Sul. In: BOGDANDY, Armin von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales (orgs.). *Direitos humanos, democracia e integração jurídica na América do Sul*. Rio de Janeiro: Lumen Juris, 2010. p. 522-523.

[41] SILVA, Virgílio Afonso da. Integração e diálogo constitucional na América do Sul. In: BOGDANDY, Armin von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales (orgs.). *Direitos humanos, democracia e integração jurídica na América do Sul*. Rio de Janeiro: Lumen Juris, 2010p. 522-523 and 525.

the study of German literature in Brazil's Northeast and which opposed the traditional orientation of the French doctrine. The production of the Brazilian Civil Code was based on the Outline of Texeira de Freitas and on Bevilaqua's experience in the area of comparative law[42].

Francisco Pontes de Miranda was another lawyer from the Northeast who was influential in Brazil and he belonged to the School of Recife's movement. He developed his famous work called Private Law Treaty, which quoted publications by German authors, even though the Brazilian situation did not coincide much with the German one. The works of Pontes de Miranda are still widely quoted in Brazil nowadays, including quotations by the Superior Courts, which demonstrates the perpetuation of Eurocentricity in the Brazilian law and the continuation of applying a transplanted judicial approach without greater critical thought with reference to the peculiarity of the Brazilian context.

In this sense, many lawyers and researchers are confident that the fixed legal principle can be effectively applied in any context, which despises the cultural differences between the legal systems. One observes that a social engineering exists by means of the law, which is extremely complex: the main question is how to make a transformation into comparative law[43] instead of only making a legal transplant without attending to the local particularities.

When we consulted the site of the Brazilian Supreme Constitutional Court, the Federal Supreme Court, we encountered 86 results from researching the entry of 'Inter-American Court"[44], which has jurisdiction that is recognized by the country since 1998, while, when researching the term "European Court", which is not formally binding on Brazil at all, we encountered 151 results on the Federal Supreme Court's website[45].

This can be explained by the fascination with the European model, which conveys the notion that the compared private law has something to do with the legal transplant and with the importation of constitutional rules from one country to the other[46] (. Nevertheless, during the period when the study was published in 2010, one should point out that the jurisprudence of the Inter-American Court of Human Rights is not echoed by the national decisions that were made.

It occurs to one that this legal transplant, which is sometimes made by the judiciary and by the burocracy on the national level, comes from the standardizing importation that reaffirms the Eurocentric colonial standard models instead of considering the local peculiarities in dialogues with the other regional legal systems.

5 The indigenous case of the Xukuru people as a decolonial proposal for reflecting upon the gaps of the right to property in the Brazilian legal system

As was demonstrated with the analysis of the Xukuru people, the world's vision of the indigenous peoples is different from the European tradition and specifically regarding what one understands by the right to property, which comprehends private property from an individual perspective.

This European concept of private law is present in Locke's theory as the "father of liberal individualism", whereby the right to property, life and liberty constitute the core of the civil state[47]. In the list of the contractualists' theories, Locke innovates by utilizing the notion of property as the possession of movables and immo-

[42] KLEINHEISTERKAMP, Jan. Development of Comparative Law in Latin America. *The Oxford Handbook of Comparative Law*, by Jan Kleinheisterkamp, organized by Mathias Reimann and Reinhard Zimmermann, Oxford University Press, 2006, p. 260 to 302. DOI. org (Crossref), doi:10.1093/oxfordhb/9780199296064.013.0009.

[43] MICHAELS, Ralf. The Functional Method of Comparative Law. *The Oxford Handbook Of Comparative Law,* [S.L.], p. 344-389, 21 Mar. 2019. Available in: http://dx.doi.org/10.1093/oxfordhb/9780198810230.013.11.

[44] BRAZIL. Supremo Tribunal Federal. *Research entitled the "Corte Interamericana"*. 2020. Available in: https://jurisprudencia.stf.jus.br/pages/search?base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&queryString=corte%20interamericana&sort=_score&sortBy=desc. Access in: 28 Jul. 2020..

[45] BRAZIL. Supremo Tribunal Federal. *Research entitled the "Corte Europeia"*. 2020. Available in: https://jurisprudencia.stf.jus.br/pages/search?base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&queryString=corte%20europeia&sort=_score&sortBy=desc. Access in: 28 Jul. 2020.

[46] SILVA, Virgílio Afonso da. Integração e diálogo constitucional na América do Sul. In: BOGDANDY, Armin von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales (orgs.). *Direitos humanos, democracia e integração jurídica na América do Sul.* Rio de Janeiro: Lumen Juris, 2010. p. 518.

[47] LOCKE, JOHN. *Two Treatises Of Government*. 1689. London, printed for Thomas Tegg; W. Sharpe and Son; G. Offor; G. and J. Robinson; J. Evans and Co.: Also R. Griffin and Co. Glasgow; and J. Gumming, Dublin. 1823. Available in: http://www.dominiopublico.gov.br/download/texto/mc000175.pdf. Access in: 10 Aug. 2020.

vables that already exist in the natural state, as one of the individual's natural rights that cannot be violated by the figure of the State[48]. Locke's notion about property was incorporated into Western Europe's codifications and subsequently into the countries which follow that tradition.

The indigenous peoples' perception of the land is not associated with a patrimonial asset but to a concept that the anthropologists understand to be territoriality linked spatially and religiously which the indigenous peoples occupy as the territory. Holding the territory in the sense of communal property, collectively, in the sense of it belonging to those peoples who are in this specific place, involves religious, identifying, cosmological and even linguistic dimensions[49].

The term "territory" is used by the Inter-American Human Rights System to refer to the place that traditional communities inhabit, not limited as a geographical space, but imbued with a religious significance and linked to the survival of the traditional community in this territory. The term "land" is widely used in private law. It has a Eurocentric and colonial matrix and does not recognize, hinder and even deny the rights of traditional communities, such as indigenous peoples. When dealing with the space in which indigenous and quilombola peoples occupy as "land", we would be denying the religious and connection issue that these peoples have with the land they occupy.

Thus, we had identified how the Inter-American Court of Human Rights has incorporated the territorial notion from anthropology into the legal concept of property (also prescribed at the article 26 of the United Nations Declaration on the Rights of Indigenous Peoples and article 23 of the American Declaration of the Rights and Duties of Man). Although the American Convention on Human Rights (ACRH) expressly mentions the "right to private property" in its Article 21, the jurisprudence of the Inter-American Court of Human Rights has advanced and matured because of its own actual experiences with Latin America. These experiences enabled the concept of private property that is stated in Article 21.1 of the Convention to also include the collective or communal dimension instead of it being limited to the understanding of property from the individual perspective.

The American Convention of Human Rights (ACHR), dated 1969, comprises the concept of a right to property in the following way:

> "Article 21. Right to private property
>
> 1. All persons have the right to use and enjoy their assets. The law subordinates this use and enjoyment to the social interest."[50] .

It was in 2001, beginning with the case of Mayagna (Sumo) Community of Awas Tingni *versus* Nicaragua, that the Inter-American Court advanced to an evolutionary interpretation of the international instruments for protecting the human rights, which conforms with Article 29b of the ACHR and which prohibits a restrictive interpretation of rights. In this sense, it was understood that Article 21 of the ACHR protects the right to property in a dimension that also comprehends the right of the indigenous communities' members to demarcate the communal property and to also understand it as collective property which is recognized in the Political Constitution of Nicaragua[51]

In the aforementioned case, there was a dialogue between the local communities and the Inter-American Court, with the victims demonstrating that they understood the concept of property as the landswhich are occupied and exploited by the entire community, according to an understanding of collective property. For the indigenous peoples the territory should be comprehended as the fundamental basis of their culture, spiritual life, integrity and survival. Thus, in an incorporation into the national context, the IDH Court understood that the indigenous communities have a relationship with the territory which is not a question of possession

[48] MARTINS, Adriano Eurípedes Medeiros. John Locke e a liberdade como fundamento da propriedade. *Griot:* Revista de Filosofia v. 11, n. 1, Jun. 2015. DOI: https://doi.org/10.31977/grirfi.v11i1.626.

[49] LITTLE, Paul. E. Territórios sociais e povos tradicionais no Brasil: por uma antropologia da territorialidade. *Anuário Antropológico*, v. 28, n. 1, p. 251-290. 2018. Available in: https://periodicos.unb.br/index.php/anuarioantropologico/article/view/6871. Access in: 3 Aug. 2020.

[50] ORGANIZATION OF THE AMERICAN STATES. *Convenção Americana de Direitos Humanos*. Signed at the Inter-American Specialized Convention about Human Rights, in San José, Costa Rica, on 22nd November 1969. Available in: https://www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm. Access in: 28 Jul. 2020.

[51] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Cuadernillo de jurisprudencia de la corte interamericana de derechos humanos nº 11:* pueblos indígenas y tribales. Drawn up by the Inter-American Court of Human Rights with the collaboration of German Cooperation (GIZ). 2018. Available in: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo11.pdf. Access in: 29 Jul. 2020.

and production but instead of territory as a material and spiritual element which the indigenous peoples are allowed to enjoy fully, inclusive of preserving the cultural legacy and transmitting it to the future generations[52].

Through the interpretation of Article 21 of American Conventions of Human Rights, the Inter-American Court understood the necessity of protection between the indissoluble bond between the indigenous peoples and their territories. The protection of the right to property was combined with the rights of cultural identity, non-discrimination and self-determination of the indigenous peoples. The Inter-American Court imposed a duty on the States to voluntarily recognized to delimit, demarcate, give legal title to the traditional territory and to abstain from any act which could prejudice the total use and enjoyment of the property.

In the recent decisions that highlight the Xukuru people against Brazil, it was determined that the State has the obligation to implement the removal of intrusion from the territory, by means of which it must remove any interference in the territory that would not be made by the indigenous people, so that they could make use of the territory in a full and peaceful way[53].

The Xukuru people consider that their identity is based upon the perception of territory, which is imbued with a sacred character because religiousness is one of the most important aspects for the indigenous community's cohesion. The formulation of identity and the institution of its mechanisms for taking the decision and representation are directly bound up with the trajectory of that indigenous society in regularizing its territory, by means of which the collective memory was activated and their culture was recreated[54].

Although the Inter-American Court did not point this out in an express way, we understand that the Inter-American Court incorporated a decolonial perspective about the right to property by also comprehending it in a collective dimension which embraces the relationship of the indigenous peoples with the territory that they occupy.

In that sense, it is interesting to draw up some commentaries about what should be decolonialization. The decolonial thinking is able to be understood as a theoretical and political alternative for resisting the practice of Eurocentric modernity. The matter does not concern forgetting the development of European thinking but its criticism vis-à-vis the subject's emancipation through proposing other organizational forms in the conceptual, political and cultural space of the cultural experience. One of the characteristics of decolonial thinking is that one does not only articulate by starting from the individual figures but also by demanding that the distinct social and cultural movements in the indigenous movements of South America should be expressed[55] (OTO, 2009).

Since the start of the modern era, colonialism has been present and it is emphasized by a Eurocentric discourse that has repercussions in the legal field and that of human rights. The decolonial perspective seeks pluralism in the production of knowledge, which distances itself in the dominant Eurocentric construction. The zones that were marginalized as in Latin America by Eurocentricity until then, made the universalistic discourse of human rights problematic that concluded by professing the European hegemonic discourse[56]

We cannot neglect mentioning that the Inter-American Human Rights System was created under the influence of the European System of Human Rights, by incorporating some precepts in it such as the liberal vision of private property that has been encrusted in the European legal system for several centuries.

Nevertheless, one should point out that the jurisprudence of the Inter-American Court concerning the indigenous peoples, apart from the vanguard about the subject, has been a paradigmatic model concerning the

[52] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Caso da Comunidade Mayagna (Sumo) Awas Tingni vs. Nicaragua.* Sentença de 31 de Agosto de 2001. Available in: https://summa.cejil.org/api/attachments/download?_id=58b2f3c45d59f31e1345d7be&file=1502488651884diumu0y9lxwvcnxvwe5u7n9udi.docx. Access in: 1 Sep. 2019.

[53] NAVARRO, Gabriela Cristina Braga. The judgment of the case Xucuru People v. Brazil: Inter-American Court of Human Rights between consolidation and setbacks. *Revista de Direito Internacional***,** Brasília, v. 16, n. 2, p. 202-223, 2019. p. 207.

[54] FIALHO, Vânia. Parecer antropológico: faccionalismo Xukuru. *In.* PLANTARAM" Xicão: Os Xukuru do Ororubá e a Criminalização do direito ao território" Manaus: PNCSAUEA/UEA Edições, 2011. p. 61-69.

[55] OTO, Alejandro de. *"Pensamiento Descolonial/Decolonial***.** Editorial Biblos Lexicón, 2009. Available in: http://www.cecies.org/articulo.asp?id=285. Access in: 4 Aug. 2020.

[56] ROMAGUERA; TEIXEIRA; BRAGATO. Por uma Crítica Descolonial da Ideologia Humanista dos Direitos Humanos. *Derecho y Cambio Social,* v. 38, 2014. p. 1-3, 13 and 24.

subject, with the majority of the cases dealing with territorial protection and demarcation[57]

From this perspective, the case of the Xukuru people represents the possibility of a decolonial proposal for developing a comparative analysis about the right to property and specifically when we consider the right to property from a perspective of collective property that differs from the liberal view of property rights.

The indigenous peoples perceive that their relationship with the territory which they occupy is imbued with a religious and cultural character[58] and this concept is different from the European tradition of a private individual's right to property, which is also incorporated into the Brazilian legal system.

6 Problems and barriers of internal and notarial private law for exercising collective property rights.

Although Article 231 of the Brazilian Constitution of 1988 has advanced to recognize the original right of the indigenous people over the territory that they traditionally occupy, there is still a disparity with the Brazilian infra-constitutional legislation and the practices of the public administration's organs, which demonstrate a clear colonialism. Besides agreeing with the Constitution that is in force, the indigenous peoples of Brazil only have the possession of the territory that they occupy, whereas the bare ownership of those territories belongs to the federal government (Union), which has the duty of demarcating, protecting and respecting the indigenous territory.

In relation to the infra-constitutional legislation that is in force, one has: 1. the Brazilian Civil Code of 2002, which disciplines the private property right in Article 1,228 but it does not prevent the arrangement of collective property; 2. The Statute of the Indian (Law no. 6,001/73); 3. The Decree no. 1,775/1996 (process of demarcation) and 4. The Law of Public Registry (Law no. 6,015/73).

Thus, apart from the rules of property law laid down in the Brazilian Civil Code and the standards about the demarcation, one should point out the problems in the notarial area, which are normally neglected in the exercise of the collective property in Brazil [59]. As already enunciated in the preceding topic, the administrative process for demarcating the Xukuru people's territory started in 1989 but it was only formally concluded sixteen years later, with a significant hiatus between the Presidential Decree that approved the Xukuru Indians' demarcation in 2001 and its notarial registration in 2005.

The Decree no. 1,775 of 8th January 1996 is the legislative instrument that regulates the complex process of demarcating the indigenous territories in Brazil. This process has several phases, which are: 1. identification; 2. approval by FUNAI; 3. contestations of third parties; 4. declaration of the limits by the Minister of Justice; 5. physical demarcation; 6. acceptance by Presidential Decree and 7. notarial registration in the Land Registry[60].

The last phase of the acceptance process is implemented by FUNAI and it takes place by registering the property in the Land Registry after 30 days from the date of publishing the Presidential Decree concerning the indigenous territory, according to Article 6 of the Decree no. 1,175/1996 about indigenous territories[61]. Furthermore, the Statute of the Indian provides that FUNAI must conclude registering the property in the Land Registry and in the Secretariat of the Union's Patrimony during these 30 days.

Article 246, 2nd para. of the Law no. 6015/73 only enunciates when dealing with registering the indigenous territory that "concerning the indigenous territory with

[57] NAVARRO, Gabriela Cristina Braga. The judgment of the case Xucuru People v. Brazil: Inter-American Court of Human Rights between consolidation and setbacks. *Revista de Direito Internacional*, Brasília, v. 16, n. 2, p. 202-223, 2019. p. 206.

[58] NAVARRO, Gabriela Cristina Braga. The judgment of the case Xucuru People v. Brazil: Inter-American Court of Human Rights between consolidation and setbacks. *Revista de Direito Internacional*, Brasília, v. 16, n. 2, p. 202-223, 2019. p. 217.

[59] NÓBREGA, Flavianne et al. Relatório da UFPE enviado à Corte Interamericana de Direitos Humanos antes do julgamento internacional do caso do povo índigena Xukuru e seus membros vs. Brasil. *In:* NÓBREGA, Flavianne (org.). *Democratizando o acesso ao Sistema Interamericano de Direitos Humanos:* estratégias para a promoção local dos direitos humanos. Recife: UFPE, 2021. In Press.

[60] BRAZIL. *Dermarcações.* The page was lastly revised on 19th April 2018. Available in: https://pib.socioambiental.org/pt/Demarca%c3%a7%c3%b5es. Access in: 6 Aug. 2020..

[61] BRAZIL. *Decreto nº. 1.775, de 8 de janeiro de 1996*. Available in: http://www.planalto.gov.br/ccivil_03/decreto/D1775.htm#:~:text=DECRETO%20No%201.775%2C%20DE,da%20Constitui%C3%A7%C3%A3o%2C%20e%20no%20art. Access in: 6 Aug. 2020.

approved demarcation, the Union will encourage the registration of the area in their name.[62]". The cited provision that refers to the law does not concern a more detailed way of dealing with the procedure and less still about the question of collective property with reference to the indigenous peoples. The officializing process of the indigenous territories does not have a specific legislation because it is exclusively associated with the Law of Public Register. In that way, the demarcating process remains susceptible to inaccuracies, such as those that occurred when registering the Xukuru people's territory in the Land Registry.

One notices that the Brazilian infra-constitutional legislation is insufficient with regard to the effectiveness of the demarcating process for the territories of the traditional peoples because the concept of collective property is not associated with it according to the consolidated jurisprudence of the Inter-American Court concerning the matter. Besides that, according to Articles 1 and 2 of the American Conventions of Human Rights, the States have the obligation to respect the laws of the American Convention and to make the arrangements that are necessary in the national law.

Thus, apart from the legislative deficiency in the law regarding the process of demarcating the territories, we are pointing out the notarial practices in relation to the collective property right of the indigenous peoples. After passing through all of the 6 stages in the demarcating process, the official of the Land Registry in the town of Pesqueira presented an action in August 2002 which aroused doubt in that last stage of the demarcating process for the Xukuru people's territory[63].

From interpreting Article 10 of the Law of Public Registers[64] one has to consider that the legal titles in the register of a property must be entered in a quick way and at the maximum on the following day after the office hours of the Land Registry have already ended. In that way, this legal period makes the fact of the officializing process for the Xukuru people's indigenous territory even more questionable because it has to be prolonged by a time that is exacerbatedly more (4 years).

That doubt was raised by the notary in order not to register the Xukuru people's indigenous property but it was subsequently judicially proved to be unfounded, since it was understood as unjustified and had a merely dilatory aim. That delay in registering the territory also violated Article 12 of the Law of Public Registers, which deals with the laws of precedence in the registration's priority.

In the words of Sandro Lôbo (2019), who was a lawyer at the time of the CIMI, that was the first time that the Land Registry proposed an action with the aim of arousing doubt about the demarcation, even though there was a Presidential determination that had been finally expressed for the registration: the President of the Republic's Decree of 30th April 2001, which accepted the Xukuru indigenous territory. The indigenous territory was only registered in the Land Register (the town of Pesqueira's property office) on 18th November 2005.

Thus, one observes that the last phase of the notarial registration is still a fragment of the colonial private law. One can say with respect to the collective property of the indigenous peoples that there is a jurisprudential understanding[65] to the effect that this registration is merely declaratory and that it does not establish the right, as is the case with registering private property.

In that way, the model of notarial registration has diverse problems that concern registering the property of indigenous peoples. It is private, limited and delineated by the colonial model. The property has to be registered in order for it to be reinstated. That is a strong European tradition. The experience of living well of the indigenous peoples differs from that European colonial model. However, it is that model of the civil legislation and of the notarial registration which is formally demanded in order for the indigenous peoples to have quiet possession of their territory.

It is important to point out that this hiatus between the Presidential Decree which demarcates the indigenous territory and the registration in the Land Register did not occur exclusively in the Xukuru case and it per-

[62] BRAZIL. *Lei nº 6.015, de 31 de Dezembro de 1973*. Available in: http://www.planalto.gov.br/ccivil_03/leis/L6015compilada.htm. Access in: 7 Aug. 2020.

[63] INTER-AMERICAN COURT OF HUMAN RIGHTS *Caso do povo indígena Xucuru e seus membros e seus membros vs. Brasil.* Sentença de 5 de fevereiro de 2018. Resumo oficial. 2018. Available in: http://www.corteidh.or.cr/docs/casos/articulos/resumen_346_por.pdf. Access in: 24 Jul. 2020.

[64] BRAZIL. *Lei nº 6.015, de 31 de Dezembro de 1973*. Available in: http://www.planalto.gov.br/ccivil_03/leis/L6015compilada.htm. Access in: 7 Aug. 20202020.

[65] Paragraph 133 of the decision in the case of the Kalinã and Lokono Peoples versus Suriname that was made by the Inter-American Court of Human Rights is worth pointing out here.

sisted in the Brazilian context. The delay of FUNAI in carrying out the notarial registration to demarcate the indigenous territory, which had been approved by the President of the Republic, was identified as a serious problem that compromised the legal security of the collective property right of other indigenous peoples. The Sixth Chamber of the Federal Public Prosecutor Office (MPF) sent formal recommendations to FUNAI and to the Land Registries in 2017, in order for them to take measures.

The National Council of Justice (CNJ) that controls the external actions of notaries and Land Registries in Brazil, approved the Petition no. 70 on 12th June 2018 which decides about registering the indigenous territory in order to fill the legislative gap on the subject. It stipulated that a daily fine should be applied, as well as that any Land Registry which does not finalize the registration of indigenous territory within 30 days has civil and criminal responsibility[66] . That rule is more coercive and it came a few months after the Inter-American Court passed the sentence in the Xukuru case in February 2018. It is hoped that this provision will prevent the problems of registering the indigenous territories in the Land Registries.

The Federal Public Prosecutor Office [67] recommended utilizing the Provision no. 70/2018 of the CNJ in the state of Maranhão, which is a federal unit of Brazil in the Northeastern region, where FUNAI informed that it was having difficulties with implementing the registrations of indigenous populations' properties. According to FUNAI:

> "The Land Registries refused to implement the cancellation of the registrations that were inserted in the indigenous territories, by justifying that the registration could only be cancelled through a judicial decision about passing an executive sentence. Apart from that, the registrants themselves pointed out the difficulties in identifying the occasional registrations of third parties over the demarcated indigenous territories, as well as the difficulties with even localizing the registrations of the held indigenous territories (ITs)[68].".

One observes a strong colonial tradition in the actions of the notaries in this region of Brazil, by which the private law is used as a strategic tool for opposing the registration of the indigenous collective property that had already passed through all of the legally prescribed stages during the demarcating process.

Some developments were observed in the Land Registries of the properties that had been registered in the state of Mato Grosso, which accepted the recommendation and promised to observe the period in the Provision no. 70/2018 that was approved by the CNJ with the aim of registering the indigenous territories, as well as with making a note about their existence in the third-party registrations[69]. However, that solution does not appear to be uniform throughout the country. One notices that one of the State's controlling agencies needs to intervene in order to prompt the Land Registries that register properties, with the aim of implementing the registration of indigenous territories even within the framework of private law.

Nevertheless, the challenge of demarcating the indigenous territories in Brazil persists as a great problem . It was worsened, during the current government of President Jair Bolsonaro, as many non-indigenous farmers have been certified in an irregular way in areas which are considered to be indigenous territory. In May 2020, it was reported that since the government of Bolsonaro began in 2019, 42 agricultural estates have been

[66] BRAZIL. Conselho Nacional de Justiça (National Council of Justice). *Petição 70/2018 de 12 de junho de 2018*. Dispõe sobre abertura de matrícula e registro de terra indígena com demarcação homologada e averbação da existência de demarcação de área indígena homologada e registrada em matrículas de domínio privado incidentes em seus limites. Available in: https://atos.cnj.jus.br/files//provimento/provimento_70_12062018_13062018130257.pdf. Access in: 8 Aug 2020.

[67] It is important to emphasize that the Federal Public Prosecutor Office (MPF) has the constitutional mission of which is to act in defence of the rights and interests of the indigenous populations. The Sixth Chamber of MPF today hold the point of view in favour of the indigenous people. The local members of the Federal Public Prosecutor Office (MPF) in Pernambuco, which acted at the beginning of the demarcating process in the Xukuru case, acted very differently by criminalizing the Xukuru people and by negating the indigenous rights (COUTO Luiz et al. Os Xukuru e a violência. *In:* FIALHO, Vânia; NEVES, Rita de Cássia Maria; FIGUEIROA, Mariana Carneiro Leão (Org.). *"Plantaram" Xicão*: os Xukuru do Ororubá e a criminalização do direito ao território. Manaus: PNCSAUEA/UEA Edições, 2011. p. 113-125).

[68] BRAZIL. Ministério Público Federal (Federal Public Prosecutor Office). *Cartórios acatam recomendação do MPF para averbar terras indígenas de MT no registro imobiliário.* Available in: http://www.mpf.mp.br/mt/sala-de-imprensa/noticias-mt/cartorios-acatamrecomendacao-do-mpf-para-averbar-terras-indigenas-de-mt-no-registro-imobiliario. Access in: 8 Aug. 2020.

[69] BRAZIL. Ministério Público Federal (Federal Public Prosecutor Office). *Cartórios acatam recomendação do MPF para averbar terras indígenas de MT no registro imobiliário.* Available in: http://www.mpf.mp.br/mt/sala-de-imprensa/noticias-mt/cartorios-acatamrecomendacao-do-mpf-para-averbar-terras-indigenas-de-mt-no-registro-imobiliario. Access in: 8 Aug. 2020.

registered in an irregular manner, which is contrary to the protection of those territories that is prescribed by the National Foundation of the Indian (FUNAI) since 2012. FUNAI published a standard authorizing certification of the private lands in unapproved indigenous areas: unapproved indigenous territories are areas that await the Presidential Decree, which is the final phase of the demarcating process before the definitive registration in the Land Register of property[70].. Carlos Frederico Marés, who is a lawyer and an ex-president of FUNAI, pointed out a colonial policy of the Bolsonaro government in relation to the indigenous peoples[71].

Even with the great potential of the Xukuru case as a case of strategic litigation for innovating with the commissioned studies about the collective property right from the decolonial perspective, the effects of changing the course of history with respect to the indigenous rights of traditional persons are still uncertain. On the other hand, the knowledge that this case has provided recuperates definitive changes with respect to implementing the collective property rights locally and it will contribute to increasing the commissioned studies about protecting the collective property rights of the traditional peoples in Brazil and in Latin America.

7 Conclusions

We are able to conclude that many advances are still needed in relation to the Brazilian legal system, such as the property right in the decolonial sense. The Brazilian Civil Code of 2002 has not advanced in the sense of incorporating the collective property right and it remains restricted in the liberal and Eurocentric sense of private property.

The Inter-American System of Human Rights, beginning in 2001 with the sentence of the Inter-American Court in the case of the Mayagna (Sumo) Awas Tingni Community versus Nicaragua, constructed an understanding of property in the collective sense, which includes the notion of territoriality of the indigenous peoples with the territory which they occupy.

Brazil was condemned in 2018 for the first time by the Inter-American Court for being involved in violations of the indigenous peoples' human rights, as in the case of the Xukuru indigenous people and their members *versus* Brazil. The case dealt with the necessity of respecting the quiet possession of the indigenous territory which had been recovered from the non-indigenous occupants of the territories and the Brazilian State has incorporated the concept of collective property into its legal system.

Thus, the case of the Xukuru people that was judged by the Inter-American Court is paradigmatic not only for the case of this indigenous people but also for the other indigenous peoples who are experiencing problems similar to those of the Xukuru people with having their collective property right recognized, by taking into account that the matter concerned a case of strategic litigation. However, for that it is necessary that the Brazilian State does not perpetuate colonial practices, such as those which occurred in the Xukuru case in relation to the Brazilian judicial power and to the sectors of public administration, like the acts which were taken by the Land Registry of Property in Pesqueira.

Taking into consideration the disparity between the Brazilian infra-constitutional legislation, which is regulated by 'Eurocentricity' through adopting the private property exclusively in a liberal and individual sense and the Inter-American Court of Human Rights decisions regarding collective property to which Brazil is formally bound, we hope that this decolonial comparative analysis can be helpful to improve the domestic legal practise for an effective legal protection of indigenous communal property rights.

One perceives that the Brazilian public authorities, not only in the judiciary but also with reference to the executive and the public administration, have a deep-rooted colonial incorporation in their practices: not only by the fact of a legal system that is anchored by an idea of limited property in an individual concept but also because of a colonial attitude to creating obstacles for the effectiveness of a property right in the collective sense, which avoids the classic comprehension of private property.

[70] FONSECA, Ana. Postura colonial do governo Bolsonaro ameaça povos indígenas e suas culturas ancestrais. *Carta Capital*. 14 Feb. 2020. Avaliable in: https://www.cartacapital.com.br/sociedade/postura-colonial-do-governo-bolsonaro-ameaca-povos-indigenas-e-suas-culturas-ancestrais/. Access in: 8 Aug. 2020.

[71] MAGALHÃES, Ana. Postura colonial do governo Bolsonaro ameaça povos indígenas e suas culturas ancestrais. *Carta Capital*. 14 Feb. 2020. Avaliable in: https://www.cartacapital.com.br/sociedade/postura-colonial-do-governo-bolsonaro-ameaca-povos-indigenas-e-suas-culturas-ancestrais/. Access in: 8 Aug. 2020.

References

ALMEIDA, Manoel Severino Moraes de et al. O caso Xukuru: lacunas e omissões da sentença proferida pela corte interamericana de direitos humanos. *Revista do CNJ,* Brasília, v. 3, n. 2, p. 67-75, Jul./Dec. 2019.

BONILLA MALDONADO, Daniel. Modern Comparative Law and the Construction of the legal barbarian. *In:* DECOLONIAL Comparative Law Workshop. Org. Max Plack Institute for Comparative and International Private Law Hamburg and University of Witwatersrand, Johannesburg, 6-7 October 2020.

BONILLA MALDONADO, Daniel. The Critical Academic of Law: Resistance and Emancipation. *In:* LEGAL Barbarians: Identity, Modern Comparative Law and the Global South, Cambridge University Press, 2021.

BORBA, Gabriel de Oliveira. O processo legislativo como garantia para a obtenção do consentimento prévio das comunidades quilombolas de Alcântara. *Revista de Direito Internacional*, [S.L.], v. 17, n. 3, p. 29-37, 20 abr. 2021. Available in: http://dx.doi.org/10.5102/rdi.v17i3.7547.

BRAZIL. [Constituição (1988)]. *Constituição Federal da República do Brasil.* Available in: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Access in: 6 Aug. 2020.

BRAZIL. Conselho Nacional de Justiça (National Council of Justice). *Petição 70/2018 de 12 de junho de 2018*. Dispõe sobre abertura de matrícula e registro de terra indígena com demarcação homologada e averbação da existência de demarcação de área indígena homologada e registrada em matrículas de domínio privado incidentes em seus limites. Available in: https://atos.cnj.jus.br/files//provimento/provimento_70_12062018_13062018130257.pdf. Access in: 8 Aug 2020.

BRAZIL. *Decreto nº. 1.775, de 8 de janeiro de 1996*. Available in: http://www.planalto.gov.br/ccivil_03/decreto/D1775.htm#:~:text=DECRETO%20No%201.775%2C%20DE,da%20Constitui%C3%A7%C3%A3o%2C%20e%20no%20art. Access in: 6 Aug. 2020.

BRAZIL**.** *Dermarcações.* The page was lastly revised on 19th April 2018. Available in: https://pib.socioambiental.org/pt/Demarca%c3%a7%c3%b5es. Access in: 6 Aug. 2020.

BRAZIL. *Lei n° 6.001, de 19 de dezembro de 1973:* arrangement about the Statute of the Indian 1973. Available in: http://www.planalto.gov.br/ccivil_03/Leis/L6001.htm. Access in: 8 Aug. 2020.

BRAZIL. *Lei nº 6.015, de 31 de Dezembro de 1973*. Available in: http://www.planalto.gov.br/ccivil_03/leis/L6015compilada.htm. Access in: 7 Aug. 2020.

BRAZIL. *Lei nº. 10.406, de 10 de janeiro de 2002*. Código Civil. Available in: http://www.planalto.gov.br/ccivil_03/leis/2002/L10406compilada.htm. Access in: 6 Aug. 2020.

BRAZIL. Ministério Público Federal (Federal Public Prosecutor Office). *Cartórios acatam recomendação do MPF para averbar terras indígenas de MT no registro imobiliário.* Available in: http://www.mpf.mp.br/mt/sala-de-imprensa/noticias-mt/cartorios-acatamrecomendacao-do-mpf-para-averbar-terras-indigenas-de-mt-no-registro-imobiliario. Access in: 8 Aug. 2020.

BRAZIL. Supremo Tribunal Federal. *Ação direta de inconstitucionalidade 3.239* Distrito Federal. Available in: http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/ADI3239RW.pdf. Access in: 12 May 2021.

BRAZIL. Supremo Tribunal Federal. *Research entitled the "Corte Europeia".* 2020. Available in: https://jurisprudencia.stf.jus.br/pages/search?base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&queryString=corte%20europeia&sort=_score&sortBy=desc. Access in: 28 Jul. 2020.

BRAZIL. Supremo Tribunal Federal. *Research entitled the "Corte Interamericana".* 2020. Available in: https://jurisprudencia.stf.jus.br/pages/search?base=acordaos&sinonimo=true&plural=true&page=1&pageSize=10&queryString=corte%20interamericana&sort=_score&sortBy=desc. Access in: 28 Jul. 2020.

CARDOSO, Evorah Lusci Costa. *Litígio Estratégico e Sistema Interamericano de Direitos Humanos.* Belo Horizonte: Forum of 2012.

CASTILHO, Ela Wiecko Volkmer de; CASTILHO, Manoel Lauro Volkmer de. *A colonialidade do poder na reintegração de posse do imóvel Caípe.* In the press.

COUTO, Luiz et al. Os Xukuru e a violência. *In:* FIALHO, Vânia; NEVES, Rita de Cássia Maria; FIGUEIRÓBREGA, Flavianne Fernanda Bitencourt; LIMA, Camilla Montanha de. How the indigenous case of Xukuru before the Inter-American Court of Human Rights can inspire decolonial comparative studies on property rights. Revista de Direito Internacional, Brasília, v. 18, n. 1, p. 333-373, 2021

ROA, Mariana Carneiro Leão (Org.). *"Plantaram" Xicão*: os Xukuru do Ororubá e a criminalização do direito ao território. Manaus: PNCSAUEA/UEA Edições, 2011.

FIALHO, Vânia. *As fronteiras do ser Xukuru*. Recife: Massangana / Joaquim Nabuco Foundation, 1998.

FIALHO, Vânia. Parecer antropológico: faccionalismo Xukuru. *In.* PLANTARAM" Xicão: Os Xukuru do Ororubá e a Criminalização do direito ao território" Manaus: PNCSAUEA/UEA Edições, 2011.

FIGUEIROA, Mariana Carneiro Leão. Um olhar antropológico acerca do processo criminal que teve como vítima o cacique Xicão Xukuru. In. Plantaram" Xicão: Os Xukuru do Ororubá e a Criminalização do direito ao território" Manaus: PNCSAUEA/UEA Edições, 2011.

FONSECA, Ana. Postura colonial do governo Bolsonaro ameaça povos indígenas e suas culturas ancestrais. *Carta Capital*. 14 Feb. 2020. Avaliable in: https://www.cartacapital.com.br/sociedade/postura-colonial-do-governo-bolsonaro-ameaca-povos-indigenas-e-suas-culturas-ancestrais/. Access in: 8 Aug. 20200.

INTER-AMERICAN COURT OF HUMAN RIGHTS. *Caso da Comunidade Mayagna (Sumo) Awas Tingni vs. Nicaragua*. Sentença de 31 de Agosto de 2001. Available in: https://summa.cejil.org/api/attachments/download?_id=58b2f3c45d59f31e1345d7be&file=1502488651884diumu0y9lxwvcnxvwe5u7n9udi.docx. Access in: 1 Sep. 2019.

INTER-AMERICAN COURT OF HUMAN RIGHTS. *Caso de la Comunidad Moiwana Vs. Surinam. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 15 de junio de 2005*. Serie C No. 124. Available in: http://www.corteidh.or.cr/docs/casos/articulos/seriec_124_esp1.pdf. Access in: 9 May 2021.

INTER-AMERICAN COURT OF HUMAN RIGHTS. *Caso do povo indígena Xucuru e seus membros e seus membros vs. Brasil*. Sentença de 5 de fevereiro de 2018. Available in: http://www.corteidh.or.cr/docs/casos/articulos/seriec_346_por.pdf. Access in: 24 Jul. 2020.

INTER-AMERICAN COURT OF HUMAN RIGHTS. *Caso do povo indígena Xucuru e seus membros e seus membros vs. Brasil*. Sentença de 5 de fevereiro de 2018. Resumo oficial. 2018. Available in: http://www.corteidh.or.cr/docs/casos/articulos/resumen_346_por.pdf. Access in: 24 Jul. 2020.

INTER-AMERICAN COURT OF HUMAN RIGHTS. *Caso pueblos Kaliña y Lokono Peoples vs. Surinam*. Sentencia de 25 de noviembre de 2015. Available in: https://www.corteidh.or.cr/docs/casos/articulos/seriec_309_esp.pdf. Access in: 10 Aug. 2020.

INTER-AMERICAN COURT OF HUMAN RIGHTS. *Cuadernillo de jurisprudencia de la corte interamericana de derechos humanos nº 11:* pueblos indígenas y tribales. Drawn up by the Inter-American Court of Human Rights with the collaboration of German Cooperation (GIZ). 2018. Available in: https://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo11.pdf. Access in: 29 Jul. 2020.

KLEINHEISTERKAMP, Jan. Development of Comparative Law in Latin America. *The Oxford Handbook of Comparative Law*, by Jan Kleinheisterkamp, organized by Mathias Reimann and Reinhard Zimmermann, Oxford University Press, 2006, p. 260 to 302. DOI.org (Crossref), doi:10.1093/oxfordhb/9780199296064.013.0009.

LEUZINGER, Márcia Dieguez; LYNGARD, Kylie. The land rights of indigenous and traditional peoples in Brazil and Australia. *Revista de Direito Internacional,* Brasília, v. 13, 2016, p. 419-439.

LIMA JÚNIOR, Jayme Benvenuto; CUNHA, Luís Emmanuel Barbosa da. *O Caso do Povo Xukuru frente ao Sistema Interamericano de Direitos Humanos:* o caminho pela Comissão Interamericana de Direitos Humanos. In the press.

LITTLE, Paul. E. Territórios sociais e povos tradicionais no Brasil: por uma antropologia da territorialidade. *Anuário Antropológico*, v. 28, n. 1, p. 251-290. 2018. Available in: https://periodicos.unb.br/index.php/anuarioantropologico/article/view/6871. Access in: 3 Aug. 2020.

LÔBO, Sandro. MINICURSO. *O Sistema Interamericano de Direitos Humanos e o Caso do Povo Xukuru:* entre implementação e impacto. Federal University of Pernambuco (UFPE) - PROExC on Web. Recife, 10 May 2019.

LOCKE, JOHN. *Two Treatises Of Government*. 1689. London, printed for Thomas Tegg; W. Sharpe and Son; G. Offor; G. and J. Robinson; J. Evans and Co.: Also R. Griffin and Co. Glasgow; and J. Gumming, Dublin. 1823. Available in: http://www.dominiopublico.gov.br/download/texto/mc000175.pdf. Access in: 10 Aug. 2020.

MAGALHÃES, Ana. Postura colonial do governo Bolsonaro ameaça povos indígenas e suas culturas ancestrais. *Carta Capital*. 14 Feb. 2020. Avaliable in: https://www.cartacapital.com.br/sociedade/postura-colonial-do-governo-bolsonaro-ameaca-povos-indigenas-e-suas-culturas-ancestrais/. Access in: 8 Aug. 2020.

MAGALHÃES, Ana. *Postura colonial do governo Bolsonaro ameaça povos indígenas e suas culturas ancestrais*. 14 Feb. 2020. Available in: https://www.cartacapital.com.br/sociedade/postura-colonial-do-governo-bolsonaro-ameaca-povos-indigenas-e-suas-culturas-ancestrais/. Access in: 8 Aug. 2020.

MARTINS, Adriano Eurípedes Medeiros. John Locke e a liberdade como fundamento da propriedade. *Griot:* Revista de Filosofia v. 11, n. 1, Jun. 2015. DOI: https://doi.org/10.31977/grirfi.v11i1.626.

MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW HAMBURG. *Decolonial Comparative Law*. Available in: https://www.mpipriv.de/decolonial. Access in: 9 May 2021.

MEDEIROS, Ricardo Pinto de. História dos povos indígenas do Sertão Nordestino no Período Colonial: problemas, metodologia e fontes. *Clio Arqueológica*, Recife, n. 15, p. 205-233, 2002.

MICHAELS, Ralf. Discussant of the paper Modern Comparative Law and the Construction of the legal barbarian. In: DECOLONIAL Comparative Law Workshop. Org. Max Plack Institute for Comparative and International Private Law Hamburg and University of Witwatersrand, Johannesburg, 6-7 October 2020.

MICHAELS, Ralf. The Functional Method of Comparative Law. *The Oxford Handbook Of Comparative Law,* [S.L.], p. 344-389, 21 Mar. 2019. Available in: http://dx.doi.org/10.1093/oxfordhb/9780198810230.013.11.

MILLER, Robert J.; RURU, Jacinta. An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand. *In:* SILVA, Denise; HARRIS, Mark (ed.). *Indigenous People and the Law*. 2015

MILLER, Robert J.; RURU, Jacinta. An Indigenous Lens into Comparative Law: The Doctrine of Discovery in the United States and New Zealand. *In:* SILVA, Denise; HARRIS, Mark (ed.). *Indigenous People and the Law*. 2015.

NAVARRO, Gabriela Cristina Braga. The judgment of the case Xucuru People v. Brazil: Inter-American Court of Human Rights between consolidation and setbacks. *Revista de Direito Internacional*, Brasília, v. 16, n. 2, p. 202-223, 2019.

NÓBREGA, Flavianne et al. Relatório da UFPE enviado à Corte Interamericana de Direitos Humanos antes do julgamento internacional do caso do povo índigena Xukuru e seus membros vs. Brasil. *In:* NÓBREGA, Flavianne (org.). *Democratizando o acesso ao Sistema Interamericano de Direitos Humanos:* estratégias para a promoção local dos direitos humanos. Recife: UFPE, 2021. In Press.

OLIVEIRA, João Pacheco de. Uma etnologia dos índios misturados? Situação colonial, territorialização e fluxos culturais. *Mana*, [S.L.], v. 4, n. 1, p. 47 to 77, abr. 1998. FapUNIFESP (SciELO). http://dx.doi.org/10.1590/s0104-93131998000100003.

ORGANIZATION OF AMERICAN STATES. Comissão Interamericana de Direitos Humanos. *Relatório nº 98/09*. Petição 4.355-02. Admissibilidade do Povo Indígena Xukuru. BRASIL, 29 de outubro de 2009. Available in: https://cidh.oas.org/annualrep/2009port/Brasil4355.02port.htm. Access in: 8 Aug. 2020.

ORGANIZATION OF THE AMERICAN STATES. *Convenção Americana de Direitos Humanos*. Signed at the Inter-American Specialized Convention about Human Rights, in San José, Costa Rica, on 22nd November 1969. Available in: https://www.cidh.oas.org/basicos/portugues/c.convencao_americana.htm. Access in: 28 Jul. 2020.

OTO, Alejandro de. *"Pensamiento Descolonial/Decolonial*. Editorial Biblos Lexicón, 2009. Available in: http://www.cecies.org/articulo.asp?id=285. Access in: 4 Aug. 2020.

RAMOS, Andre de Carvalho. Responsabilidade Internacional do Estado por violações de Direitos Humanos. *R. CEJ,* Brasília, n. 29, Apr./Jun. 2005.

ROMAGUERA; TEIXEIRA; BRAGATO. Por uma Crítica Descolonial da Ideologia Humanista dos Direitos Humanos. *Derecho y Cambio Social,* v. 38, 2014.

SANTOS, Cecília MacDowell. Xucuru do Ororubá e Direitos Humanos dos indígenas: lutas pela terra-segurança e Estado no Brasil. In. BENVENUTO; Andréa Almeida Campos *et al. Direitos Humanos*: debates contemporâneos. Recife: Ed. Do autor, 2009.

SCHADEN, Egon. Antropologia: Aculturação e Assimilação dos Índios do Brasil. *Revista Do Instituto De Estudos Brasileiros,* v. 2, p. 7-14, 1967. Available in: https://doi.org/10.11606/issn.2316-901X.v0i2p7-14.

SILVA, Edson. *Biografia:* O Povo Xukuru de Ororubá. Available in: https://osbrasisesuasmemorias.com.br/povo-xukuru-do-ororuba/. Access in: 10 Aug. 2020.

SILVA, Edson. História Xukuru, história indígena no nordeste: novas abordagens. *Mnemosine Revista,* v. 1, n. 2, p. 64-83. Jul./Dec. p. 2010.

SILVA, Edson. Índios: desafios das pesquisas as reflexões históricas. *In:* NETA, Francisca Maria; PEIXOTO, José Adelson Lopes. (orgs.). *Ecos do silêncio:* o saber e o fazer da pesquisa. Recife: Libertas, 2018.

SILVA, Edson. *Xukuru:* memórias e história dos índios da Serra do Ororubá (Pesqueira, PE), 1959-1988. 2. ed. Recife: UFPE publisher, 2017.

SILVA, Virgílio Afonso da. Integração e diálogo constitucional na América do Sul. In: BOGDANDY, Armin von; PIOVESAN, Flávia; ANTONIAZZI, Mariela Morales (orgs.). *Direitos humanos, democracia e integração jurídica na América do Sul.* Rio de Janeiro: Lumen Juris, 2010.

Para publicar na Revista de Direito Internacional, acesse o endereço eletrônico www.rdi.uniceub.br ou www.brazilianjournal.org.
Observe as normas de publicação, para facilitar e agilizar o trabalho de edição.