

THE YANOMAMI'S TRADITIONAL BURIAL RITUALS AND THE STATE- IMPOSED LIMITATIONS DUE TO THE COVID-19 PANDEMIC: A FUNDAMENTAL RIGHTS COLLISION

Os rituais funerários tradicionais dos yanomami e as limitações impostas pelo Estado devido à pandemia de covid-19: uma colisão de direitos fundamentais

Erick Cavalcanti Linhares Lima*
Alcenir Gomes de Souza**

Abstract: Due to the Covid-19 pandemic, a Yanomami was contaminated and died. The Roraima state authorities imposed a series of restrictions on the release of the body, requiring immediate burial in the local cemetery to avoid the possible risk of mass contagion. Roraima's Health Secretary stated that the immune system of indigenous people is more sensitive to respiratory diseases and that Covid-19 infection in a tribal community could have devastating effects. The fact is that, in general, in Yanomami culture, the spirit of the dead will only be released from the body (and not perish with it) if proper funeral rituals are performed, which require, for example, cremating the body and then eating its ashes in porridge prepared especially for the occasion. Only when the village consumes this sacred mixture, called "ripu", is it guaranteed that the spirit of the deceased will rest. The deceased's relatives requested the body's release for transport to their village for the funeral ceremony preparations. They argued that it was not a question of discussing the absolute or relative meaning of life, health, or the risk of contagion, but of respect for the indigenous culture, which should require these rights to be guaranteed by the State as seen by the community and not from the point of view of the surrounding society. They support their claim in Article 231 of the Constitution of the Republic (respect for their social organization and traditions), in Article 7.1 of ILO Convention 169 (right to define their priorities), and in item 57 of Resolution 1/2020 of the Inter-American Commission on Human Rights on Pandemic (health care according to the culture of tribal peoples).

Keywords: Covid-19; religious freedom; traditional people; human rights.

Resumo: Devido à pandemia da Covid-19, um Yanomami foi contaminado e morreu. As autoridades do estado de Roraima impuseram uma série de restrições à liberação do corpo, exigindo o enterro imediato no cemitério local para evitar o possível risco de contágio em massa. A Secretaria de Saúde de Roraima afirmou que o sistema imunológico dos povos indígenas é mais sensível a doenças respiratórias e que a infecção por Covid-19 em uma comunidade tribal poderia ter efeitos devastadores. O fato é que, em geral, na cultura Yanomami, o espírito do morto só se desprende do corpo (e não perece com ele) se forem realizados os devidos rituais fúnebres, que exigem, por exemplo, a cremação do corpo e o consumo das cinzas em um mingau preparado especialmente para a ocasião. Somente quando a aldeia consome essa mistura sagrada, chamada "ripu", é garantido que o espírito do falecido descansará. Os parentes do falecido solicitaram a liberação do corpo para ser transportado para sua aldeia para os preparativos da cerimônia fúnebre. Eles argumentaram que não se trata de discutir o caráter absoluto ou relativo da vida, da saúde ou

* Pós-doutor em Direitos Humanos e Democracia pela Universidade de Coimbra. Doutor em Relações Internacionais pela Universidade de Brasília. Juiz de Direito do Tribunal de Justiça de Roraima.

** Master in Comparative Law (J. Reuben Clark Law School -BYU). Mestre em Segurança Pública, Direitos Humanos e Cidadania (UERR).

do risco de contágio, mas que o respeito à cultura indígena exige que esses direitos (sepultamento com suas tradições) sejam garantidos pelo Estado como visto pela comunidade e não do ponto de vista da sociedade circundante. Fundamentam sua pretensão no artigo 231 da Constituição da República (respeito à sua organização social e tradições), no artigo 7.1 da Convenção 169 da OIT (direito de definir suas prioridades) e no item 57 da Resolução 1/2020 da Comissão Interamericana de Direitos Humanos sobre Pandemia (atenção à saúde de acordo com a cultura dos povos tribais).

Palavras-chave: Covid-19; liberdade religiosa; povos tradicionais; direitos humanos.

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INTRODUCTION

The COVID-19 pandemic brought with it one of the most traumatic chapters of the modern era, with impacts on the physical and mental health of populations in different countries, on employability, the economy, and on farewell rituals of loved ones who passed away amid the chaos installed during those challenging days.

Every country, group of people, and culture has its own mourning rites. Their own way of saying goodbye, celebrating, and honoring the memory of the departed. However, due to the extremely contagious nature of the COVID-19 virus, several governments have created strict sanitary protocols, to try to reduce the risk of spreading the viral threat.

In Brazil, it was no different.

The following protocol was created and established: “It is recommended that funerals be suspended indefinitely, limiting the presence of family and friends to the minimum possible”¹. The rule was established by the Brazilian Ministry of Health, and each state, due to its peculiarities, could include complementary regulations in order to comply with federal regulations.

Now, Roraima, proportionally, is the Unit of the Brazilian Federation with the largest indigenous population in the country, duly registered. There are several ethnic groups, languages, ancestral traditions, and a cultural heritage that predate the arrival of the Portuguese in Brazilian lands.

In this context, the various tribes in the region have their own beliefs about the afterlife, especially about the burial rites of their loved ones. For example, from the Wai-Wai perspective, the deceased “relative”² must be buried in his village, in the place where he was born and raised, otherwise, he will have no peace in the spiritual world.

¹ Available: https://docs.bvsalud.org/biblioref/2021/05/1222356/af_manejo-corpos-covid_2ed_27nov20_isbn.pdf. Access: october 31, 2022, at 1:40pm.

² The term "relative" is commonly used by the traditional peoples of the region and refers to a broad understanding of family ties that go beyond the consanguineous elements, making the whole community part of a "single" family.

On the other hand, the Yanomami have a different way of approaching their people's funeral rituals. For them, in general, deceased "relatives" are not to be buried. The corpses will be "exposed and then later on cremated". Some other Yanomami groups, after the cremation, consume the ashes of the deceased. For other tribes, the ashes should be kept in the house of the deceased for a certain time, usually taking into consideration the age of the "deceased".

The coexistence of these and other "models" of funeral rituals and their sacred liturgies has never been a challenge in this region. However, due to the health protocols adopted by the states and municipalities during the pandemic, a new challenge has arisen: after all, can health protocols override the ancestral rituals of the people of the region?

1 WHO ARE THE YANOMAMI?

The Yanomami inhabit the northern region of the Amazon rainforest, distributed in more than 600 villages. They are one of the largest isolated indigenous peoples in the world and occupy a territory of approximately 192 thousand square kilometers in Brazil and Venezuela, an area larger than that of countries like Austria and Hungary combined. In Brazil alone, the demarcated land (96,650 km²) is larger than Portugal. Their land is the largest forested indigenous territory in the world.³

The Yanomami are hunters and farmers who live in societies where life is communal and where tasks are divided according to gender. They all live in large circular houses called "yanos" or "shabonos". Usually, women cultivate the land, producing vegetables that, it is estimated, account for 80% of the communities' food supply. Men are responsible for hunting. According to the habits of the Yanomami, a hunter cannot eat the animal he has killed. Meat is shared by the group, and men only consume meat obtained by another hunter.⁴

For the Yanomami, "urihi", the forest land, is not a mere inert space for economic exploitation (what we call "nature"). It is a living entity, inserted in a complex cosmological dynamic of exchanges between humans and non-humans. As such, it is today threatened by the blind predation of whites. In the view of leader Davi Kopenawa Yanomami:

The forest land can only die if it is destroyed by the white people. Then the streams will disappear, the land will become friable, the trees will dry up and the mountain stones will crack in the heat. The xapiripë spirits, who live in the mountains and play in the forest, will end up fleeing. Their parents, the shamans, will no longer be able to call them to protect us.

³ SURVIVAL. **Os Yanomami**. Available: <https://survivalbrasil.org/povos/yanomami>. Access: 06/28/2023.

⁴ GONZAGA, Maria Eduarda. **Quem são os Yanomami, o povo que segura o céu**. Available: https://brasildedireitos.org.br/atualidades/quem-so-os-yanomami-o-povo-que-segura-o-ceu?utm_source=google&utm_medium=cpc&utm_campaign=yanomami&gclid=CjwKCAjwkLckBhA9EiwAka9QRm gzVqxXIML3nH-TZ_6rquup6rdB63S0gTgmCrsRdfj99x4Wr9JwPxoCw6AQAvD_BwE. Access: 06/28/2023.

The forest land will become dry and empty. The shamans will no longer be able to stop the smoke-epidemics and the evil beings that make us sick. Thus, all will die.⁵

2 THE FEDERAL SUPREME COURT AND THE SAFEGUARDING OF RELIGIOUS FREEDOM IN BRAZIL

The Brazilian Federal Constitution provides in its article 5, item VI, the protection of Religious Freedom in Brazil, in the following terms: “freedom of conscience and belief is inviolable, being assured the free exercise of religious cults and guaranteed, in the form of the law, the protection to places of worship and their liturgies”.

Professor Nathalia Masson⁶ commenting on this clause, teaches:

This facet of the right to freedom consists of the neutral and independent state position in front of the plurality of religions and philosophical conceptions referring to supernatural phenomena, giving citizens vast autonomy in adhering to religious, spiritual, moral or political-philosophical values.

[...]

Autonomy as to conscience is very broad, since it frees the individual from any moral, philosophical, religious, political or sociological interference, allowing each one to embrace judgments, ideas and opinions according to his particular choices. In this sense, a person can "believe in supernatural concepts proposed by some religion or revelation (theism)", can "believe in the existence of a God, but reject any kind of divine revelation (deism), or even not believe in any God at all (atheism).

Also, in 2018, the Brazilian Constitutional Court was called to establish the correct interpretation regarding Religious Freedom in the text of the 1988 Federal Constitution.

The decision was summarized as follows:

The right to religious freedom is, to a large extent, the right to the existence of a multiplicity of religious beliefs/beliefs, which are linked and harmonized - for the survival of all the constitutionally protected multiplicity of faiths - in the so-called religious tolerance. One must distinguish between religious discourse (which is centered on one's own belief and the reasons for the belief) and discourse about the beliefs of others, especially when it is done with the intention of harming, demeaning, or belittling them (or their followers). One is typically a representation of the right to freedom of religious belief; the other, diametrically opposed, is an attack on the same right. As pointed out by the Superior Court of Justice in the appealed trial, the patient's conduct does not consist only of 'the defense of his own religion, cult, belief or ideology, but rather, of an attack on the cult of others, which puts at risk the religious freedom of those who profess a different faith of the patient'⁷.

As can be clearly seen, Freedom of Religion in Brazil is protected by the Federal Constitution, in the chapter on Rights and Individual Guarantees. Therefore, it is an immutable

⁵ Os Yanomami. Available: <https://survivalbrasil.org/povos/yanomami>. Access: 06/28/2023.

⁶ MASSON, Natália. **Manual de Direito Constitucional**. 4 ed. rev. ampl. e atual. Salvador: JusPODIVM, 2016. p. 258/259.

⁷RHC 146.303, red. do ac. min. Dias Toffoli, j. 6-3-2018, 2ª T, *DJE* de 7-8-2018.

clause⁸, prohibited from being considered in the National Congress deliberations aiming to eliminate this guarantee from the constitutional text and to diminish its significance by the Ordinary Legislator.

3 THE BRAZILIAN CONSTITUTION OF 1988 AND THE PROTECTION OF INDIGENOUS PEOPLES' RIGHTS

The Brazilian Constitution of 1988 is admittedly the most protective in relation to the recognition and protection of the rights and guarantees of traditional peoples. Such that the Constituent Assembly reserved an entire chapter of the constitutional text for this theme. Thus, we find in articles 231 and 232 the following rules:

Art. 231. The social organization, customs, languages, beliefs, and traditions of Indians are recognized, as well as their original rights over the lands they traditionally occupy, the Union being responsible for demarcating them and protecting and enforcing respect for all their assets.

[...]

Art. 232. The Indians, their communities and organizations are legitimate parties to take legal action in defense of their rights and interests, the Public Prosecution Service intervening in all acts of the process.

The definition of the recipient of the guarantees in Articles 231 and 232 of the Brazilian Constitution has reached the Federal Supreme Court (STF) in order to find its legal definition. Thus, in 2010, the Brazilian Constitutional Court defined the word “Indian” as follows:

The noun "Indians" is used by the 1988 FC in an invariably plural mode, to express the differentiation of aborigines by numerous ethnic groups. Constitutional purpose to portray an indigenous diversity both interethnic and intraethnic. Indians in process of acculturation remain Indians for the purpose of constitutional protection. Constitutional protection that is not limited to forest dwellers, who are Indians still in the primitive stage of jungle dwellers⁹.

The branch of Brazilian Law specialized in indigenous matters is known as Indigenous Law or Indigenous Constitutional Law and has the following fundamental principles in its theoretical framework, as taught by Robério Nunes dos Anjos Filho¹⁰:

⁸Art 60. [...] § The proposal of amendment tending to abolish will not be subject to deliberation:

I - the federative form of State;

II - the direct, secret, universal and periodic vote;

III - the separation of Powers;

IV - individual rights and guarantees.

⁹ Pet 3.388, Rel. Min. Ayres Britto, j. 19-3-2009, P, DJE de 1º-7-2010.

¹⁰ ANJOS FILHO, Robério Nunes dos. **Comentários à Constituição Federal de 1988**. In: BONAVIDES, Paulo *et al.* (coord). Rio de Janeiro: Forense, 2009. p. 2402.

- a) Principle of recognition and protection by the State of the social organization, customs, languages, beliefs, and traditions of the original and existing Indians in the national territory;
- b) Principle of recognition of the indigenous people's original rights over the land they traditionally occupy and protection of its permanent possession in exclusive usufruct for the indigenous people;
- c) Principle of equal rights and equal legal protection;
- d) Principle of otherness or the right to difference;
- e) Principle of maximum protection for Indians.

Based on the constitutional text and on the elements brought from Brazilian doctrine regarding the rights of traditional peoples, it can be perceived that the list of rights indicated in articles 231 and 232 of the Brazilian Constitution is merely exemplificative. That is, the constitutional command outlines a minimum content, which can be expanded by the Ordinary Legislator in order to implement the constitutional protections or recognize others. However, any form of legislative or jurisprudential retrogression is immediately prohibited.

As can be seen, article 231 of the Constitution of Brazil, which deals with the rights of indigenous people, is excessively laconic and the interpretation that has been given is that the expressions “beliefs and traditions” include both religious protection and its own justice system, this based on dialogic and collective decisions.

The problem for the effective recognition of indigenous rights is that, throughout history, they have received inferior treatment, characterized by vulnerability, disrespect and marginalization, marked by the systematic denial of rights and dignity to the individuals that make up this group and by the absence of participation in decision-making processes.

The main Brazilian law on indigenous people (Statute of the Indian) starts from the idea of assimilation, classifying them as isolated, in the process of integration, and as integrated (article 4, Law 6001 of 1973). Therefore, all their rights, as a differentiated group, would be transitory, due to civilizational inferiority. The underlying concept here is that the indigenous people would little by little disappear as an ethnic group and would be assimilated into the national culture.

The 1988 Brazilian Constitution marked a significant break from this historical perspective by abandoning ideas of cultural inferiority or the legal inability of indigenous people to make their own decisions. However, unfortunately, what we saw in the pandemic was that the door opened by the Constitution for the recognition of rights was promptly closed by framing indigenous peoples in certain previously established hegemonic models.

The internal and external conflicts involving these groups are usually analyzed from the perspective of non-indigenous society, which chooses priority legal interests according to its own criteria, relegating the interests of indigenous people to a secondary plan.

With the Covid pandemic, it was no different, unfortunately. No dialogue was sought with the indigenous people to reconcile the restrictions of the pandemic with their cultural and religious

aspects. Nor was there any attempt to break the social invisibility in which they find themselves. The indigenous religious and funeral practices were treated as non-rational whims.

Once again, they were silenced and ignored.

4 FUNDAMENTAL RIGHTS COLLISION: RELIGIOUS FREEDOM X HEALTH PROTOCOLS - COVID-19

The first aspect to evaluate here is: what is the concept of fundamental right that we will use in this research?

For the Spanish Professor Antonio Enrique Pérez Luno¹¹, fundamental rights are: “a set of faculties and institutions which, at each historical moment, materialize the requirements of human dignity, freedom, and equality, which must be positively recognized by legal systems at the national and international level.”

For the purposes of this work, we can contextualize that, in general, the norms existing in the Brazilian Constitution, in Title II - Fundamental Rights and Guarantees - are considered fundamental rights and, therefore, belong to the intangible axis of the Brazilian constitutional charter.

Now, there are several guarantees and rights contained throughout the text of the Brazilian Constitution. Therefore, it is easy to imagine that there will be "clashes" or “collisions” of fundamental rights since they apply to all individuals in the national territory. But what would be a collision of fundamental rights?

Portuguese author José Gomes Canotilho¹² explains that:

Generally speaking, a collision of fundamental rights is considered to exist when the exercise of a fundamental right by its holder collides with the exercise of a fundamental right by another holder. Here, we are not in the presence of a crossing or accumulation of rights (as in the competition of rights), but a clash, a true conflict of rights.

This is, without a doubt, one of the most sensitive issues in modern Constitutional Law, that is: how should we proceed when fundamental rights "collisions" occur?

The Jus philosopher Robert Alexy¹³ in his classic work – “Teoria de los Derechos Fundamentales”, clarifies:

¹¹LUNO, Antonio Enrique Perez. **Los derechos fundamentales**. Madri: Tecnos, 2004. p. 43.

¹²CANOTILHO, José Joaquim Gomes. **Direito Constitucional e Teoria da Constituição**. 3 ed. Coimbra: Almedina, 1999. p. 1191.

¹³ALEXY, Robert. **Teoria de los Derechos Fundamentales**. Tradução de Ernesto Garzón Valdés. Madri: Centro de Estudios Políticos y Constitucionales, 2001. p. 295.

[...] the clash between principles, assumed as fundamental rights, must be resolved by criteria of valuation, whereas the conflict of rules must be resolved by declaring the invalidity of one of the conflicting rules or by applying the exception clause (...) in the occurrence of a collision between principles, the recognition of the preponderance of one over the other does not result in the declaration of invalidity of the one with "less weight".

Now, as pointed out earlier, the Brazilian Constitution established religious freedom as a genus of which the following are species: freedom of belief, freedom of worship, and freedom of religious organization (Art. 5, VI), as essential values to the Brazilian Nation.

For Professor José Afonso da Silva¹⁴, freedom of belief is the:

[...] freedom of choice of religion, freedom to adhere to any religious sect, freedom (or right) to change religion, but also comprises the freedom not to adhere to any religion, as well as the freedom of unbelief, the freedom to be an atheist and to express agnosticism. But it does not include the freedom to hinder the free exercise of any religion, of any belief.

He continues his teaching by clarifying that freedom of worship "consists in the possibility of praying and performing the acts proper to external manifestations at home or in public, as well as receiving contributions¹⁵." Finally, it states that freedom of religious organization "concerns the possibility of establishing and organizing churches and their relations with the Government"¹⁶.

At this point, it is clear that Religious Freedom in Brazil enjoys consecrated prestige in the constitutional text, recognition in legal doctrine, and support by the Supreme Court in several judgments. However, the COVID-19 pandemic brought a scenario of chaos that would challenge this fundamental right for all, but with a special impact for traditional communities.

The biosecurity protocols adopted during the pandemic period, while in theory providing some control over the spread of the virus, on the other hand, promoted one of the most painful chapters in our recent history. The death of a loved one or a friend is a painful event that brings with it a period of mourning.

Brazil, in general, is a notoriously religious country, with more than 87% of its population professing to belong to some religious creed. This closeness to the "divine" brings with it many different rituals of worship and farewell ceremonies for the deceased.

Due to the pandemic, strict protocols were adopted which, in most cases, meant that only a few people were present at the burial of the deceased relative or friend. This physical limitation, as well as of the "farewell rituals" of each family group, brought as much suffering as the death itself.

¹⁴ SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 5 ed. rev. ampl. de acordo com a nova Constituição. São Paulo: Revista dos Tribunais, 1999. p. 221.

¹⁵ *Ibid*, p. 221.

¹⁶ *Ibid*, p.221.

The Brazilian Supreme Court was called to manifest itself regarding the viability and constitutionality of this “limitation”, in comparison with Religious Freedom in its different aspects. In response, the following decision was issued:

The dimension of the right to religious freedom (art. 5, VI, of CF/1988) that claims legal protection in the ADPF departs from the core of freedom of conscience (forum internum) and is closer to the protection constitutionally conferred on the freedom to exercise collective worship (forum externum). Under the internal dimension, freedom of conscience is not exhausted in the religious aspect but finds in it a concrete expression of marked importance. On the other hand, in the external dimension, the Brazilian constitutional text includes freedom of faith, freedom to adhere to a religion and freedom to exercise the respective worship. The FC, however, authorizes the relative restriction of this freedom by providing a legal reserve clause for the exercise of religious services (art. 5, VI, of the FC). After the World Health Organization (WHO) declared a global pandemic of the new Coronavirus, on March 11, 2020, several countries began to adopt bans or restrictions on the exercise of collective religious activities. With variations in intensity and time horizon, these measures sometimes consisted of a total prohibition of the holding of worship services, sometimes in the establishment of intermediate guidelines for the operation of religious houses. Restrictions on the operation of houses of worship were driven by super-contamination events identified in various regions of the world. Comparative law has led to decisions of Constitutional Courts recognizing the constitutionality of restrictions on collective face-to-face religious activities during the new Coronavirus pandemic. Under the prism of formal constitutionality, the issue of the contested rule respected the understanding signed by the STF in the trial of the Direct Action of Unconstitutionality 6.341, rapporteur of the eminent Minister Marco Aurélio, the wording of the judgment of Minister Edson Fachin, in which it was established that all federal entities have the power to legislate and adopt health measures aimed at confronting the Covid-19 pandemic. Precedents. Under the prism of material constitutionality, the measures imposed by the state Decree resulted from technical analyses regarding the environmental risk of contamination by Covid-19 according to the economic and social sector, as well as according to the need to preserve the service capacity of the public health service network. The norm proved to be adequate, necessary, and proportional in the strict sense to combat the serious picture of contamination that preceded its edition¹⁷.

The decision of the highest Brazilian court guaranteed the constitutionality and applicability of the sanitary protocols while the threat of COVID-19 lasted. In the midst of this scenario, another challenge arose, involving the traditional peoples of the region, more specifically the Yanomami.

The Coronavirus affects all social groups, regardless of religion, language or geographical location. In this aspect, members of the Yanomami community were also infected and had to travel from their communities to the capital, Boa Vista, in search of medical assistance.

Unfortunately, some members of the Yanomami community died due to complications from COVID-19, and here begins a new chapter in the delicate relationship between health protocols versus religious freedom. To clarify the situation, I bring to light a journalistic article¹⁸ on the subject:

¹⁷ADPF 811, rel. min. Gilmar Mendes, j. 8-4-2021, P, *DJE* de 25-6-2021.

¹⁸Mães Yanomami imploram pelos corpos de seus bebês. Available: <https://brasil.elpais.com/brasil/2020-06-24/maes-yanomami-imploram-pelos-corpos-de-seus-bebes.html>. Access: november 05, 2022, at 6h30pm.

The Yanomami are not buried. They never, under any circumstances, bury a body. The bodies are cremated and there is a long ritual so that the dead can die for themselves and for the community. The Yanomami are not individuals, like a white person living in Brazil, or Spain or the United States is. A Yanomami understands himself as part of a community and intertwines with various dimensions of visible and invisible worlds in relationships mediated by shamans. Death rituals must be followed in every detail and take months and even years to be completed. Several villages go to the community of the deceased to participate in the cremation, at first. The ashes are then stored.

Months later there will be the second part, when the visitors once again return for the celebrations. The deceased will then be remembered in his deeds, in his disagreements, and in all the important marks of his trajectory. He will be remembered so that he can then be forgotten, his marks can be erased, and the community can move on. In the last act, the ashes of the dead are diluted in banana porridge so that the one who died is dissipated in everyone's body.

The ritual makes the dead man die also as a memory so that the living can live. If the ritual is not performed, the dead person can neither be forgotten nor let himself be forgotten, which causes great harm to his relatives and the whole community. The death ritual of the Yanomami is of extreme complexity and wisdom in its symbolism. The rite is collective and is also a moment to establish sociopolitical and even loving relationships.

Unfortunately, following government health protocol, some Yanomami were buried in the city of Boa Vista. This situation caused pain and anger in the families and community of the deceased. The Federal Public Ministry was called in to act on the situation and expressed its opinion through the Public Prosecutor of the Republic, Alisson Marugal¹⁹:

More than mourning the death of someone and paying their last respects, as occurs in the funeral ceremonies of the surrounding society, for the indigenous peoples the ritualistic practice of mourning occupies a central space in their worldview, and there are no compensatory alternatives for this ceremony. Therefore, to deprive these peoples of their traditional acts is a way of violating them and depriving them of their way of saying goodbye to their loved ones, or, as the Yanomami state, "to put their ashes into oblivion."

In this sense, on December 17, 2021, the Attorney General's Office in Roraima, 7th Office, issued the Recommendation No. 24/2021/MPF/RR, with the following reasoning and determination:

RESOLVES, pursuant to Article 6, section XX, of Complementary Law No. 75/1993, to RECOMMEND to the Coordinator of the Special Indigenous Health District of Eastern Roraima and the Coordinator of the Special Indigenous Health District Yanomami that they promote the exhumation and transfer of the bodies of indigenous persons buried in the cemeteries of Boa Vista to their communities of origin, in order to perform their funeral rituals.

Despite the recommendation of the Federal Public Ministry, the biosafety health protocols indicated that exhumations of bodies, which died due to complications resulting from COVID-19, should only take place after 3 years had elapsed from the burial of the deceased.

¹⁹MPF recomenda exumação de corpos de indígenas em Roraima. Available: <https://www.mpf.mp.br/rr/sala-de-imprensa/noticias-rr/mpf-recomenda-exumacao-de-corpos-de-indigenas-em-roraima>. Access: november 05, 2022, at 7h10pm.

Furthermore, the Federal Government body responsible for the region where the Yanomami live, the Special Secretary for Indigenous Health (Sesai), expressed its opposition to the exhumations alleging epidemiological risk and budgetary limitation. As a result, on February 16, 2022, the Federal Public Ministry filed a Public Civil Action to force the Federal Government and the State Government of Roraima to promote the exhumation and transfer of the bodies of the indigenous victims of COVID-19 (pending trial).

CONCLUDING REMARKS

Strict protection of the guarantees of human dignity must always be part of the international ideology and, consequently, must be based on the legislation of countries around the world. Without demagoguery and without disregarding the possibilities for improvement, in Brazil, legislation, doctrine, and the jurisprudence of the Superior Courts point in the direction of making these universal rights effective.

Unfortunately, in moments of unforeseeable sanitary catastrophes, such as the one we have recently experienced due to the Coronavirus, the (re)actions of governments and legislators may pose a threat, temporary or not, to the fundamental guarantees of individuals. With respect to the context of COVID, these (re)actions in fact resulted in the suspension of constitutional rights.

In the case we analyzed, we assessed if a state administrative act (biosecurity protocol) could impose limitations on the Freedom of Worship, as guaranteed by the Federal Constitution. Evaluating the situation regarding this issue, the Federal Supreme Court manifested itself clarifying that “(...) the FC, however, authorizes the relative restriction of this freedom by foreseeing a legal reserve clause for the exercise of religious cults (art. 5, VI, of the FC).”

The decision of the Brazilian Constitutional Court is in line with what is stated in the Universal Declaration of Human Rights (UDRH), article 29, which establishes the possibility of temporary limitations regarding Freedom of Religion and Worship, provided that “(...) in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

An approach that respects the rights guaranteed by the 1988 Constitution would require equality before the law and recognition of differences. The role of the legal interpreter is thus to reconcile both fair treatment and respect for the differences.

This means, in practice, that the indigenous people themselves must have some effective control over the decisions that affect them, not only based on medicine but also according to an intercultural guideline that takes into account their traditional practices, especially religious ones.

The way to do this will be through prior consultation (if possible), free and informed to these people, under the terms of Convention 169 of the International Labor Organization. This practice of respect and dialogue will have an affirmative and transformative character, as it will provide the indigenous with information so that they can freely choose the best solution. In other words, the solution is to deal with the richness and diversity of indigenous traditions, working alongside them rather than imposing upon them.

Precisely for this reason, the complexity of coexistence with traditional peoples and in the specific case of the Yanomami, analyzed in this text, requires an effective dialogue, not only to better accommodate the indigenous to the surrounding society, but above all to build solutions based on the respect and multiculturalism.

In spite of the legal possibility of the measures restricting Freedom of Worship adopted by the biosecurity protocols, a third way was presented, when the indigenous Yanomami leader Dario Kopenawa (Hutukara Yanomami Association) said: “We want the bodies to be sanitized or, if this is not possible, we want them to be cremated. Then we can take the ashes back to the villages”.²⁰

At the time of the pandemic, the city of Boa Vista did not have an official crematorium, and perhaps because of this, the proposal was not taken forward. However, in July 2022, a crematorium was inaugurated in the city, making it possible, should there be a future need, another way that can better equate health protocols and the Freedom of Worship of the Yanomami people.

BIBLIOGRAPHICAL REFERENCES

ALEXY, Robert. **Teoria de los derechos fundamentales**. Tradução de Ernesto Garzón Valdés. Madrid: Centro de Estudios Políticos y Constitucionales, 2001.

ANJOS FILHO, Robério Nunes dos. **Comentários à Constituição Federal de 1988**. In: BONAVIDES, Paulo *et al.* (coord). Rio de Janeiro: Forense, 2009.

CANOTILHO, José Joaquim Gomes. **Direito Constitucional e Teoria da Constituição**. 3 ed. Coimbra: Almedina, 1999.

DINIZ, Maria Helena. **Legal Dictionary**. 2. ed. rev. atual. e aum. São Paulo: Saraiva, 2005. vol.4.

DURKHEIM, E. **As formas elementares da vida religiosa**. Trad. Paulo Neves. São Paulo: Martins Fontes, 1996.

²⁰ Mães Yanomami imploram pelos corpos de seus bebês. Available: <https://brasil.elpais.com/brasil/2020-06-24/maes-yanomami-imploram-pelos-corpos-de-seus-bebes.html>. Access: november 07, 2022, at 3:15pm.

EDUARDA, M.; FRUTUOSO, J.; BELLAGUARDA, Maria.; LUNA, I. Funeral rites in the COVID-19 pandemic and grief: possible reverberations. **Escola Anna Nery**, Rio de Janeiro, vol.26, 2022.

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS. **Resolution n. 1/2020**: pandemic and human rights in the Americas. Washington, 2020.

JÚNIOR, D. C.; NOVELINO, Marcelo. **Constituição Federal para concursos**. 3. ed. rev. ampl. e atual. Salvador: JusPODIVM, 2012.

LUNO, Antonio Enrique Perez. **Los derechos fundamentales**. Madri: Tecnos, 2004.

MASSON, Nathalia. **Manual de Direito Constitucional**. 4. ed. rev. ampl. e atual. Salvador: JusPODIVM, 2016.

SILVA, José Afonso da. **Curso de Direito Constitucional Positivo**. 5. ed. rev. ampl. de acordo com a nova Constituição. São Paulo: Revista dos Tribunais, 1999.

TELES, E.; CALAZANS, M. **The pandemic and the management of deaths and casualties**. São Paulo: Federal University of Sao Paulo, Center for Forensic Anthropology and Archivology (CAAF), 2021.

TEIXEIRA, P. FREIRE, A. Sociocultural transformations of funerary rituals and cemiterial of practices in pandemic times. **Ciência geográfica**, Bauru, vol. 25, n.1, p.208-222, jan./dez. 2021.

WORLD HEALTH ORGANIZATION. **Practical considerations and recommendations for religious leaders and faith-based communities in the context of COVID-19**: interim guidance, 7 April 2020.