REVISTA PIHHY

# Nhandereko, the Guarani Law[1]

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> For a long time, the existence of law in Indigenous societies was not accepted. Since the discovery of America, from an ethnocentric perspective, the consensus was that the Indians [sic] had neither 'Faith, nor Law, nor King'.
>
> — (Colaço (2012), p. 20).

## 1. Indigenous Law

We must make some initial considerations to avoid conceptual confusions, by pointing out the differences between Indigenous law and Indigenist law. Indigenous law, customary law, Indigenous legal system, law of Indigenous Peoples. Such terms are synonyms and refer to each Indigenous People's own law: law that is manifested orally, and that is collective, customary and traditional.

Some things to consider! The Guarani Indigenous people are present in ten Brazilian states, and ethnography classifies them into three subgroups, namely: *Nhandeva*, *Kaiowá* and *Mbya* (living in 222 Indigenous territories in Brazil, see '*Mapa Guarani Digital*'). It can be said that each of these Indigenous territories has its own legal system or law — notwithstanding the many things they all have in common, such as language, cosmology and similar social organizations. Still, considering that culture is not static, there are differences even between three linguistic variants, due to the time they have been in contact with the Spanish and Portuguese languages and with regional differences.

Pacheco, citing Souza Filho, presents two mistakes in legal historiography studying Indigenous societies. These are:

> 1) The belief that Indigenous societies' law and organization existed only until 1500, being substituted thereafter by the protection of the Portuguese State and law. This understanding disregards that these Indigenous societies, with or without contact with the national society, have their own ethical, legal and organizational principles;
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> 2) Another mistake pointed out by Souza Filho that, in truth, complements the first, is that of imagining that only one Indigenous society exists, or that all Indigenous people form part of the same society, with a shared legal, ethical and social system. It's known that in Brazil today an Indigenous population formed of more than 200 ethnicities coexists, and that Indigenous societies have their specificities (Pacheco (2006), p. 124).

It is worth remembering that, according to the 2010 IBGE Census, there are more than **305** different Indigenous Peoples in Brazil. Given the great diversity of Indigenous Peoples in Brazil, just as many Peoples have their own law in place today, each according to their specificities.

## 1.2 Indigenist Law

Indigenist law is the positive law created by the State to deal with legal issues involving Indigenous peoples and the State. It is formal and generally created by the Legislative Branch, as is the case with constitutional laws applied to Indigenous Peoples. Let's take a look at points of view on the concept and legal nature of law relating to Indigenous Peoples.

For Villares, neither Indigenous law nor Indigenist law exist, since in the first case, it's more accurate to think of them as the legal systems of

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each people rather than the law, since this term is a Western construction and would not apply to Indigenous Peoples. These are the author's words:

> [...] As will be explained, the artificial gathering of the varied legal practices of Indigenous Peoples should not be defined as the law.
>
> Many Brazilian Indigenous Peoples have not organized themselves in the same way as Brazilian society, under the yoke of positivized laws and rules. Law as an organizational social phenomenon is a construction of the Western Modern Age, but its roots can be traced back to Classical Antiquity. In this way, to speak of Indigenous law is to impose an organizational model that is foreign to the legal system of every Indigenous People (Villares (2009), p. 15-16).

For Villares, 'Indigenous law' should not be spoken of, but rather a legal system for each people, since law is a Western construction. This way of thinking reminds me of the historical records in which they said of the Indigenous — 'people without faith, without law, and without a king.' Villares equally does not recognize the existence of an Indigenist law, hence the title of his book *Laws and Indigenous Peoples*. The author says:

> Indigenous Law should not be spoken of, because under this title the objective would be limited to a compilation of normative texts and doctrinal opinions on the rules of Brazilian positive law on Indigenous Peoples. Indigenous law is beyond the scope of this book, because it has not yet been defined as an independent branch of law, recognised by legal experts and endowed with defined principles and objects of study. Possibly, in a disorganized way, Indigenous Law (or whatever more appropriate name is given to a new branch of law that studies the rules on Indigenous Peoples) will be consolidated in the future. (Villares (2009), p. 15).

Thinking differently is Lobo, who in 1996 had already published his work entitled *Brazilian Indigenist Law: Subsidies to its Doctrine*. The author defends the existence of an Indigenist Law and teaches:

> We maintain that indigenist law constitutes an autonomous branch of law and this raises another question [...] It can be said that indigenist law is public, since the protection of the peoples' rights is in the interest and duty of the State [...] In this sense, we understand indigenist law as a branch of public law. Firstly, because it is in the interest and duty of the State, since it has assumed the protection of these rights. Secondly, because Indigenous rights and interests are predominantly collective, with the exception of personal rights. Thirdly, because there are frequent relationships of subordination of which the State is part, and lastly, because these rules may not be removed by force of will. (Lobo (1996), p. 93, 95).

Diverging from Villares, Lobo envisions indigenist law with autonomy and with four guiding principles:

> 1) The protection of Indians [sic] and their communities is in the interest and duty of the State. 2) Indigenous populations have the right to be recognized as nations. 3) Indigenous populations have the right to their territories in accordance with their social, cultural and economic needs. 4) Indigenous populations have the right to decide whether they wish to join the dominant national society or not. (Lobo (1996), p. 91).

Demonstrating the lack of consensus between the terms Indigenous and Indigenist, which are sometimes even presented as synonyms, from Stefanini, in his *Indigenous Code in Brazilian Law*: "Indigenous law is an authentic law that transforms the organism of social dynamics and enlivens this axiological fabric, which is why it should be conceived as a social law in its own right" (Stefanini (2012), p. 25).

I think that the concept presented by Stefanini, of Indigenous law as a social law, is equivalent to indigenist law — that is, that law created, positivized by the State. Therefore, the author is not speaking here of the law of each people, but rather of indigenist state law. In fact, it is not only Stefanini that deals with Indigenous law as a synonym of indigenist law. Pacheco clarifies that:

> In this sense, it is worth clarifying that, normally, when dealing with Indigenous Law, we refer to the law that the Brazilian State confers on the Indians – also understood as indigenist law, and not to the laws of the Indians themselves, this understood as their own set of rules that regulate the internal conduct of every Indigenous society in Brazil (Pacheco (2006), p. 122).

As we can see, Pacheco understands the term Indigenous and indigenist differently, without, however, ignoring that the terms are taken by many to be synonyms.

Such considerations made, I defend the existence of Indigenous laws, that is, those that are their own. Although, scientifically, law is a creation of the Western world, their own legal systems are, in my opinion, law; not least because Ulpiano said in *Corpus Iuris Civilis: 'Ubi homo ibi societas; ubi societas, ibi jus.'* 'Where there is man, there is society; where there is society, there is law.' Such a statement does not mean that I am unaware of the

existence of a classical current in the philosophy of law, that only recognises law where the State exists; that is, without the State there is no law. I also recognise the existence of indigenist law as being created, organized and systematized by the State, denominated "positive law" by many.

Closing the present subject, I thus join the law-naturalists and law-relationists who defend the existence of laws beyond Western law, since law is inherent to human beings. In this school, natural law is universal, stable and immutable. Having woven such considerations on Indigenous law and indigenist law, I will now ponder the law of the Guarani people, since Guarani social organization has always had its own rules on the most varied of subjects, so as to maintain equilibrium in the heart of society. So much can be understood from Hélène Clastres words, presenting the result of social transgression among the Guarani when the individual eats raw meat, or cooks in the forest and eats there (Clastres (1978), p. 94).

The act of eating meat raw, or far from the community, is a practice that goes against the *Mbya* community principles of reciprocity and solidarity, removing the characteristics of humanity from the transgressor. Eating raw meat is not part of *Mbya* humanity; in fact, this act is a practice of the Jaguar,[3] so this transgression makes the Indigenous person similar to the animal. Hence they may become enchanted, to the point that they too turn into a jaguar. The transgressor may become ill, to the point of transformation (metempsychosis). And because they are a potential threat to wider society it may be necessary, if they are not treated on time by the *nhanderu*, that the transgressor be killed.

Hélène Clastres demonstrates this possibility emphatically:

> During treatment, the possessed must stay on their feet; if they cannot manage, if they bend over, it's already too late: ñe "e", their word, has already abandoned them and the raw meat's spirit is in their blood; the possessed will start to growl. **Then it is necessary to kill them with an arrow and burn them**. (Clastres (1978), p. 94, my emphasis).

As we can see, what must be killed is already not human in essence, but rather has already been transformed into a jaguar. Since they are a threat to all individuals and the community, because of this loss of humanity and transformation into a Jaguar, the transgressor must be shot dead and burned. Many of the case reports demonstrating the existence of Indigenous laws or their violations are from remote times, like the one above, recorded by Hélène Clastres. Even those related to internal and external conflicts demonstrate this temporal bias. However, since living is about updating and reinventing oneself, it can be said that all Indigenous communities, whether more or less autonomous, exercise their law, since law is something living and applicable in time and space.

In this sense, it's credible to maintain that relationships of kinship, marriage, community labor laws, rules of coexistence, conflicts and other cultural expressions are happening at each instant in all the *aldeias* and territories in Brazil, bringing the constitutional principles to life by recognizing the uses, customs, languages, beliefs and traditions that, in my opinion, are the Indigenous Peoples' laws, or Indigenous laws.

Moreover, there are dozens of cases that prove the existence of an Indigenous law proper; that is, their own ways of resolving their issues, be they in civil or criminal spheres, or be they in relation to internal collective rights. In this way, it can be said that there are as many laws as there are Indigenous Peoples in Brazil, since each Indigenous People has their own law. Following this direction, the situations presented speak to that which in Western law is called public law, more specifically, criminal law; but Indigenous Peoples also have rights relating to marriage rules and impediments.

Regarding the application of domestic law, Rita Segato comments:

> One of the richest and most complex moments of conceptual discussion happened when one of the participants, the Indigenous lawyer Lúcia Fernanda Belfort – Kaigang, asked about the possibility of considering the traditional custom of an Indigenous population equivalent to the law, that is, about the possibility of considering the "traditional" law, custom, equivalent to law in its modern sense and subject to change within the community. This is, without doubt, a big question, one that finds the most diverse answers in the literature on the subject. If we refer to the 1989 International Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples in Independent Countries, ratified by Brazil in June 2002, we are warned that although sensitivity is recommended with regard to the so-called "customary" law and

3. Jaguá is the denomination we give to dogs, but I have noticed, even in the case of the Jaguar cited by Clastres, it means jaguar and not dog. Usually we *Mbya* call the jaguar "*jaguareté*."

the customs of Indigenous societies, these other laws, or their own laws, such as they are sometimes called, cannot contradict the laws defined by the national legal system nor internationally recognized human rights. A certain degree of vagueness is thus maintained by innovating in the pluralism that the Convention introduces; regardless, it insists on the necessity of negotiation when modern laws, and especially human rights, establish the intolerable nature of certain customs:

> Article 8.
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> 1. In applying national legislation to the concerned peoples, their customs or customary law must be taken into due consideration.
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> 2. These peoples must have the right to conserve their own customs and institutions, provided that they are not incompatible with the basic laws defined by the national legal system nor with internationally recognized human rights. Whenever necessary, procedures must be established to resolve conflicts that may occur in this principle's application.
>
> 3. The application of paragraphs 1 and 2 of this Article must not prevent the members of these peoples from exercising the rights recognized for all the country's citizens, nor from assuming the corresponding obligations.
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> Article 9.
>
> 1. Insofar as is compatible with the national legal system and with internationally recognized human rights, the methods to which the concerned peoples traditionally recur for the repression of offenses by their members must be respected.
>
> 2. The authorities and courts summoned to rule on criminal matters must take into consideration the customs of the peoples concerned in the matter.
>
> Article 10.
>
> 1. When penal sanctions are imposed upon members of the concerned peoples by general legislation, their economic, social and cultural characteristics must be taken into consideration.
>
> 2. Preference must be given to other types of punishment than incarceration.

We see that, despite the special recommendations, and despite pluralism in the recognition of traditional forms of conflict resolution, retribution and reparation, the Convention makes clear that it does not recognize traditional rules based on cultural-ancestral practices and values as equivalent to the laws of the state or supra-state sphere. It should be highlighted that the subject of legal pluralism is of great complexity and includes fundamental controversies for regulating the use of the Convention (see, for example, Albó 1998, 1999; Castro and Sierra 1999; Maliska 2000; Sánchez Botero 2003, 2004; Sousa Santos 1998, 2003; Sousa Santos and García Villegas 2001; Yrigoyen Fajardo 1999; and Wolkmer 2001, among many others who contributed to this exciting field of study) (Segato( 2006), p. 107–236).

The aim at this point is not to construct or analyze a treaty on Indigenous laws, but to demonstrate that the *Nhandereko* has always existed among we the Guarani. To this end, some more legal cases or situations will be presented in order to support the existence of Guarani law, whether pre-colonial or current. From this perspective, Guarani collective rights are part of their essence as a people, since the collective is privileged if it enters into conflict with private rights. There are various cultural rights like dance, belief and various cultural manifestations, customs, and land and territory rights. Considering the aspects I have just cited, and without excluding others, I follow the teachings of Geertz (2014, p. 10) in maintaining: "To understand the culture of a people exposes its normality without reducing its particularity."

Colaço says about collective property:

> The pre-colonial Guarani also had a type of collective and individual property. Collective property was more important and more extensive, beginning with the occupation of territory. The land was considered a sacred asset, indispensable for the survival of the group. The limits of each tribe should be rigorously respected by other tribes. Territory belonged to the whole community and could never be ceded (Colaço (2012), p. 173).

Regarding the right to land as a collective right, we need not bring many examples, because it is public and well known that land is a collective asset for Indigenous Peoples and that its sale or individual exploitation is not permitted. That is not to say that many communities do not currently have an economic relationship with the land, to the point of creating leases and other contracts, cases which are also public and well known. But for us, the Guarani of today, we continue to respect and treat the land as a collective right for the people's common use. Our reality in Jacundá demonstrates this well: we have already had internal conflicts, to the point of my father, brothers and nephews moving away from Jacundá and building a new *aldeia*. Some went to the city, but there was never any thought of selling the land and making it individual property. Even faced with conflicts, we always knew that we would overcome the situation and that we would

always have a place for everyone — a place that aims to guarantee our rights as a collectivity, as the Guarani people.

Also, on Jacundá Indigenous land, the community has had more than a dozen head of cattle, but they were never anyone's individually, they belonged to the whole community. If they were to be sold, the whole community participated in the decision on what was to be sold, or what was to be food for the community. It is a fact that collective rights have always been known by our people, which results in the so-called *Mbya* reciprocity and solidarity. In this case, in my capacity as a legal expert and anthropologist, I see many of the points discussed, although they have other nomenclatures, as the law; that is, as Guarani customary law, which I have summarized in the expression *"Nhandereko*," translated as our way of being, our custom, our system.

Legal historian Colaço maintains in his introduction:

> Despite the 'artificial' division of the pre-colonial Guarani society's legal system into internal and external government relations, into criminal law and civil law, all are ruled by a single connecting thread, formed of four basic principles: valuing collective over individual interests; collective responsibility; solidarity; and reciprocity. All of these principles are intimately linked and often conflated. (Colaço (2012), p. 19).

Although this respected author puts artificial in quotes, the same can be said of traditional Western law; since law is considered by many scholars to be one, but for methodological and didactic purposes alone it is divided into public and private; then public into constitutional, administrative, procedural law and so on; and private into corporate and civil law. In this sense, Lessandra Almeida Barbosa and Larisse Leite Albuquerque write:

> Despite the law being one, indivisible and indecomposable, the branches are divided for didactic purposes even if studied as a large system. As well as this, constitutional law is within the fundamental branch of public law, since it refers to all the primary elements of the organization and functioning of the State, establishing the bases of its structure (Barbosa and Albuquerque (2019), p. 88).

The legal system, to be called as such, must have, among other requirements, autonomy and principles, although they are interdependent on each other; such that Professor Colaço is right in presenting the four basic principles of Guarani law: valuing collective over individual interests; collective responsibility; solidarity; and reciprocity. As can be seen, the problem between the two worlds of law does not reside in its didactic-methodological "artificial" division, but in its diametrically opposed structure, since customary Guarani Law is based on the value of collective over private interests, collective responsibility, solidarity and reciprocity.

Foreign European law, on the other hand, was and is rooted first and foremost in the protection of property, which is characterized by individual, exclusive, perpetual and absolute rights. It is not over-exaggerating to say that the secularly constructed law in Brazil was based on these premises. Added to this is the religious ideological discourse that justifies the predominance of European law over all other peoples, since it came from divine providence, as maintained by innumerable European theorists, legal experts and theologists, and seen in Sepúlveda's defense of the primacy of European law over the Indigenous in the sixteenth century:

> Those who surpass others in prudence and reason, even if they are not superior in physical strength, are by nature the masters; on the contrary, the lazy, those of slow spirit, even if they have the physical strength to fulfill all the necessary tasks, are by nature servants. And it is right and useful that they be servants, and we see this **sanctioned by divine law itself**. Such are barbaric and inhuman nations, strangers to civil life and peaceful customs. **And it will always be right and in accordance with natural law** that these people to be subject to the empire of princes and more cultured and humane nations, so that, thanks to their virtue and the prudence of their laws, they abandon barbarism and conform to a more human way of life and to the cult of virtue. And if they refuse this empire, it can be imposed by means of arms and this war will be just, just as natural law declares that honorable, intelligent, virtuous and humane men dominate those without these virtues (Sepúlveda apud Laplantine (2003), p. 39; my emphasis).

As stated, the colonizer in his ethnocentrism judged himself above everything and everyone, and did not recognize faith, law, or king except on a European Catholic basis, a fact that justified all manner of political, religious and legal impositions on the dominated peoples. For Portuguese and Spanish law, values other than

those of individuality, power centralized in the monarch and the Church, and the accumulation of riches in the hands of a few sounded very strange.

Only many centuries later will we find morals and ethics entering into our national legal system in a standardized way. Before, it was as if they were subjects from separate areas, becoming true constitutional principles such as that of human dignity, sociality, objective good faith and more recently because of human rights and the principle of solidarity. The same can be said for collective and individual rights in the current national legal reality. Thus, this evolution of Western law took centuries post-colonization.

For the Guarani people, these were already principles since those times of contact between them and European peoples, as presented by Colaço. These were, the principles of valuing collective over individual interests, collective responsibility, solidarity and reciprocity.

On account of legal ethnocentrism, Guarani law has not been recognized. In this sense, Chase-Sardi, cited by Colaço, clarifies:

> "Legal ethnocentrism" is what he calls the position of various authors from both the left and right, like MARX, ENGELS, KELSEN and RADCLIFFE-BROWN, who link law to the State, not accepting the existence of law in societies without writing because there is not state organization (Colaço (2012), p. 21).

In the same way, Branislava Susnik, a Guarani scholar, here also cited by Colaço, teaches:

> Susnik understands that, in order to maintain the integrity and order of any human grouping, there must be a "legal guide" capable of regulating social coexistence and defining prohibitive conduct with sufficient moral strength to prevent socially reprehensible acts (Colaço (2012), p. 21).

We can see that over time, principally due to the efforts of anthropologists, Brazilian law itself has been changing and accepting — or even "tolerating" — socio-diversity and legal pluralism, because it understands that there is no society without law. That is, where there is society there is law, no matter where it is nor what its customs, beliefs, values, cultures and traditions.

## 1.3 Guarani Law and Pluralism: In Brazil and in México

In order to analyze how the relationship between the laws of Indigenous Peoples and state law comes about, including in this relationship principally Guarani Law, I will begin presenting this question from the Mexican context, because of the explicit handling of this theme in Mexican law and due to the period of inter-university doctoral exchange which permitted me to live for six months in the state of Oaxaca, studying at the *Centro de Investigaciones y Estudios Superiores en Antropología Social* (CIESAS, Center for Research and Higher Studies in Social Anthropology). This enabled me to go into the field, meet with Indigenous leaders and learn a little about their political action in the exercise of their autonomy and self-governance, as well as participate in anthropology classes/seminars about not only the Mexican reality but that of other peoples and cultures, since some of the doctoral students were from other countries.

In light of this, let's see what the Mexican Constitution says about cultural and legal pluralism in relation to Indigenous Peoples:

> Article 2. The Mexican Nation is one and indivisible.
>
> The Nation has a pluricultural composition originally constituted in its Indigenous Peoples, which are those that descend from populations that inhabited the current territory of the country when colonization began and that conserve their own social, economic, cultural and political institutions, or part of them.
>
> Consciousness of their Indigenous identity must be a fundamental criterion to determine to whom the clauses on Indigenous Peoples apply.
>
> Communities forming an Indigenous people are those which form a social, economic and cultural unit, are established in a territory and that recognize their own authorities in accordance with their uses and customs.
>
> The right of Indigenous Peoples to free determination will be exercised within a constitutional framework of autonomy that ensures national unity. Indigenous peoples and communities will be recognized in the constitutions and laws of federal entities, which must take into consideration, as well as the general principles established in the preceding paragraphs of this article, ethnolinguistic and physical settlement criteria.

The heading of Article 2 of the Mexican Constitution decrees that the Mexican Nation is one and indivisible. Notwithstanding this principle, it subsequently declares that the nation has a pluricultural composition originally constituted

in its Indigenous Peoples. The recognition is not merely cultural or multicultural, but also reaches the law, since the Article also declares that the right of Indigenous Peoples to free determination will be exercised in a constitutional framework of autonomy that ensures national unity. From this perspective, this recognition of Indigenous rights in Mexico goes well with this country's representation in international organizations participating, in recent years, in the creation of international institutions for the protection of the rights of Indigenous Peoples and, subsequently, in the incorporation of these rights into the national order.

In recent decades, Mexico has progressively put participation on the international stage on the agenda, especially with regards to the human rights of Indigenous Peoples, voting in favor of the advancement of international instruments, such as ILO Convention 169, the United Nations Declaration for the Rights of Indigenous Peoples and the American Declaration of the Rights of Indigenous Peoples. In this sense, we will briefly analyze the legislative impact, principally in the national sphere of Mexico, of the inclusion of some international laws in Mexico's constitution, as well as other infra-constitutional legislation.

ILO Convention No. 169 on Indigenous and Tribal People in Independent Countries (adopted on June 27th 1989 by the General Conference of the International Labour Organization at its 76th meeting). With respect to its approval by the Mexican Chamber of Senators, as well as its ratification by the president of the Republic, it is worth citing Marcos Matías Alonso upon presenting the compilation entitled "International Treaties and Indigenous Rights in Mexico," when he says:

> In Latin America, Mexico was the first country to ratify Convention No. 169. On a global scale, Norway was the first country to adopt this international legal instrument. The convention was approved by the Chamber of Senators on July 11th 1990. In Mexico, the provisions of ILO Convention No. 169 have been in place for 28 years, and its observance is mandatory for the Mexican State (Alonso and Morales (2017), p. 3).

As we can see, Mexico nationally adopted the Convention in question very early, something that would came to pass much later in Brazil, after intense debates in the Executive Branch as well as in both Houses of the Brazilian National Congress, due to the refusal by conservative ideological forces to call Indigenous collectives "Peoples" as the Convention does, or to designate Indigenous lands as territories.

> II — Data relating to Brazil: a) approval = Legislative Decree n. 143, 20.06.2002, of the National Congress; b) ratification = July 25th, 2002; c) promulgation = Decree n. 5051, 19.04.2004; national implementation = July 25th, 2003.[4]

It should be highlighted that ILO Convention No. 169 is an international legal landmark that, when it is incorporated into the national legal framework, becomes a determined part of the domestic legal system. In the case of Brazil, since its incorporation it has come to receive in the hierarchy of laws, or legal status, that of a supra-legal law, that is, it is beneath only the Federal Constitution and above all other laws.

With regard to the United Nations Declaration on the Rights of Indigenous Peoples, it is worth recording the Official Note issued by the Secretariat of the United Nations Permanent Forum on Indigenous Peoples, on February 7, 2017, in relation to the Tenth anniversary of the United Nations Declaration on the Rights of Indigenous Peoples: measures adopted to apply point II of the Declaration, which addresses the recognition of the rights of Indigenous Peoples on the national stage in item A regarding constitutional recognition, which in No. 13 presents an analysis of Mexico.[5]

> The Mexican Constitution of 1917 was modified in 2015 to incorporate various references to the rights of Indigenous Peoples, including their right to free determination through the autonomous exercise of internal government in accordance with their traditional rules, processes and practices, and their right to choose Indigenous representatives in the governments of municipalities with an Indigenous population. According to the Constitution, the Mexican authorities are obliged to consult Indigenous Peoples in the elaboration of the National Development Plan and state and municipal development plans and, when appropriate, to incorporate the recommendations and proposals that they make. The Mexican Constitution also recognizes the importance of bilingual and intercultural education.

The references made by the Permanent Forum recognize some important points of the United

4. Available at: <https://www.ilo.org/brasilia/convencoes/WCMS_236247/lang--pt/index.htm>. Accessed on: August 21, 2019.
5. Enquiry made at: https://www.un.org/en/ga/search/view_doc.asp?symbol=E/C.19/2017/4&referer=http://www.un.org/en/documents/index.html&Lang=S . Accessed: August 23rd, 2019.

Nations Declaration on the Rights of Indigenous Peoples that were incorporated by the Mexican Constitution, indicating an official recognition by one of the UN organizations of a particular country, in the present case the Mexican State. With regard to the Secretariat's Report, it is unfortunately worth mentioning that at no point does it make reference to Brazil, an absence which demonstrates that, although Brazil has been an important participant over the more than twenty years in which the Declaration was elaborated, and even having been one of the 143 global countries that voted in favor of the Declaration, it ended up incorporating nothing of this important Declaration into its legal system, even though ten years have passed since it came into effect.

At this point, I'd like to highlight that, between the years 2000 and 2006, I actively participated in UN meetings in New York and Geneva as a member of the working groups for drafting the Declaration Project in question, either representing the Brazilian State when I held the position of General Coordinator of the Defence of Indigenous Rights at the National Indian Foundation (FUNAI), or representing the Brazilian Indigenous movement. In these meetings and/or informal conversations between American and South American representatives, those from the South, on the one hand, said that the United States always voted against human rights and, in the present case, against the advancement of Indigenous rights. The Americans, on the other hand, said that Brazil and other countries from the region always voted in favor of everything but never actually incorporated it into their legislations, nor practiced or voted in favor of it at the UN.

In relation to Mexico, in the legislative sphere we can verify that the American representatives were mistaken, as the advances in Indigenous rights were incorporated quickly in the country. With regards to the effectiveness of these legislative measures, this will have to be verified at another time, as *a priori* what we seek to analyze is the legislative incorporation of such international instruments. In relation to Brazil, unfortunately the American assertion has proven true, since in the case of the previously analyzed Convention, Brazil took more than a decade to legally incorporate it; and in relation to the United Nations Declaration on the Rights of Indigenous Peoples, twelve years have already passed with no measures taken by either the Executive or Legislative Branch. It has taken until now for there to be initiatives to incorporate it into the Brazilian legal system.

From this perspective, the American Declaration on the Rights of Indigenous Peoples is the last international instrument to be analyzed in the present report. It is worth highlighting that this is the most recent international legal document to be approved by the General Assembly of the OAS, on June 15, 2016 in Santo Domingo, the capital of the Dominican Republic. With respect to this important and novel instrument of international law, it is worth highlighting that Mexico's Federal Constitution obliges the State to comply with all international treaties of which the country is part, according to Marcos Matias Alonso and Miguel Flores Morals: "The first paragraph of the first article elevates to constitutional status the obligation of the Mexican State to comply with all international treaties of which our country is part" (Alonso and Morales (2017), p. 4).

Brazil, following its own dynamic, has taken practically no stand with regards to this important instrument for protecting the rights of Indigenous Peoples that is the American Declaration of the Rights of Indigenous Peoples (ADRIP), approved by the Organization of American States (OAS), except in a brief note from the Ministry of Foreign Relations (MFR) reproduced on the website of Radio Yandé:[6]

> According to analysis by the Ministry of Foreign Relations (MFR), the ADRIP is almost 30% more extensive than the United Nations (UN) Declaration of the Rights of Indigenous Peoples and deals with four new themes not covered by the UN or by the International Labor Organization (ILO) Convention 169. **The new themes are in articles II, IX, XVII and XXVI, all supported by Brazilian legislation** (my emphasis).

Although the Minister of Exterior Relations explains in the part that I emphasized that the advances contained in the ADRIP find support in Brazilian legislation, this shouldn't be the best path to welcoming an instrument of such importance on the American stage into our domestic legal order, especially given that the Declaration was approved by acclamation and that Brazil made itself present throughout the construction of this international framework until its final approval in 2016. Because it is a question of human rights, it is its approval by the National Congress with a view

6. Available at: https://radioyande.com/default.php?pagina=blog.php&site_id=975&pagina_id=21862&tipo=post&post_id=616

towards its formal legal incorporation that would ultimately demonstrate Brazil's commitment to Indigenous Peoples' human rights.

Still, even if good will does not implement such rights, it does open the possibility of seeking a jurisdictional pathway. What international instruments for the protection of Indigenous rights consist of are minimum principles, and each and every state should go far beyond these minimum declarations. Even though in Brazil, in order for such instruments to have legal efficacy it is necessary that they be approved in both houses of the National Congress, there is no avoiding its application– for, upon the Declaration's approval, it enters into effect within the countries that make up the Organization of American States (OAS), and, consequently, violations of rights within them can be taken to trial by the OAS International Commission of Human Rights. It is important to note, again, that Brazil was one of the most important countries in the search for the approval of the ADRIP during the 17 years it took for its approval.

Brazil, with its official delegation, with both Indigenous and Indigenist civil society organizations, and with various Indigenous leaders and professionals, including Indigenous lawyers like Joênia Wapixana, Paulo Celso Pankararu, Samuel Karaja and Vilmar Guarany, always actively participated in that process, even managing to bring one of the final consensus meetings to Brazil. Between March 21–25, 2006, the VII Negotiation Meeting for the Search for Consensus took place in our country, aiming towards the final approval of the American Declaration of the Rights of Indigenous Peoples.[7]

Confronted with the three international instruments in the present analysis, it is also important to state that Brazil actively participated in the General Assemblies as much as in official Working Groups and/or through back-channels, always looking to push forward projects that are by now legal documents. It is thus more than fair that we look to at least officially integrate them with the laws of our country — as Mexico is doing via inclusions in domestic laws, principally in the constitutional sphere.

> In this panorama of interculturality, it becomes necessary to reemphasize legal pluralism as an important tool so that a particular legal inclination — in the sense of formalist centralization, and in the mere casuist application of juridical norms— does not rule singularly, but, instead, looks to make these norms wider, and, as such, capable of securing the right to singular and collective identities, however different they may be from each other.

Our Supreme Law does not go so far as to make legal pluralism explicit, but it does recognize Indigenous peoples' social organization, uses, customs, languages, beliefs and traditions, and these provisions present in Article 231 of the Federal Constitution make up part of what is denominated Indigenous Rights or the Rights of Indigenous Peoples. Recognizing such rights within the constitutional sphere implicitly recognizes legal pluralism.

Reenforcing this recognition, it is important to emphasize that ILO Convention No. 169 is part of Brazilian juridical regulations through Decree No. 5,051, from April 19, 2004, that enacted the Convention in Brazil. As for the United Nations Declarations and that of the Organization of American States, these two did not pass through the scrutiny of the National Brazilian Congress to formally enter into national law, even though, as already mentioned, the approval in both the UN and the OAS had not only the active participation of Brazil, but ultimately its favorable vote. These declarations are international instruments with the purpose of orienting policy and amendments within the legislature of the signatory countries, seeking the protection of the rights and interests of Indigenous peoples.

We hope that in the new Brazilian political situation, these declarations may be properly analyzed and approved by the Federal Legislature in the coming years so that the behavior of Brazil in international spheres is actually echoed in the political-juridical national reality.

Having comparatively analyzed Brazilian and Mexican law, we will now analyze Guarani Law from the early moments of contact until the twenty-first century.

Regarding Guarani Law, Colaço states:

> In short, the pre-colonial Guarani respected tradition, obeying the norms of social relationships instituted by the group, because Indigenous societies are so homogenous that the juridical, moral, religious, productive and other norms are all mixed together. All of these rules are vital for their survival, principally by means of the natural environment in which they live and

7. Cf. <https://www.oas.org/pt/centro_midia/nota_imprensa.asp?sCodigo=P-068/06>.

**Photo 23:** Vilmar Guarany and wife Clarice in Oaxaca de Juarez, Mexico, during my time in the Doctoral Program in Social Anthropology, on the Professor Abdias Nascimento Scholarship, hosted between the Federal University of Goiás (UFG) and the Center of Research and Studies of Social Anthropology (CIESAS) - Pacífico Norte, Mexico. (Source: Author's personal collection. Accessed on: September 22, 2022.)

> by means of their technological knowledge. To violate the law would be to sentence one's own death, for the individual would have little chance of survival if they were ignored or abandoned by their group. Moreover, there is all of the psychological and mental involvement. To defy customs would mean disrespecting taboos, angering the gods and nature, bringing catastrophic consequences to the infringing individual and to the community in general, putting at risk the integrity of the group (Colaço (2012), p. 23).

In accordance with Prof. Colaço, keeping in mind my life and social ties with my relatives in the Central-Northern region, as well as the various Guarani communities of the South and Southeast, I have been able to observe the issue of Guarani Law. Sometimes this was through the histories told by elders — including one of them about my group's failure to obey the Nhandereko, which had consequences ranging from the death of our last leader to our dispersion, just as he had predicted and said: "After my departure, another leader will not rise, you will end up dispersed for having not walked according to our customs, our laws, according to *Nhandereko* (our custom, our laws)."

This prophecy foretelling the consequences of disobeying the Guarani system's precepts led my group to disperse to various regions — and is ultimately the reason I am currently writing this dissertation. From that moment on, the migration of our people and the search for *Yvy Dju Porã*

practically ceased, and our group began to move around constantly, now in order to reunite with lost relatives and to seek out a place of peace for our people.

In practical experience, we already knew that amongst our people there couldn't be mixing with, or participation in the social life of, the non-Indigenous, such as parties, dances, and weddings with other peoples, especially when it came to the use of alcoholic beverages. For example, when, in 1987, my uncle Benedito Werá and I were in Terra Indígena Morro das Saudades in Parelheiros — currently the Guarani Tenondé Porã aldeia — we used alcohol frequently. When we met up with our friends and other relatives who lived there that also drank, we didn't dare enter the *Opy* (the house of prayer) because it is a sacred place, and we were scared of being discovered by the *nhanderu*, who have contact with *Nhanderu Eté* or with *Nhandejara* (our Lord). We thus preferred to participate only in the political meetings or the community gatherings, but not in the sacred rituals.

That is because we were certain of the possible outcomes, for our people were already dispersed as a result of disobeying the legal dictates of *Nhanderu Eté* and also because we were certain that the leader of the community is the maximal spiritual authority of our people, so he has the power to know of things even when no one tells him. He knows about everything by means of dream, which maintains order and peace in the community.

## 1.4 Guarani Law (*Nhandereko*)

Much has already been said about the word or expression *NHANDEREKO*, but, now, in order to bring forth a juridical perspective, it is necessary to once again return to the teachings of Colaço:

> Even without having legally constituted courts or written laws, they possess their law and their justice. The Concept of law existed in the Guarani language, represented by the words TEKO, which means "to be, state of life, condition, being, custom, law, habit." The ideas of natural law, "conformity with the elders," or "conformity with the customary law" was represented by the words TEKO REKO, TEKO RAPE and TEKO MÉÉ. They also possessed the notion of "good conduct," through the word TEKÓ PORÃ, and "bad conduct" through the word "TEKÓ VAÍ." Bertoni affirms that the Guarani Constitution is contained "in the moral concepts, transmitted via traditions and poems, sanctioned by religion and by mythology" (Colaço (2022), p. 24; author's emphasis).

As already indicated elsewhere, in fact, for a long time, not only the word *TEKO* and *NHANDEREKÓ,* but all ways of being in the Guarani world were translated by academics as Guarani customs or culture, due to a tradition of anthropology that studies a certain society as a whole.

I recognize that *Nhandereko* can be translated as our 'custom,' but I also understand that the concept exceeds simply 'customs' or our way of being. As such, my analysis of *Nhandereko* comes from a juridical perspective, even reaching one of the principles of international law– that is, the principle of self-determination.

Bertoni, cited by Colaço, states that the Guarani Constitution is contained in the moral concepts, communicated in traditions and poems, sanctioned by religion and by mythology. I'd affirm this, adding evidence from various writings about Guarani culture, such as the *Aspectos Fundamentais da Cultura Guarani* (*Fundamental Aspects of Guarani Culture*) by Schaden, *Mitologia Guarani (Guarani Mythology)* by Cadogan, na *Etnografia de Los Guarani del Alto Paraná (Ethnography of the Guarani of the Upper Paraná)* by Franz Müller, and one of the deepest studies about the Guarani entitled *Yvu Rapyta - Textos míticos de los Mbya Guarani del Gairá (Yvu Rapyta - Mythical Texts of the Mbya Guarani of the Gairá)*, by León Cadogan.

We shall briefly look at what Cadogan writes in *Yvu Rapyta*. In Chapter VI of this work, Cadogan explains the flood within Guarani cosmovision:

## Yvy Ru'u

1. Yvy tenondeguakuéry
   Oupitypáma omarã'eyrã
2. Oñembo'e porã i va'ekue,
   Ijarakuaa va'ekue
   Ijaguyje porã,
   Oóma oambarãre.
3. A'ekuéry voi ombojera oyvy ju ruparã
   Tupã Miri ambápy.
4. Ijarakuaa"ey va'ekue,
   Arandu vai ogueno'ã va'ekue,
   ñande aryguakuérype ojeavy va'ekue oo vai,
   ijaguyje amboae.
5. Oime oo va'ee guyráramo, ju'íramo, enéramo;
   Guachúramo omondo Ñande Ru kuña omonda va'e:
   Ñande Ru porãkuéry ñande rekoarã oeja va'ekue rupivy aéma
   Jaiko porã i va'erã.
6. Karai Jeupie ojeavy Ñande Ru Tenondekuérype:
   Omenda ojaiche ire.
   Ou potáma yy;
   Karai Jeupie oñemboayvu, oporaéi, ojeroky;
   Oúma yy, aguyje oupity e'yre Karai Jeupie.vy
7. Oyta Karai Jeupie, kuã revê oyta;
   Yýpy ojeroky, oñemboay, oporaei.
   Oñembomburu: mokõi jachy aguépy imbaraete.
   Ijaguyje: ombojera pindo ju ogue mokõi i va'e;
   Kandire anguã.
8. Karai Jeupie, Karai Joajue,
   A"e voi ombojera oyvy ju ruparã i tupã Miri ambáre.
   Oo Karai Jeupie Ñande Ru Karai Tapariramo;
   Tupã Miri Ru Etéramo oo.

## The Flood

1. The inhabitants of the first land
   all of them reached the state of indestructibility.
2. Those that prayed in good form,
   those that held understanding,
   those that achieved perfection,
   they headed towards their future dwelling.
3. They themselves created their homes in the eternal earth,
   in the living place of the lesser gods.
4. Those who didn't have understanding,
   those that were inspired by the bad science,
   those that transgressed against those situated above us,
   were left in poor conditions, they suffered from metempsychosis.
5. There are those that became birds, toads, beetles;
   Our Father transformed the mother that had stolen into a deer:
   simply living in accordance with the precepts left by our good parents
   we should prosper.
6. The Incestuous Lord transgressed against Our First Parents:
   he married his paternal aunt.
   The waters were about to arrive;
   the incestuous Lord prayed, sang, danced;
   The waters already arrived, without the Incestuous Lord having achieved perfection.
7. The Incestuous Lord swam, with the woman he swam;
   in the water they danced, prayed, and sang
   They were inspired by religious fervor; after two months they gained force.
   They obtained perfection; they created a miraculous palm tree with two leaves;
8. The incestuous Lord, the Lord of the harmful union,
   he himself created, for his future dwelling of indestructible earth in the paradise of the lesser gods.
   The Incestuous Lord became our Father Tapari;
   he became the true Father of the lesser gods.
   They rested in their branches and afterwards went to their future home, in order to become immortal (Cadogan (1960), p. 97ff).

The poem in its beauty, in the Guarani language registered by Cadogan, expresses from the first times the consequences of not walking according to what is good, correct, in accordance with the good law; the consequences of not having good sense, knowledge, for having acted against the first beings, the celestials — depicting those that went through what we call *odjepotá* (victims of enchantment that transform into toads, deer, beatles, among other insects and animals). The greatest consequence for having violated the rules of marriage, or incest, was the immense flood.

Moreover, this narrative, considered mythology by Anthropology, expresses in truth the rules of good living amongst the Guarani — where one learns to respect the next, to practice alterity, love, to walk beneath the highest standard of integrity, to share, to practice reciprocity, solidarity, collective responsibility, and the prevalence of collective rights over the private.

That is the rule of good living — in other words, that is the good *law*, not theorized, but taught and practiced in the day to day of the community and sung in beautiful songs and beautiful words through the *pora'êi* (prayer) rituals. To all of this we give the name *NHANDEREKÓ*.

On mythology, Maria Inês Ladeira clarifies:

> 'Myth is a true history because it always refers to realities' (Eliade, 1963, p. 13). As such, the story about the origin or discovery of the aldeias and of what constituted the Mbya territory is true because the Mbya occupation along the coast is a fact [....] For the Mbya, especially those who are in the process of migration to the coast or who still have not defined a place for a more permanent settlement, 'to live myths,' such as 'religious experience,' is not distinct from quotidian life — for the quotidian is full of mythical relations with the universe" (Ladeira (2007), p. 66, p. 77).

Eliade, cited by Ladeira, finishes this point with the following: "To know the myths is to learn the secret of the origin of things. In other words, one learns not only how things came to exist, but also where to find them and how to make them re-emerge when they disappear" (Ladeira (2007), p. 80). As such, we can conclude that Guarani myth is something that already existed, exists and continues to exist in life, in songs, in dreams, explaining origins and at the same time the form or rules of living in order to achieve the *aguyje*, in order to achieve eternal and simple life in *Yvy Dju Porã*. Breaking with this standard makes it impossible to cross that ocean and achieve the dwelling-place of the virtuous ancestors that were successful in the Guarani endeavor.

In this way, myth, religiosity, important models of Guarani living are clearly laid out by Ladeira in her *Espaço Geográfico Guarani-Mbya (Guarani-Mbya Geographic Space)*-- meaning, constitution, and use are explained in one of the points of her work, 'Ethics and Value.' According to the author, "Beyond a state or a condition of being, the concept of *teko* represents or incorporates all the ethical and moral principles that define the norms of Guarani behavior" (Ladeira (2008), p. 135).

Ladeira goes on, affirming:

> Nhanderekó is translated by the Guarani as "**our system, our law, our customs and traditions**." Teko is, then, the referential model so that they may assign value to their relations, including the norms of coexistence, sociability, and the mode of production of consumption which, in turn, defines a mode of spatial use. Teko, as a system, emerges from a vision of the world in which cosmology builds a religion that implicates the systematic fulfillment of ritual practices. **Teko is a reference that encompasses, or brings together, ethics and law.** A Guarani ethics, as a collective and communal reference, seems to superimpose itself upon the dominion of religious practices. As such, while religion substantiates this ethics, ethics can serve in and of itself as a 'legal' parameter" (Ladeira ( 2008), p. 135-136).

Ladeira is correct to present and explain *nhanderekó* and *teko* as system, ethics, law, customs, and traditions. This explanation of the encompassing totality of the term *nhanderekó* — that is, this understanding drawn from the Guarani way of being— demonstrates that we, the Guarani, are correct; and that our ancestors were correct in having these already-cited principles, such as reciprocity, solidarity, valorization of the collective over the individual.

These considerations made, I can state that *Nhandereko* is the maximal expression of the Guarani world in that it encompasses values, ethics, being and beingness, belief, and in that it is the highest expression of a social and political standard — it is to walk following the rules of good living. In arguing this, I know that it is not easily understood by Western thought — that which, with its sciences, looks to comprehend a global society, but which, in order to do so, compartmentalizes it, studying only a small part to somehow understand it all. Thus, in order to understand human beings, biology, by means of anatomy, looks to know the human structure breaking it down into parts, systems like the skeletal, the muscular, the

nervous, the circulatory. Western Law, in the same way, in order to understand the juridical system or structure, breaks down law into public law and private law; then its subdivisions of constitutional, administrative, tributary, civil, business, and so on, even as the law remains one and orders life in a certain society.

In that context, *Nhandereko* is all that complex and complete Guarani world; but, for comprehension by a non-Indigenous society that recognizes the world in parts, in various fields such as religion, power, economics, philosophy, etc., I will attempt to do the same with *Nhandereko*. I do not plan on thoroughly defining the concept of culture, but will instead borrow from Sauer, cited by Torres, when they affirm:

> Culture joins together religion, morals, art, science, and material culture; civilization is a part of culture, the final part of its evolution, which is to say, it is the particularly technical and economic material culture. The terms culture and civilization are, thus, correlated. (Torres, (1996), p. 11).

In these words, religion, morals, art, science and even material culture can be called culture. I can therefore affirm that culture can be analyzed through the most varied aspects or dimensions. *Nhandereko*, when understood broadly in its total and absolute character as an encompassing Guarani way of being, can be understood as culture — both in the sense of traditional way of being from times gone by, and in the sense of traditional being that is presented, reinvented, recreated and reproduced today.

In this way, *Nhandereko* can be presented in dimensions, namely: the cultural/customs dimension, the dimension of power and leadership (*tekoaruvixa*), and the legal dimension (law, justice, and jurisdiction).

> *eko nome* (flexion xe- + r). 1. Way of living. 2. Cultural system, body of customs: nhandereko rami aiko, I live according to our system; nhandereko rovai aiko, I live outside of our system (Léxico Guarani, Dialeto Mbya, 2013, p. 32).

*Eko* is the equivalent to way of living; *teko* means law and/or system, *Nhandereko*; thus it is the same as our way of living, our cultural system, our customs, our law. The place where one lives according to *Nhandereko* is the *tekoa*, which in open translation is aldeia. In the present thesis I emphasize the term *Nhandereko* in the sense of the law, and the legal-jurisdictional aspect that it encompasses. Legal as a system of general and abstract law. General in its reaching all of the Guarani community, abstract for containing the elements that make up that way of living; when someone violates that law, it ceases to be general and abstract and becomes something rather concrete. Put differently, if someone violated the rule of good living, that person subjects themselves to the consequences of that violation, or rather, a penalty will be applied, that application is the so-called Indigenous jurisdiction or the power that a community has to apply the law to the concrete case.

If *Nhandereko* encompasses all of these dimensions (cultural, legal and jurisdictional), and if the Guarani have power to decide their political, social, and cultural aspects; if they have the autonomy of decision for their internal questions, self-governance is being exercised. The collection of all these elements can also be understood as self-determination. It is this latter concept that I will now go on to consider.

## 1.5 Guarani Law in the Present Day

Pre-colonial Guarani Law having thus been examined, and having previously attended to the world of law from the perspective of current authors, I will now analyze the current reality of the Guarani, using Indigenous authors.

In 2003, the Guarani community of the Nova Jacundá (Tekoa Pyau) aldeia, located in the south of the State of Pará, together with the team of the *Conselho Indígena Missionários* (CIMI, Indigenous Missionary Council - North), produced a document called the Handbook [*Cartilha*] of the Guarani Mbya People, entitled *The Historical Resistance of a People — Recounting to Live, Living to Recount* (*Contar Para Viver, Viver Para Contar*) — *YWY DJÚ*.

This handbook was elaborated by students, Indigenous professors, leaders, parents of students and the group of Indigenous health, and spoke of traditions, culture, language, and myths. From that work, I would like to cite the following:

> LAWS AND INTERNAL NORMS
>
> Just like any other people, the Guarani organized themselves and created laws and norms to orient their path. The *pajé* [shamanistic authority] or the *cacique* [chief] held all the power to bless or curse. They gathered all the men, women and children in one place in order to give advice. With their heads low, everyone would pay attention to their teachings. Everyone was meant to obey the orders of the pajé or the cacique, and never

disobey them.

The Guarani could not mix blood, that is, they couldn't marry white people, nor other Indigenous people. Amongst them, first cousins were considered siblings, so they also prohibited dating and marriage between these.

The Guarani could not have various women nor various men.

The Guarani could not drink alcoholic beverages (p. 17).

This document from 2003 was the free expression of the thinking of the current young people of the Jacundá aldeia, and we note they are talking about the past. This past dates back to when all were under the leadership of the leaders Klenio and later his son Manoelzinho, both of whom led our people in the region of Mozarlândia, Goiás, when my father, Luiz Guarani, was quite young.

This same account was frequently told to me by my father about the traditional way of being and living, according to the customs — or rather, that was the expression of *Nhandereko* (our law). Even today it is told and retold to the youngest of the community.

What was transcribed above from the document produced by the community itself clearly shows the existence of a Guarani Law — that which regulates marital life, inter-relations, the prohibition of incest and of the use of alcoholic beverages. It prohibits incest between consanguineous relatives up until the fourth degree — that is, first-degree cousins would be prohibited from marrying each other, because they are considered cousin-siblings. It thus guides endogamous marriage.

My relatives that elaborated the Handbook wrote — even without ever having attended law school — how cases understood as punishable were handled in the time of our *nhanderu* (until the end of the 1960s). This was already known to me because of the oral narratives passed down to me by my father, but here I bring the collectively constructed and presented telling:

> The Guarani were severe with those who violated the laws. Before taking any measures, the pajé or cacique gathered everyone to discuss and see what they were going to do with the person who had disrespected the law.
>
> When someone married a non-Guarani person or committed a betrayal, they were considered impure and expelled from the aldeia, and excluded from social coexistence.
>
> If someone drank alcohol, they could not enter a prayer house nor participate in singing and dancing rituals. These people were banished from the aldeia and punished so that others took the case by example, so that no one would repeat the committed offense.

In this account, beyond the punishment itself, we can infer its purpose — the sentence had a preventative and exemplificatory character, not differing in this case from the application of current Western law, for the purpose of criminal law is not vengeance but rather a form of maintaining peace in society.

Another important document produced by the community came together in 2021, the result of the Territorial and Environmental Management Plan – Project Consolidating Experiences in the Territorial and Environmental Management of Indigenous Lands in the Brazilian Amazon, carried out by the Guarani Community of Tekoa Pyau/Nova Jacundá Indigenous Land and the *Centro de Trabalho Indigenista* (CTI, Center for Indigenist Work), in Guarani Mbya "*Ka"aguay rupa nhangareko*." In this work, they presented historical accounts from the times of the *nhanderu* Manoel Rodrigues.

> After crossing the border between Brazil and Paraguay, almost one-hundred years ago, we crossed the state of Mato Grosso do Sul, passing through Ponta Porã, Campo Grande and through the Coxim river, until the headwaters of the Araguaia river. We then crossed that river through the water and arrived at Santa Rita do Araguaia, in Goiás.
>
> We passed by the Bonito river and arrived to Campo Alegre, where we lived for various planting seasons. There, a fight occurred with the ***jurua kuery***. Some had not listened to the word of the ***nhanderu*** and participated in the dances of the ***jurua kuery***. One time, at a dance, they randomly killed (***ojuka rive***) one of our own. Three others survived only because there was an ***Opy*** (a ritual and ceremony house) and our ***nhanderu*** took care of them. The ***nhanderu*** already knew that this was going to happen and had already warned everyone that they should not attend the dances. He had had the revelation that it would be dangerous for us to mingle with the ***jurua*.**
>
> We thus were left to our own devices, and we didn't do ourselves any favors; we didn't gather our strength, nor did we remain. There were the parties and dances of the white people. We had parties, danced, fell into alcohol and cachaça, all at a loss. Our cacique thus left us on this earth (Mendes Júnior (2021), p. 208; emphasis original).

The end of this text is the account of Albino Kara Ata, recorded in 2012 on the Xambioá Indigenous

Land. Albino was the last of those who were born in Paraguay and died in 2014 in the Jacundá Aldeia. Albino was the cousin of my father and the nephew of my grandfather Roberto, my grandfather who had in turn been born in Paraguay and who had died in 1980 in Araguaína, Tocantins.

The narrative thus presented confirms that religious, cultural, traditional, and legal aspects walk side-by-side in our family and that the result of not complying with the moral and ethical precepts culminates in events that call into question the continuity of all of the Guarani collectivity.

Sandra Benites, Indigenous Guarani, in her master's dissertation in Anthropology, understands Nhandereko as our system of Guarani living and thus expresses:

> The Guarani are always following the *yvy rupa* — their world on planet earth, a territory where borders don't exist. In that sense, *yvy rupa* is the walk (*guata*) itself, it is the infinite walks (*teko*) in search of *tekoa porã rã*, the foundation of the future way of being and living of this people, that is, the *nhandereko*, our system. As such, they live always in motion, passing from one aldeia to the other, visiting their relatives to strengthen themselves, *onhomombaerte*, keeping the essence of 'being Guarani,' the foundation of the person. (Benites (2018), p. 95).

As we can see, Guarani Indigenous intellectuals are unanimous in recognizing *Nhandereko* as a system that encompasses cultural, religious, and ethical aspects; lifeway, system, our customs.

In the same way, Almires Machado, in their doctoral thesis for the Federal University of Pará (UFPA), in 2015, writes about *Nhandereko*:

> Even though the Guarani *tekos* are currently close to large urban centers, there is no reason to abandon *nhandereko* (way of life), it always reinterprets and assumes its locus in modernity, as a form of resistance and immanence; the beliefs, the narratives/mythology are resignified in order to continue resisting other forms of faith. There is not an impassibility or impossibility resulting from it, but rather it permits the Guarani to make use of it for the continuous re-edification of their being (Machado (2015), p. 41).

From this, we can affirm that the Guarani way of life, their system denominated *Nhandereko* envelops practically all aspects of the life of this people, be it in the cultural, political, religious, moral, and ethical senses, and because it is a way of being and of living, a form of following spiritual and terrestrial precepts, there is no way of separating the world once lived from the world now living and the world to come.

Moreover, the religious, political, and sociocultural system cannot be separated, the separation is merely scientific, of Western science, typical of non-Indigenous researchers, as for our people *Nhandereko* is culture, science, life, traditions, spirituality all in unison, forming a complete whole in its essence, so it is from the point of view of the 'researcher' that we are presenting *Nhandereko*.

As such, if the researcher is a philosopher, *Nhandereko* will be philosophy; if they are sociologist it will be the form of Guarani societal being; if they are theologian it will be the manifestation of the human and of the celestial; *Nhandereko* runs through the terrestrial sphere and unites itself with cosmology.

Because I am Mbya, a legal scholar, and an anthropologist, I can affirm without fear of erring that *Nhandereko* can also be understood as the Guarani Consuetudinary Law, as their own system of law with its "processual" applicability in the concrete case — that is, it is what western jurists call jurisdiction. Thus, *Nhandereko* is law, and jurisdiction is the being or the rightful being, in a way that can't be separated.

It should be emphasized that it is not merely the 'intellectual' Guarani that perceives the existence of laws as a totality of living, the maximal of Indigenous sociocultural existence, what I have denominated *Nhandereko*. Maria Inês Ladeira brings the testimony of a representative of an aldeia on the coast of São Paulo in a 1997 seminar promoted by the CTI that presents this recognition, which is general for the Mbya:

> We in the Guarani community also have traditional Indigenous legislation, created through our demand for coexistence. And the concern always comes, usually with wood, the leaves of the guaricanga used to make houses and to make the fields. And there is a calendar that predicts the start and end of the year, because the identification of the twelve months of the year is different than the one recognized by you all. So, there are the Indigenous laws, and that is not only in order to regulate when to make houses, the fields, but also the knowledge of when to hunt, when to fish [...] there is a concern with how it is all being used [...] For us the land is important, our security is that we can continue planting and, for us, the fact that we are religious, and the teaching of the pajé is that we cannot have those ambitions, we shouldn't have so many material things. So, when a community plants, the families prepare the field so that the harvest will only be for use, for consumption itself [...] And the exchange is important, because recuperating, in many aldeias of the coast,

> that planting of Guarani corn and also trying to bring in other cultures that are interesting that there may be in the other aldeias [...] the concern that is had today is with the traditional planting that there always must be" (Ladeira (2008), p. 169).

As seen here, the customary Guarani law existed before contact; and, even as it was denied by the colonizer, it reigned during contact, and it is currently a reality. This law that recognizes social, moral, religious, laboral, organizational, and nuptial rules, I denominate as *Nhandereko*, thus going beyond its meaning simply of custom or our way of being; rather, it is an expression that, analyzed through a juridical framework, is precisely that, a juridical system. I would like to reiterate that this analysis looks to contribute to anthropological science, as we the Guarani do not separate the law from faith, from ethics, from the life of the celestial beings and from daily life in the *tekoa* land.

The categorical defense of *Nhandereko* as a law looks to create a dialogue between Indigenous Guarani Law with the positivist Brazilian and International Law, where it is necessary to see to it that contemporary Western law accepts and respects juridical pluralism in relation to the Guarani people. This recognition is legal, positivized, and normatized, given that it is provided for in the declarations of the UN and the OAS about the rights of Indigenous Peoples, and given that Indigenous Peoples' autonomy, consent and right to participation finds provision in ILO Convention No. 169. However, the same cannot yet be said about its applicability and efficacy. As such, it is correct to say that *Nhandereko* as a legal system in dialogue with Western law is still in the field of what should be, and thus of what aspires to be — many political battles and processes of judicialization in order to become a reality, remain necessary.

## 1.6 Guarani Customary Law

As we have argued from the start, a Guarani Law exists. It existed before European colonization; it has remained since, from the Empire and now during the Republic, even though it has been denied throughout history. This law remained, not totally intact or without changes— after all, no law, no society continues to be the same as the past, and whoever supports such permanence is either a romantic-nostalgic, or is searching in the other that which he used to think was the reality of his people in some forgotten time. Despite Guarani Law having been violated, combatted, and invisibilized for a long time, there have been strategies to keep it and preserve the continuity of Guarani life. Even though it was combatted during the period of the Jesuit missions, it resisted. Colaço affirms about this period:

> The implementation of a reductional model will clash with the freedom and individual autonomy of the Indigenous people, who did not accept a repressive, disciplined, and authoritarian government. The authoritarianism established in the missions violated the 'Guarani way of being' of members of the party and sympathizers with the political leaders; the Guarani became indirectly subjects of the king of Spain and direct subalterns warded by the Jesuit priests (Colaço, (2012), p.170).

In Colaço's text we also find a law lived out during the period of the Jesuit missions; the right to practice war, which, according to the author, "aimed not to exterminate the enemy, but toward territorial expansion, the feeling of revenge, the victimization of those imprisoned, ethnic discrimination, the kidnapping of women, and personal prestige" (Colaço (2012), p.171). The author notes the existence of a civil law about property that was practiced both collectively and individually. Even though collective rights to territory and other kinds of law were stronger, there were individual rights to property (Colaço (2012), p. 171).

It is important to make note of the collective and individual property law because I have heard in speeches and even seen in articles that Indigenous people did not have and do not have individual property rights. I see this, again, as a vestige of the desire for there to be what has never been amongst those who support this point of view. On this subject, I have heard that property is another creation of the Western world and its capitalism. Personally, I find this way of thinking interesting — yet, instead of guaranteeing rights to Indigenous people, it denies them. It's the same old way of considering Indigenous people in the negative, in the position of not having — that is, not having faith, not having a king, not having law, not having property, not having rights, and so on. It is the ideology of absence perceived by Laplatine, an anthropologist who said:

> This discourse about alterity, which often turns to the zoological metaphor, opens up a range of absences:

> without morals, without religion, without law, without writing, without State, without consciousness, without reason, without objective, without art, without past, without future. In the 18th century, Cornelius de Pauw will even add: "without beard," "without eyebrows," "without body hair," "without spirit," "without passion for his female."
>
> "And the great glory and honor of our kings and the Spaniards, Gomara writes in his General History of the Indians [sic], to have made the Indians [sic] accept God, a single faith and a single baptism and to have removed from them idolatry, human sacrifices, cannibalism, sodomy; and other large and evil sins, which our good God hates and punishes. Similarly, we removed from them polygamy, an old custom and a pleasure of all sensual men; we showed them the alphabet without which men are like animals, and the use of iron, which is so necessary to men. We also showed them several good habits and arts and monitored customs so that they could live better. All of this and even more– because all of these things are worth more than the feathers, the pearls, the gold that we take from them, all the more so because they did not use these metals as currency."
>
> "The people of this country, by their nature, are so idle, vicious, of little labor, melancholic, cowards, dirty, of bad condition, liars, of weak constancy and firmness (...). Our Lord allowed, for the great, abominable sins of these savage, rustic and bestial people, that they would be thrown out and banished from the Earth's surface" (Laplatine (1999), p. 41-42).

As Laplantine's text shows, the idea for the Europeans was to end not only Indigenous law but also their way of life, language, and customs to the point of saying that they should be thrown out and banished from the Earth's surface. It was a thirst not only for the richness of Indigenous lands but for exterminating, a path towards the genocide of many Indigenous Peoples in Brazil. Furthermore, we can affirm that by simply existing as Indigenous people, we are resisting the cruel colonizers. But we still suffer persecution, racism, and prejudice, which are rooted in the minds of a portion of the descendants of those from the past. In her final considerations, Colaço concludes:

> Given the above, it was evident the violence that this population suffered due to the flagrant difference between the two societies and their **legal systems**. It has been verified that tutelage, which should guarantee and protect the **Indigenous rights**, served more as an instrument of coercion to limit them, transforming them into a strong mechanism of dependency and cultural annulment, stealing from them individual freedom and collective independence. (Colaço (2012), p. 210; my emphasis).

The author concludes with the expectation that her research contributes to making Indigenous cultures better known and, subsequently, to the respecting of their law and its acceptance as the law of the other, free from centuries-long prejudices. There is no doubt for the law historian that there is a Guarani legal system and Indigenous rights. I agree with this affirmation since the law of the Guarani people continues to exist and gains strength to the point of leaving a position of former invisibility, contributing to the national legal system, and changing how the non-Indigenous population perceives the rights of other societies.

## 1.7 Concept and Legal Nature of Guarani Law

It is possible to conceptualize Guarani Indigenous Customary Law as an original collective law that refers to all aspects of Guarani life.

It is an Indigenous law because it emerges from the Guarani people, not the state. It is customary because it operates through customs rather than through positive law. It is Guarani because it refers to these people and not other Indigenous peoples. It is collective by encompassing mainly collective interests without disregarding private rights.

It is also important to reemphasize that this article aims to understand Guarani Law. As such, we are not seeking to explicate indigenist law but rather Indigenous law and, more particularly, Guarani Indigenous Law.

The indigenist law is a positive law, a creation of the Western world, and is not Indigenous. In the Brazilian case, the law imposed by the Republic aims to deal with the relationship between the Indigenous peoples and the Brazilian State. Thus, it is a law created according to the national legal system. In this sense, we can affirm that the rules about the Indigenous peoples in the Federal Constitution are indigenist laws, and so are the rights established in the Law No. 6.001/1973, named *Estatuto do Índio* [Indigenous Bylaws], and all the laws applied to Indigenous people such as those in the fields of health, education, environment, and others that have been created by national order to address Indigenous Peoples.

Moreover, the rights created by the UN, OAS, and other international courts are indigenist, as they are produced in national, regional, and international legal systems. Indigenous laws, or

the laws of Indigenous Peoples, are those created by the Indigenous people themselves.

To understand the juridical nature of a law or institution of law is to recognize in which field it is inserted. For this reason, Western law, for example, considers administrative law to be public law. That is, it belongs to that field of law in which the public interest prevails over the private and/or has a public entity present in a specific demand.

Concerning the Guarani Law, I understand its juridical nature to be collective, since collective rights prevail significantly over individual rights.

Regarding its origins, it is a law that pre-existed the formation of the National State. It has autonomy and is independent from the law of other Indigenous Peoples.

Because of its autonomy, it is addressed by and to other fields of law and other sciences, particularly constitutional law, sociology, history, and anthropology.

With constitutional law, there is a significant proximity, as the Federal Constitution protects Indigenous rights in Article 231. We also see a very close dialogue with sociology since sociology studies societies, their social behaviors, and the realities in them. In this sense, the aim is to understand Guarani Indigenous society's multiple possibilities of existence. Having said that, history as a discipline seeks to understand contemporary society by examining historical aspects of human actions through time. Thus, its objective is to understand the Guarani people from the period of colonization until today. With anthropology, the dialogue is close and direct because anthropology seeks to understand human beings in their entirety. Anthropology aims to understand humanity's social, religious, political, economic, and cultural aspects in all areas of a specific society.

Therefore, it is possible to affirm that Guarani law interacts with and relates to several fields of knowledge and sciences. Western science considers a specific field of Law through the lens of autonomy, its juridical nature, and its principles. With this in mind, we will now move to analyze the principles of Guarani Law.

## 2. Principles of Guarani Law

Modern juridical science sustains that the principles within a legal system are the foundations that support its base and that violating rules is less severe than violating principles. In the Brazilian case, principles indicate the grounds of the democratic rule of law, carrying an ethical and evaluating connotation in a dialectic relation between rules and principles for social justice to be realized. Let's see what the most prominent authorities in the Brazilian legal field today say:

> Regarding the contents, the principles — such as norms that identify values to be preserved or ends to be reached — stand out. They typically carry within themselves some axiological content or a political decision. Isonomy, morality, and efficiency are values. Social justice, national development, and reduction of regional inequalities are public aims. Rules, on the other hand, are limited to delineating a behavior. The question about the values of public ends is not made explicit in the norm because the lawmaker has already decided on it, and it has not been transferred to the interpreter. For this reason, it is possible to affirm that rules are behavior descriptors, while principles are evaluative or finalistic. (Barroso and Barcellos (2003), p. 150).

Since this analysis focuses on Law through the lens of anthropology and Western law, it is necessary to focus on the principles of Guarani Law through the same perspective — that is, as an integral part of a legal system of both rules and principles, bringing together wherein the principles are evaluative of an end, such as cultural aspects, values, and norms. In this sense, those principles presented by Colaço not only have historical value but remain in effect when adapted to the current realities of the Guarani world. These Include solidarity, the supremacy of collective interests over individual interests, collective responsibility, self-determination, reciprocity, and the principles of customs and orality, Mbya self-identification, and Mbya territoriality.

### 2.1 Solidarity

As Pierre Clastres used to say about the generosity of the leader, the second characteristic of Indigenous leadership is that the leader is the one who owns the least. The leader's role is to serve the community, that is, to serve collectivity/community. In Clastres' words:

> The second characteristic trait of Indigenous leadership, generosity, seems to be more than a duty: a servitude. Indeed, ethnologists noticed that among the most diverse populations in South America, the obligation of giving, which is tied to the leader, is actually lived by the Indigenous people as a type of right to submit him to permanent plundering (Clastres (1986), p. 23-24).

In Western law, the principles are interrelated and complement each other, so Clastres' affirmation can be understood from the point of view of collective interest, individual interest, and solidarity.

## 2.2 Supremacy of collective interest over individual interest

On the principle of supremacy of collective interest over individual interest, we do not need much effort to observe this, since everyday life happens mostly collectively — in the Nhemongarai festivities, the collective games, the *xondaro* dance, the rituals at the *Opy*, and in the collective farming and the use of territorial rights since the land belongs to everybody and nobody in particular. Compared to Brazilian law, it is possible to say that it is collective because it belongs to everyone and diffuse because the title-holders are not identified individually.

It is also a principle of collective Guarani law — the use of the common language, traditional education, and stories, myths, and traditional knowledge. These belong to each wielder of the knowledge, but much more to the collective, since they aim to guarantee the physical and cultural survival of the community, as can be perceived in the healing rituals and the naming of children. In light of this, even identity and the feeling of belonging, much more than an individual right, are collective rights, and the Guarani Indigenous people's self-determination principle is one of the most important manifestations of the collective principles.

## 2.3 Collective responsibility

Regarding the principle of collective responsibility, we can draw from the initial narrative in which the two aldeias of my ancestors began a conflict through the dissemination of lies, of misleading from the *avaí* carrier of *nheen vai* (foul words), which culminated with the destruction of practically all the community of my great-grandparents. In this aforementioned case, the person who committed slander was only the leader (*nhanderu*), but everyone was held responsible for the "acts committed" by only one person.

Along these lines, collective responsibility is a principle that cannot be disregarded. Even when punishment is applied to only one individual, as in severe cases such as homicide, all the aggressor's family end up paying for the act committed, oftentimes being expelled from the community or even suffering other kinds of reprimand from the community.

## 2.4 Self-determination

Regarding peoples' self-determination, it is worth bringing forth the third article from the Declaration of the United Nations about the Rights of the Indigenous Peoples, which says that Indigenous Peoples have the right to self-determination. By virtue of this right, they can freely determine their political condition and pursue economic, social, and cultural development.

Article 4 states, "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions."

The Declaration studied here states, "Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law."

As clear as crystal water, currently valid international law recognizes Guarani self-determination and, as seen, nothing in the Declaration may deny to any people, in this case, the Guarani, their right to self-determination, in conformity with international law.

In sum, these are principles of the Customary Guarani Indigenous Law: the supremacy of collective interests over individuals, collective responsibility, reciprocity, solidarity, collective rights over the land, and self-determination.

I would like to clarify that self-determination in the UN Declaration and the OAS is the sum of the primary Indigenous rights and aspirations to maintain order and their own internal political, economic, and social choices, without, however, representing a right to secession and sovereignty on international affairs, retaining sovereignty in its internal sense.

Thus, the primary demand of Indigenous peoples is self-determination. Reaching this recognition will allow them to manage their own interests freely (Barbosa (2001), p. 313). Self-determination, therefore, is tied to cultural aspects and identity, as Barbosa teaches:

> Cultural identity and self-determination are indissociable. Cultural identity is the ultimate criteria in the definition of a people, the active subject of the right to self-determination. Only self-determination can be the adequate tool to protect the cultural identities of Indigenous Peoples, and consequently to guarantee the right to difference (Barbosa , (2001), p. 313).

National States would not even accept discussing topics such as Indigenous territory, people, and self-determination. Considering the growing participation of Indigenous people in international forums, States wished to limit the extent of self-determination to internal questions such as self-government and autonomy in an attempt to avoid supporting politically and legally the recognition of self-determination. Or, if they recognized it, they wished to limit it to the point of prohibiting the possibility of secession. Here is the text of the American Declaration on the Rights of Indigenous Peoples:

> Article XXI
> Right to autonomy or self-governance
> 1. Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. (My emphasis)

> Article III
> Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.

As we can see here, the American Declaration was more timid and, therefore, restrictive, pointing out that the concept of self-determination applies to internal and local affairs. By articulating it in this way, the Declaration ended up diminishing the importance of self-determination and, in practice, the autonomy and self-governing. The decrees in the United Nations Declaration discussed earlier were different, as we can see in Article 45 of the UN Declaration.

> Article 45
> Nothing in this Declaration may be construed as diminishing or extinguishing the rights Indigenous Peoples have now or may acquire in the future.

> Article 46
> 1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations, **or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.** (My emphasis)

Even though it is broader, the article above from the UN Declaration affirms that the interpretation should not be understood to authorize or to instigate actions reducing, totally or partially, the territorial integrity of sovereign States. In other words, it practically repeats the meaning of self-determination of Indigenous peoples as autonomy and self-governing. However, it is a considerable advancement, since up until the 1960s, the International Labor Organization, by means of Convention No. 107 from 1967 had an assimilationist and integrationist character. It did not consider Indigenous Peoples as Peoples, and it did not recognize the right to autonomy and self-determination.

In the Brazilian case then, Indigenous people were considered relatively incapable of specific acts of civil life according to the specialized legislation—the *Estatuto do Índio* (Law No. 6.001/1973) and the Civil Code of 1916. The State regarded Brazilian Indigenous people as wards, with the support of the national law.

There is a long way to go in search of recognizing the self-determination of Indigenous peoples to the point where they can decide *de facto* and *de jure* all aspects of their lives and their interests, such as performing self-demarcation of their territories — or at least being able to directly influence the procedure — and the right to say no to any policies of exploitation of their territories and natural resources.

## 2.5 Reciprocity

Maria Inês Ladeira, through her vast experience among the Guarani and in academia, both in anthropology and geography, envisions reciprocity in agriculture not only in the quality and quantity of production but also in its socio-cultural implications. Here is her teaching:

> Among the Guarani, the importance of agriculture does not reside only on the quantity and quality of production (even though these are the goals), which can oscillate each year for several reasons. Its meaning is found in the act of doing and what that implies: internal organization, **reciprocity**, exchange of species, experiments, rituals, and renewal of cycles. This way, **agriculture is part of a broader system involving aspects of social organization and ethical**

> and symbolic **principles** founded on the temporal dynamics of cycle renewals instead of the quantity or availability of food for consumption (Ladeira (2008), p. 176; my emphasis).

The author clearly demonstrates the reality of reciprocity in Guarani life between planting and the act of doing, affirming that agriculture is part of a broader system involving aspects of social organization and ethical and symbolic systems. Ladeira unveils the existence of ethical principles, something rarely seen among legal experts. Therefore, it is to be sustained that reciprocity as an ethical and legal principle in the Guarani world is not only from a remote past but a reality that is ritualized and updated in constant movement, which, ultimately, is innate to Guarani life.

Regarding the principle of solidarity, it is noticeable in the account of *senhora* Rosa, wife of Urbano Guarani de Cocalinho, that what she says is the reality of many Guarani aldeias which I have been through and where I have lived, at least among the Mbya from the states of Goiás, Tocantins, and Pará. Here are the words of Rosa:

> Our land was good. Land of *bacuri* fruit. I would farm there, planting rice, and it would produce a lot of rice. Rice, provisions, a lot was produced there. There was cassava planted there, and there were a lot of pineapples there. We would plant everything there. We had a farm, it was everything together. The farms were all together. Each one would harvest their own, but the farm was like a joint effort. We would make the piles and put the rice inside. We would make it, the farm was big. Sugarcane. We had three sugarcane farms, and we had one hectare of coffee. We planted coffee for drinking. We had everything planted. We raised cattle, horses. There, in that place, there was only us. I was born and raised in that place (PNCSA No. 9 (March 2019), p. 3).

As mentioned above, the Guarani life happens as a whole; there is no separation. We are once more speaking of economic activity, collective family farming, and reciprocity as manifested in a family ethics, in the law. All of this I call *Nhandereko*.

Through this analysis, we can verify that the Guarani Law has its own concept, juridical nature, autonomy, and principles.

## 2.6 Customs and Orality

This principle regards the force of customs, traditions, and practices repeated in time and space. It is something present, not tied to a long-forgotten tradition, but a legal system alive and being lived daily. Regarding orality, it is a condition intrinsically tied to the Guarani world, which has an oral, not written tradition. Thus, the law is not written, nor does it need formality or be specified. It is a law that survives on orality's force; once the speech, the verb, the *ayvu rapyta*, the *nheen porã* [is spoken], the wisdom of law is linked to *arandu* (wisdom) within this way of being and expressing.

The force of words guided the Guarani through time, in our case, from Paraguay to the center-north of Brazil, in a movement called migration; and through the force of words, it was said that our people would split up. Through the force of words, our *nhanderu* was able to free an incriminated Indigenous person who, up until that point, was defenseless. And through the force of words, a whole community was condemned when there was a conflict between two groups. Orality is one of the most potent manifestations of the world and of Guarani law.

## 2.7 Mbya Self-identification

Unfolding from the principle of self-determination, self-identification is its expression in terms of feelings, concepts, and perceptions that the Mbya people have of themselves. It is a vision, an intrinsic identity to the people.

For this reason, the fundamental criteria that designate belonging to the Mbya are the Indigenous group themselves, with their beliefs, histories, and values according to their self-determination. Regarding individual self-identification, it is enough to be recognized by a specific Mbya people by their representative political institutions; that is, Indigenous people have autonomy to say who their members are, who their people are.

## 2.8 Mbya Territoriality

The Resolution No. 454, from April 22, 2022, from the *Conselho Nacional de Justiça* (CNJ, National Justice Council), establishes guidelines and procedures to carry out the guaranteed right to accessing the Judiciary by persons and Indigenous peoples. Article 6 of the Resolution informs:

> Indigenous territoriality derives from the particular relation of these peoples to the spaces necessary to their physical and cultural reproduction, social and economic aspects, and symbolic and spiritual values, be they used permanently or temporarily, under the terms of Article 231 of the Federal Constitution, of Article 13 of the Convention n. 169/ILO and Article 25 of the law n. 6,001/1973.

The principle of Mbya territoriality is anticipated according to the Resolution No. 454 of the CNJ, which has its legal base in Article 231 of the Federal Constitution, Article 13 of Convention No. 169 by the ILO, and Article 25 of the Estatuto do Índio, adding to the dictamen in the UN Declarations and the OAS about the Rights of Indigenous Peoples.

Territoriality is a principle and foundation of *Nhandereko*, it is one of the primary expressions of Mbya self-determination. The State must recognize this right and guarantee its effectiveness since it is a matter of physical and cultural survival for the Mbya.

Resolution No. 454 of CNJ recognizes this principle in its temporary and permanent use. In this sense, the principle of territoriality refers to the permanent use by the Mbya of the Jaguari Indigenous Land and the Aldeia Nova Jacundá, as well as the Mbya occupation/presence in the Xambioá Indigenous Land and the Xerente Indigenous Land.

We should note that that other Guarani and even Terena people already have their rights recognized in the so-called urban centers. In the first case, it is the traditional Guarani Mbya occupation in Lomba do Pinheiro in the greater Porto Alegre, in the state of Rio Grande do Sul. In the second case, it is the Terena occupation in the Urban Aldeia in Jardim Inápolis in Campo Grande, in the state of Mato Grosso do Sul. Besides the community mentioned in the article below, it should be noted that in Campo Grande the Aldeias Marçal de Souza, Água Bonita, Darcy Ribeiro and Tarsila do Amaral are recognized, as seen in the table below, published in an article by Batistoti e Latosinski (2019, p. 335).

These are not the only Indigenous communities in areas that became urban centers, for there are records of presence or traditional occupation in the capital city of São Paulo, in Rio de Janeiro, in Distrito Federal, in Manaus, the state of Amazonas, and many other cities in Brazil. The Indigenous people from these aldeias are collective subjects with differentiated rights such as education, health, and other public policies. This question has been a flag of the Indigenous movements' struggles, locally, regionally, and even nationally, as shown below:

> The regularization of plots of land and the construction of housing are among the primary demands of the Indigenous people in Campo Grande. Other demands are the revitalization of the *oca* Marçal de Souza, the organization of community centers, and the reactivation of the community radio. These demands were presented during a meeting this Thursday (17) among leaders and representatives in the City Council to discuss next year's budget.[8]

This is a typically communitarian demand from the urban aldeia, in this case, the regularization of plots of land and construction of housing, the organization of community centers, and the reactivation of the community radio, among other demands. Regarding the Mbya, the Correio do Povo newspaper recognizes the Mbya traditional

8. Available at: <https://www.campograndenews.com.br/cidades/capital/moradia-e-principal-reivindicacao-dos-indigenas-em-campo-grande>.

**Table 1:** Urban Aldeias recognized by the city of Campo Grande – MS

| **Urban Aldeia** | Marçal de Souza | Água Bonita | Darcy Ribeiro | Tarsila do Amaral |
|---|---|---|---|---|
| **Location** | Neighborhood Jardim Tiradentes | Neighborhood Nova Lima | Neighborhood Jardim Noroeste | Neighborhood Nova Lima |
| **Public institution responsible for establishing** | Municipal Habitational Agency of Campo Grande | Habitational Agency of the State of Mato Grosso do Sul | Municipal Habitational Agency of Campo Grande | Municipal Habitational Agency of Campo Grande |
| **Year of establishment** | 1999 | 2001 | 2007 | 2008 |
| **Structure** | 115 houses and 1 cultural center | 60 houses and 1 community center | 98 houses | 70 houses |

Source: Batistoti and Latosinski (2019), p. 335.

occupation in the capital city of Rio Grande do Sul, and in 2017, they published a special article titled "Indigenous Aldeia at Lomba do Pinheiro Gathers 16 Families."

> In an area composed of two plots of land in Lomba do Pinheiro, on the East side of Porto Alegre, 16 Indigenous Guarani families have 25 hectares of land to call their own. It is a space acquired over the past 25 years, reflecting an achievement and a permanent struggle.
>
> With 80 people living in the Guarani aldeia of Lomba do Pinheiro, the inhabitants' main activity is artisanal craft production, sold in places such as downtown Porto Alegre and Brique da Redenção. However, according to *cacique* José Cirilo Morinico, the income they obtain with this practice is not always enough, and, for this reason, nowadays, Indigenous people end up working as employees in other sectors.
>
> Moreover, there are supported cultural projects and health and social assistance initiatives. But all of these are in the second plane compared to the territorial demand, which is always present. 'So long as the land question is not resolved, there is no advancement in other points,' the Municipal Coordinator of Indigenous Peoples and Rights (CMPID) explains.
>
> The question of demarcation of land brings with it a bureaucracy. For example, the Guarani area in Lomba do Pinheiro is composed of a 10-hectare area considered Indigenous domain. On the other side, 15 hectares have been acquired by the city as an area of cultural interest. Currently, the area is under review for its classification as the traditional territory of the Guarani People to be demarcated by the Federal Union.[9]

These two situations of traditional Indigenous occupation in "urban centers" were presented only for illustration purposes. In the Mbya case, the information given by the leadership is that the territorial question makes the practice of artisanal crafting difficult due to the lack of raw materials that would support production. The question of land is the primary demand, and other claims have advanced from that demand. This discussion does not conclude the debate about Mbya territoriality. On the contrary, it is only a starting point. It must be part of the official agenda of Brazilian indigenist policies because the Federal Constitution is quite clear in Article 231, where Indigenous uses, customs, languages, beliefs, traditions, and rights over traditionally occupied land are recognized.

Traditionally occupied lands represent the locus, the environment, the *tekoa* for the Mbya, wherever they live according to their *Nhandereko,* being either a rural or an urban area. I would also point out that those present-day urban areas came into existence due to the demographic growth of the Brazilian population in general, as well as because of rural exodus.

Moreover, this is the case of the reservation in Dourados from the Guarani, Kaiowá, and Terena Peoples, which had always been Indigenous land before colonization in Mato Grosso do Sul. Today, it is inserted in the context of one of the largest urban centers in the state. Besides belonging to a reservation, it is a traditionally occupied Indigenous land according to the Federal Constitution.

To understand and apply the principle of Mbya territoriality, it is necessary, first, to recognize the self-determination of the Mbya people, their self-identification, and their territorial occupation according to uses, customs, beliefs, and traditions. The administrative procedure of demarcating Indigenous land performed by FUNAI is a measure that aims to declare Guarani Law. Such law is innate — or, in the words of João Mendes Júnior, Guarani ownership is an original right, or an ownership called *indigenato*.

## Conclusions

It has been demonstrated through legal and anthropological arguments the existence of an Indigenous Guarani customary law. This law is called *Nhandereko* and has its own concept, juridical nature, principles, and foundations. Some of its principles include collective characterization and orality. *Nhandereko* is an expression of self-determination, a measure imposed on the political, social, and legal reality. The State must guarantee this legal system, making it valid in all spheres of constituted power in Brazil, including the jurisdiction that is the power of the Guarani to apply their law to their people within their *teko*.

*Nhandereko* has legal support in international order and internal legal order, that is, in the world of what should be. However, in the factual world, recognition and effectiveness are still missing in order to move away from the abstract, universal, and generic; and to become a reality. To do so, the State must be plural, carrying and strengthening Indigenous law in the same space as the State law,

9. Available at: <https://www.correiodopovo.com.br/not%C3%ADcias/geral/aldeia-ind%C3%ADgena-na-lomba-do-pinheiro-re%C3%BAne-16-fam%C3%ADlias-1.228982>. Accessed on: Sept. 2, 2022.

since the laws of Indigenous peoples — and, in this case, the Guarani law — precedes the formation of the Brazilian State.

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