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Unveiling the institutional arrangements in the criminalization of indigenous peoples: the logic of the enemy in the case of the Indigenous People Xukuru of Ororubá

Desvelando os arranjos institucionais na criminalização dos povos indígenas: a lógica do inimigo no caso do povo Xukuru do Ororubá

Flavianne Fernanda Bitencourt Nóbrega[1]

[1] Federal University of Pernambuco, Recife, Pernambuco, Brazil. E-mail: flavianne.nobrega@ufpe.br. ORCID: https://orcid.org/0000-0002-2349-0167.

Alexsandra Amorim Cavalcanti[2]

[2] Federal University of Pernambuco, Recife, Pernambuco, Brazil. E-mail: alexsandra.cavalcanti@ufpe.br. ORCID: https://orcid.org/0000-0003-2643-8134.

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Abstract

Violence against indigenous peoples has notably increased in recent years, and its news has been consequent on the violence faced by defenders of their rights. This article aims to explain this pattern of violence, demonstrating how legal uncertainty within the demarcation process encourages indigenous people and landowners to go to war. Through the study of the case of the Xukuru People of Ororubá, we describe two major violent events to demonstrate the set of threats, murders, autonomous retaking of demarcated territory, and institutional violence incidents by the police, Federal Public Prosecutor's Office and FUNAI. We rationalize these facts in a game theory matrix to demonstrate that the legal insecurity of the territory under demarcation leads both sides, as rational actors, to act and use all available resources to defeat the opponent, generating a suboptimal balance. This result leads to two outspreads. First, Brazil's failure to comply with the obligation to provide domestic legal effects allows the courts to adopt a legal thesis that conditions the effectiveness of territorial rights to Funai's budget. Second, an informal institutional arrangement translated into the permanence of the territory with non-indigenous people's rule. It was identified by the set of sanctions that the literature called the enemy's logic, composed of the criminalization of indigenous leaders and human rights defenders, as well as the distortion of purpose in the performance of public bodies. Therefore, this work contributes to the literature of Indigenous Law, Constitutional Law, and International Human Rights Law by offering a causal link between state omission and physical and institutional violence.

Keywords: Indigenous peoples; Land demarcation; Violence; Judicial insecurity; State omission.

Resumo

A violência contra povos indígenas e seus membros aumentou de maneira notável nos últimos anos, cujas notícias têm sido acompanhadas pela violência enfrentada por defensores de seus direitos. O objetivo deste artigo é oferecer uma explicação para este padrão de violência, demonstrando como a insegurança jurídica dentro do processo demarcatório incentiva povos indígenas e proprietários a entrar em guerra. Através do estudo do caso do Povo Xukuru do Ororubá, descrevemos dois grandes eventos de violência enfrentados para demonstrar o conjunto de ameaças, assassinatos, retomadas autônomas de território demarcado e violência institucional exercida pelas polícias,

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Ministério Público Federal e Funai. Racionalizamos esses fatos numa matriz de teoria dos jogos para demonstrar que a indefinição da situação do território em demarcação leva ambos os lados, como atores racionais, a agir ao invés de se omitir, utilizando todos os recursos disponíveis para derrotar o oponente e gerando um equilíbrio subótimo. Este resultado leva a dois grandes desdobramentos. Primeiro, o descumprimento pelo Brasil da obrigação de prover dispositivos de direito interno a permitir com que os tribunais adotem tese jurídica que condiciona a eficácia dos direitos territoriais ao orçamento da Funai. Segundo, a existência de um arranjo institucional informal traduzido na permanência do território com os não-indígenas e identificado pela existência de sanções que a literatura denomina como lógica do inimigo, composta pela criminalização de lideranças indígenas e defensores de direitos humanos, assim como pelo desvirtuamento de finalidade na atuação de órgãos públicos. Desta feita, este trabalho contribui para a literatura do Direito Indigenista, Direito Constitucional e Direito Internacional dos Direitos Humanos ao oferecer um nexo de causalidade entre a omissão do estado e a violência física e institucional.

Palavras-chave: Povos indígenas; Demarcação territorial; Violência; Insegurança jurídica; Omissão estatal.

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1. Introduction: proposal of a neo-institutional analysis to unveil the criminalization of indigenous peoples[1]

This article aims to investigate the informal institutional arrangements that are naturalized in the criminal prosecution of crimes against indigenous peoples, which have been undertaken to favor their criminalization. To unveil this reality, we chose the case of the indigenous people Xukuru of Ororubá, who faced a severe criminalization process as an answer to their actions in retaking their ancestral territory. This kind of biased criminal prosecution Is commonly framed as as the "criminalization of the right to territory" phenomenon (ALMEIDA, LÔBO, ADVÍNCULA, 2019; FIALHO et al, 2011). The National Indian Foundation (Funai), the Federal Police (PF), and the Federal Public Attorney's Office in Pernambuco (MPF) acted in such a way as to create obstacles to the defense of the rights of these indigenous people, directing criminal investigations to criminalize them and doing the same to their defenders. This study is based on a neo-institutional analysis, which incorporates the interdisciplinary look of the social sciences to the law, to investigate and reveal how institutions work in practice, evaluating the interaction between formal and informal rules (NÓBREGA, 2013).

Other authors (ALMEIRO, LÔBO, ADVÍNCULA, 2019; FIALHO et al, 2011) have already denounced the scenario of structural violence in Pernambuco (Brazil),based on the criminalization of the Indigenous People Xukuru of Ororubá by state agents. The analysis developed here advances the state of art and fills an editorial gap in the legal field, since most of the facts related to criminalization had not been examined by the Inter-American Court of Human Rights (IACHR) when it handed down its sentence that condemned Brazil in 2018 (NÓBREGA; CALABRIA, 2022).

First, the Inter-American Court of Human Rights (IACHR) did not appreciate the assassination of Chief Xicão Xukuru because it was outside its temporal competence. Although Brazil ratified the American Convention on Human Rights (ACHR) on September 25, 1992 (BRASIL, 1992), it only accepted the Court's jurisdiction on December 3, 1998 (BRASIL, 2002; BRASIL, 1998), months after the assassination. Thus, this episode was used only as a "historical context" of the case, not a fact for judicial appreciation of human rights violations. Second, there were damages in the assessment of the attack against chief Marcos Xukuru because of the lack of presentation of the "writ of petitions,

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arguments, and evidence in the adequate procedural opportunity" (IACHR, 2018). The only material related to the matter was the writings produced by the Inter-American Commission on Human Rights (Commission), which failed to gather sufficient evidence. Therefore, there was no proof concerning the accusation against the Brazilian State about the offense of the right to personal integrity (article 5 of the ACHR) of the Xukuru people, and Brazil was acquitted.

Moreover, the Inter-American Court did not reveal the ways in which Brazil failed to fulfill its obligation to provide domestic law provisions (article 2 of the ACHR). Once again, it decided for insufficient evidence, something influenced by the previously mentioned absence of the procedural defense (IACHR, 2018). However, this article will demonstrate the role of Funai in fostering or resolving conflicts between indigenous people and landowners, arguing that its posture of omission determines a non-cooperative game between the parties. Funai is the official national agency for the indigenous people's relations with the Brazilian state, which is subordinate to the Ministry of Justice and to elected Executive Power (BRASIL, 1967).

The aim of this article is thus to bring a new perspective and to contribute to the issue through neo-institutionalism. Within its various currents (HALL and TAYLOR, 2003), North's historical neo-institutionalism defines institutions as the "rules of the game in a society or, more formally, the human-created constraints that determine human interaction" (NORTH, 1990, p. 1). Institutions are formal when they are created, communicated, and implemented through channels that are widely accepted as official. They are informal when created, communicated, and implemented outside the official sanctioning channels, while at the same time, being socially shared (HELMKE and LEVITSKY, 2006). It is essential to identify the informal institutions through their punishment and reward mechanisms (VOIGT, 2018). Thus, this article works on the hypothesis of an existing informal institutional arrangement for the permanence of the possession of the traditional territory with non-indigenous people, whose institutional incentive mechanism is precisely by criminalization. This article will point out how the informal arrangements have unfolded into two crimes: the murder of Chief Xicão and the attempted murder of Chief Marcos.

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2. The emblematic case of the Indigenous People Xukuru of Ororubá (Xukurus)

The struggle of the Xukuru people of Ororubá represents how Brazilian indigenous peoples waged evils of war over the centuries (NAVARRO, 2019). . The disputes over the territory they inhabit date back to colonial times. The fertility of the land in the Ororubá wetlands has always been an evident issue in a dry climate marked by disputes over water.In 1654, the King of Portugal donated large allotments for sugar planters and cattle breeding in this territory. Thus, tenants and ancestors of the traditional families of Pesqueira-PE invaded the land over time. These families would form the present oligarchy of Pesqueira.. In 1850, the imperial Land Law legitimized these usurpations through land registrations and declared the extinction of the remaining Xukuru's indigenous lands, the Aldeamento de Cimbres (SILVA, 2018).

The pre-demarcation distribution of the land ownership reflects the process of invasions. At the beginning of the demarcation, Funai conducted a land survey. The result made evident the latifundia structure of its occupation by non-Indigenous. Small squatters, whose land does not exceed 100 hectares, represent about 11% of the territory. Meanwhile, possessions of 100 to 500 hectares were almost 19% of the indigenous land, and those with more than 500 hectares constituted more than 20% of the territory. Thus, only 32 properties had about 11 thousand hectares, corresponding to 39% of the land possessions with more than 100 hectares (ALMEIDA, LOBO, ADVINCULA, 2019; FIALHO et al, 2011). Among the main non-indigenous occupants of the Xukuru territory was the mayor of Pesqueira, councilors of Pesqueira, municipal secretaries, and people related to a senator of the Republic (FIALHO, 1998; FIALHO et al, 2011).

The turning point in the situation was the 1988 Federal Constitution, which marked the change of the integrationist paradigm by therespect for the alterity paradigm (CAVALCANTI, 2018). Although there was no indigenous constituent in Subcommittee VII-C of the 1987 Constituent Assembly, whose theme was "Blacks, Indigenous Populations, Disabled Persons and Minorities", representatives of these traditional peoples were able to occupy a place among their debates (BARATTO, 2016). One of them was Francisco Assis de Araújo, who would later known as "cacique Xicão". Due to this intense participation, the Charter established not only the right of the Brazilian indigenous peoples to their respective ancestral territories, but also the originality of this right, that is, the recognition that it precedes the constitutional order itself (SILVA, 2018, p. 8).

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Despite the documentation of the land conflict since the 19th century, it is from the 1989 demarcation initiative that the rivalry has become more visible, with systematic monitoring by the media and the use of administrative and legal resources (FIALHO et al, 2011). This was the starting point of a series of violent cases related to the dispute over the territory, two of which we will outline below.

3. How the representatives of the state operated the criminalization

a. The Assassination of Chief Xicão: the actions of the police and the Public Attorney's Office.

Xicão's assassination was the third since the start of the demarcation process. The first was that of José Everaldo Bispo, son of the Xukuru shaman, on September 3, 1992. The second was that of Geraldo Rolim Mota Filho, a Funai attorney, on May 14, 1995. These first two murders had a clear motivation linked to territorial disputes, but their investigation in common justice insisted on relating them to personal disputes (FIALHO et al, 2011).

The leadership of Xicão gained immense prominence with his participation in the 1987 Constituent Assembly. It was a clear sign that the Xukurus of Ororubá would begin to actively fight for their territory, as established by the caput of Article 232 of the Constitution. Funai officially initiated the demarcation process in 1989, at which time the chief abstained from participating in meetings of territory recognition precisely because of the growing animosity (FIALHO, 1998). The facas were related to the resources released for the concussion of theVale do Ipojuca project in 1988. The project involved the transformation of the Xukuru's lands into agricultural enterprises. Still in 1989, there were cases of arrest and torture of indigenous people by local police and threats to the lives of Xukuru leaders (FIALHO et al, 2011).

The situation would worsen in 1990, when there was a peak of distrust between Funai and the Xukuru's people. Firstly, Funai remained silent about the imprisonment and torture of three indigenous men: Cícero Sarafim dos Santos, Edilson Leite, and Adelmo Ferreira Messias. Secondly, Funai did not give the expected relevance to the "Pedra D'Água" location. It was a sacred ritual site to the Xukuru people. Nevertheless, the municipality of Pesqueira donated this land to the federal Ministry of Agriculture to

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facilitate the Vale do Ipojuca agricultural project. The Xukurus expected Funai to stop the advance of this enterprise, but there was no action. Therefore, the first indigenous autonomous repossession occurred on December 17, 1990, to guarantee the Pedra D'Água's possession (FIALHO, 1998; FIALHO et al, 2011).

It was in this context that criminalization began. In 1991, the Public Prosecutor's Office of Pernambuco[2] denounced Xicão and other indigenous people for "having promoted disorder and the destruction of existing improvements in the indigenous area" (FIALHO et al, 2011, p. 31). Geraldo Rolim, then Funai prosecutor[3] (and alive), denounced the act as a political maneuver to weaken the chief. The criminal case had its final arguments in 1994.

The unfolding coincided with the advance of the reoccupations by the Xukurus, who were acting to reconquer the land independently from Funai. In 1995, six years after the beginning of the administrative process, the phase of physical demarcation began. The Xukuru occupied about 10 percent of the entitled indigenous land at this time, while about 300 non-indigenous squatters occupied the rest. The territory was a mosaic of indigenous and non-indigenous lands, characterizing a permanent conflict (FIALHO et al, 2011).

Due to the conquest of land employing the repossessions and the advance of demarcation, Chief Xicão "provoked the anger of the landowners" (SILVA, 2018, p. 9). Under his leadership, the repossessions made it possible for the indigenous people to plant and harvest to overcome the misery and hunger of years, which is why people revered him as a hero after some years. Thus, the oligarchy in Pesqueira financed a gunman who assassinated the indigenous leader on May 20, 1998 (SILVA, 2018; FIALHO et al, 2011).

The criminal prosecution produced a series of rights violations, which we can translate as institutional violence. In the first place, the inquiry into Xicão's death

[2] In Brazil, public prosecutors are part of a unique and powerful state agency, the “Ministério Público”. In a literal translation, it would mean “Public Ministry”, but it is usually translated as “Public Prosecutor's Office”. This body has national and subnational branches, as well as subject-specialized ones. Here we discuss the acts of a specific subnational Public Prosecutor's Office, whose competence is the causes submitted to the judicial system of Pernambuco state (MPF, 2018).

[3] All Brazilian executive power agencies have their official legal advice and defense, exercised by the numerous branches of the Public Attorney’s Office (see the article 131 of the Federal Constitution of Brazil) (SILVA, 2014). Although Geraldo Rolim is called “prosecutor”, he was not an Public Prosecutor’s Office agent. His institution is the Public Attorney’s Office, which has national and subnational units as well. He worked in the national branch and his specific function was to represent the Funai interests in the judicial system.

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requested an exhumation to locate the bullet in his body in order to submit it to a ballistics exam. The negotiation of the date and the uncertainty of the need for the exhumation created great tension. The Xukurus engaged in a religious ritual before the exhumation, and some of them accompanied the removal of the body and the forensics. The remains were laid out on a canvas and examined with a fish knife. We can interpret it as a violation of the Xukurus uses and customs, since the chief Xicão had been "planted" so that new warriors would be born from him (FIALHO et al, 2011).

Secondly, the Federal Police[4] treated the territorial conflict as just one more line of investigation. They were working with the hypothesis of both a crime motivated by the land struggle and a crime of passion, since Chief Xicão was accused of having been involved with several women and having love affairs. Xicão's widow, Mrs. Zenilda Araújo, had suspicions raised against her and was interrogated. An indigenous man was even arrested and later released. Not only that, but the sheriff in charge also accused the Human Rights organizations of being, in fact, criminal organizations. In the words of Manoel Almeida (UFPE, 2019):

> "There was a moment, exactly after the death of Chief Xicão, when the Human Rights Movement was the protagonist in that institutional dialogue of the invitation to the Federal Police sheriff who came to preside over the inquiry into the death of Chief Xicão. And this delegate was a person who, for us, in that context, was an emblematic figure. [...] He was a person who would help us with this whole issue. So, the Federal Police sheriff came with the legitimacy of having dismantled an extermination group in Acre and that he would come here to contribute to this process [...] of consolidating what is in the Constitution. But the public security apparatus was all based on the military dictatorship, so there was no transparency [...]. The concrete fact is that, in the indigenous case, the representative that comes, starts to conspire and we start to react [...]. We made a pamphlet denouncing this situation. In this pamphlet, [...] the entities signed. Thank goodness, imagine if I had personally signed my name... So, GAJOP and other entities signed this document [...], and they were all sued by this officer [...] based on the idea that we were demeaning his image. You know, the document doesn't even mention his name [...]. And this pamphlet was created and ended up being the object of a lawsuit that the sheriff ended up losing. But imagine the distress of being sued at that time. In the process, some gems of wisdom appear. [...] [About] the Luiz Freire Center, it was said that the training courses that were given, according to the Federal Police, in fact, were diverted from their purpose of buying weapons... This kind of thing. Imagine, you receive resources... from Oxford, for example, and you are not doing training. In fact, Sandro is training guerrillas. Imagine Sandro training guerrilla warfare with

[4] The police in Brazil also have national and subnational branches. Each state has its Civil Police and its Military Police. The Federal Police has a subject-specific actuation, which includes investigating all crimes against the national government interests (see article 144 of the Federal Constitution of Brazil). As the indigenous lands are formally federal government property (see article 20, XI, of the same Chart), all crimes that happened on an indigenous land concern the Federal Police (SILVA, 2014).

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> the indigenous people [...] It is the kind of thing that was not tolerable from the point of view of the real world. Nevertheless, these situations were established. [...] But this was exhausting, distressing. Therefore, the entities started to be criminalized in the community. So, the message was very simple: 'if you come along, you will be prosecuted.

There was also a denial to collaborate with organizations representing the interests of the Xukuru of Ororubá. It was evidenced in the account of Sandro Lobo (UFPE, 2019):

> Police inquiries are created. A civil police inquiry [...] to investigate the causes of death in a generic sense. And another inquiry, by the Federal Police, to determine whether this fact was related to the struggle for land. Here the Sheriff took office… The first time I was with him to deal with this inquiry [...] and I identified myself as IMC's[5] lawyer, and the first response, which I will never forget, was the following: 'I have nothing to answer for IMC'. Then he will say that there is nothing in the inquiry to deal with me. Then I answer, another confrontation: 'you may not be accountable to IMC, but you are accountable to the widow; I am here as the widow's lawyer, [...] you have a power of attorney in the police investigation; you have to give me information'. Perhaps we have here a process of building a legal practice with a profile of confrontation, of resistance, in this process of struggle, because the mechanisms of the State, even at that moment, were already proving themselves, in 1998, to be ineffective in the sense of guaranteeing the integral protection of indigenous rights.

To this context it can be added the posture of the Public Attorney's Office, the institution responsible for representing the state agencies' interests in justice. According to the defenders of the Xukuru people who accompanied the investigations, the position of the Public Attorney's Office was to create obstacles to the protection of the indigenous people. The representative even claimed that there were no indigenous people there (UFPE, 2019).

Two years of investigation have not produced a conclusion about the facts: none of the three hypotheses raised (crime of passion, territorial dispute, power dispute between indigenous people) have been proven sufficiently, and no suspects were named. The defenders of the Xukuru people then sent a petition to the Ministry of Justice to appoint a new sheriff. Despite resistance, Marcos Cotrim, a delegate of the Federal Police, took over the case on December 15, 2001. In the end, the new conductor of investigations pointed out three suspects (FIALHO et al, 2011).

[5] Comparing Almeida's words to the writings of Fialho et. al (2011), it is clear that he confused "Louro Frazão", the shooter who fled soon after the attempt, with "Zequinha Vicente", who effectively fled to a house in Cimbres soon after the crime.

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At the end of the investigations, it concluded that the intellectual authors of the assassination of chief Xicão were José Cordeiro de Santana, known as "Zé de Riva" and one of the landowners who invaded the Xukuru do Ororubá territory. He and other landowners allegedly acted through an intermediary, identified as Rivaldo Cavalcanti de Siqueira, known as "Riva de Alceu". The material author of the crime was a man named "Ricardo". The latter died in Maranhão because of other events. José Cordeiro de Santana committed suicide while being detained by the Federal Police. Rivaldo, in turn, was sentenced to 19 years in prison for simple homicide and was murdered in the penitentiary center (IACHR, 2018).

All these facts pointed to the control of the state apparatus by one side of the conflict. As described by Sandro Lôbo, the Attorney Prosecutor's Office and the Federal Police presented a "symbiotic" relationship converging to the institutional logic of the indigenous people as enemies (UFPE, 2019). Trying to resolve the situation, the lawyers for the Human Rights advocacy entities turned to another division of the Federal Public Prosecutor's Office, the 6th Chamber of the Federal Public Prosecutor's Office[6].

Note that the IACHR did not consider these facts for the evaluation of human rights infractions, since they were outside its temporal competence. Although Brazil ratified the ACHR on September 25, 1992 (BRASIL, 1992), it only accepted the Court's competence on December 3, 1998 (BRASIL, 2002), months after the assassination. Thus, the facts described above were used only by way of "historical contextualization" of the case.

b. Murder attempt against chief Marcos: police actions and pro-indigenous reaction by the commission from the Presidency of the Republic.

Between 1998 and 2001, the Xukuru of Ororubá carried out shared leadership management while the preparation of Chief Marcos Xukuru, son and successor of Chief Xicão Xukuru, took place. Taking over in 2001, the new leader was receiving threats (UFPE, 2019). In early February 2003, the attempt on his life occurred, with the death of two other indigenous people who accompanied him: Jozenilson José dos Santos, 24, and José Ademílson Barbosa de Silva, 19 (IACHR, 2018; FIALHO et al, 2011).

[6] It is a specialized committee of the Federal Public Prosecutor's Office. They focus on the "indigenous populations and traditional communities" to "mobilize human and technical resources in order to [achieve] the established constitutional goals (MPF, 2013).

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The police authorities from the Military Police of Pernambuco[7] went to the scene soon after the incident occurred. The indigenous Xukuru immediately identified José Lourival Frazão ("Louro Frazão", author of the shots) and José Vicente de Carvalho ("Zequinha Vicente", who contributed to the physical fight with Louro Frazão) as the perpetrators of the crime. According to Almeida, José Vicente[8] ran away to a house and, due to the inertia of the local police, the indigenous people went in pursuit of him. Instead of proceeding with the arrest *in flagrante delicto*, the agents' attitude was to deny the presence of the Federal Police to mislead the indigenous defense. In their words:

> When the assassination happened, we received the news from Sandro, I think it was nine in the morning. Sandro calls the entities and says: 'look, we have to go to Pesqueira [...]'. [...] This was at the beginning of President Lula's government. […] We started calling someone in Brasília because we had never had contact with the Minister [...]. And then we found out, through information from the Planalto Palace, that the Federal Police were in Pesqueira. This scene is very interesting [...], you have no idea what is going to happen. Inside the hospital in Pesqueira, shot indigenous people start to appear, and we had news of two indigenous people murdered. [...] What was happening? Louro Frazão, with another partner, goes to Cimbres, isolates himself in a house, and the Indigenous siege him. And as they tried to get close to Louro Frazão's house he would shoot [...] So [there were] several indigenous people wounded because of the siege that was set up, because the indigenous people didn't want Louro Frazão to run away. But the Federal Police [with the PM] did not arrest Louro Frazão, they left him there in Cimbres [...]. When we arrived in Pesqueira and got the news that the Federal Police were in Pesqueira, we said: 'Someone is wrong...'. Either the Planalto doesn't have the correct information because there are no Federal Police here anywhere, or someone is lying. [...] And we go to the command, the PM's headquarters. We arrive in front of the military police headquarters, and we say: 'Look, we are from the Human Rights Movement, and we would like to talk to the Federal Police station officer, we have important information to give you about the crime [...]'. Then he said to us: 'Look, there is no one like that here, you see? There is no one from the Federal Police and you must be mistaken. Then I remember that [...] we said: 'Yes, we must be mistaken'. When we are talking in front of the policeman [...], a sergeant arrives with about four pizzas. This is indescribable, isn't it? [...] Then one sergeant arrives in front of the other and says: 'Friend, let me pass you the pizzas that are for the Federal Police station representative. [...] And then I said: 'Look, kid, I think we are invited to eat pizza too... Go there, tell the man we are here. The soldier was embarrassed because the lie had blatantly fallen.' (UFPE, 2019).

[7] As explained above, it is one of the subnational Police branches in Brazil. Also known as "PM" (from "Política Militar"), it is a state government agency. Its function is primarily ostensive: to preserve the public order, including intervening in situations out of state's competence (SILVA, 2014). It is why people recurred to them right after the incident. It also happened because the PM is more decentralized and present in people's contends.

[8] Indigenous Missionary Council (*Conselho Indigenista Missionário* or *CIMI*).

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Being able to initiate dialogue, the representatives asked for help with the situation. However, the police officers refused to make the arrest. Using unconvincing reasons, they said they were unable to take any action:

> This meeting is very interesting. If you see the picture, there are the main public security authorities of the State of Pernambuco in a high command meeting to decide what to do. There is the Chief of the Federal Police, there is the FUNAI prosecutor, there is the commander of the Pesqueira Military Police... All the high authorities are there, and the police chief is sitting at the head of the meeting. Then the Federal Police representative, who is not very polite, [says]: 'You are the Human Rights Movement... Well... I want to say [...] that there are two people shot on one side, three shot on the other side...'. Then we said: 'Look, my friend, this is not a Sport and Santa Cruz[9] game... this is not a soccer league table, this is a crime that is in progress, and you must go immediately to Cimbres and arrest the gunmen who are there [...]. Because there will be others dead, they are shooting...'. You know what the Federal Police chief... [...] He looked at us and said: 'But... There are cattle on the road'. 'What do you mean there are cattle on the road?', [we asked]. 'Yes, because I have very big and armed cars and the Federal Police can't enter a highway at night because there are cattle on the road'. Then we would say: 'But how can there be cattle if we just came from there, pal? You must go, you must arrest them…' (UFPE, 2019).

However, the situation was reversed with the intervention of the main people in charge of justice in Brazil. A commission from the Presidency of the Republic was designated to travel to Pesqueira and monitor the situation. Among the members of the delegation was Raquel Dodge, former Attorney General[10]. As soon as they received the news, the Federal Police changed its posture and took the necessary steps. Follow the report:

> In the middle of the road, in that situation, someone from the Luiz Freire Center comes in with the phone in his hand and says: '[...] Who can talk to the Presidency of the Republic?' Then the Federal Police chief looks... [...] The girl arrives with the phone and says: 'No, it's serious... There is someone from the Presidency of the Republic that would like to know who he can talk to'. Then the policeman looks at the chief of police and says: 'You must be the one to talk, right? [...] But what do they want? [...] 'It is because President Lula ordered that the presidential airplane is coming here to Pesqueira tomorrow [...] and they want to know where they can land the presidential airplane with a special commission formed by the Minister of Human Rights, a prosecutor, president of FUNAI...'. [...]The chief got up livid, he left the room without knowing... [...] When he returns to the room, the man was completely disfigured. [...] He sits on the headboard and goes: 'You...', addressing the Military Police chief. 'You, how many people do you have there? [...] How many cars do you have? [...]. I need [...] 15 men and two cars'. [...] Then the rescue operation, the arrest, was done. There are no cattle... Another thing he said: that he couldn't arrest them because the weaponry of the Federal

[9] Local football clubs.

[10] It is the highest function of the Public Attorney's Office. The elected president can almost freely nominate the General Attorney (SILVA, 2014).

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> Police is so powerful that if there was a disturbance they would kill several indigenous people, it would be a public calamity, a genocide. Yes, he even said that. [...] But after the Presidency of the Republic, I don't know who this man spoke to, this man comes back, sets up the structure and goes to arrest the gunman[...] What was the interest of the police in not having to make the arrest? [...]What was missing [to] go and have the offenders arrested? Evidently, they wanted, in my opinion [...], a lynching. Because, if a lynching happened there, it would be proof that the Xukuru group is a criminal group, a lethal group. It is a threat to civil society (UFPE, 2019).

The operation took place, and the police arrested José Vicente. On the next day, the Brasília Commission began to follow the case and participate in the investigations. However, the anti-indigenous bias on the investigations continued indiscriminately and was even the cause of the dismissal of the local Chief by Raquel Dodge. In the words of Almeida (UFPE, 2019):

> It was late at night when he started to listen to the first person, who, if I'm not mistaken, was Chief Marcos. And visibly he begins to induce Marcos [...] in the sense of criminalizing him. [...] Raquel Dodge herself [says] to the sheriff: 'Ask Chief Marcos if he has ever received a death threat. [...] And the sheriff, dying of rage, asked [...]. But the sheriff's questions were in a line to try to create the crime of passion. The sheriff's idea was visible in his questions. It was to conduct the inquiry from the perspective that Marcos must have had a confrontation with Louro Frazão, right, and that the two were displeased [...]. But it was nothing like that, right? What happened was an absence of public security. [...] He said just like that, in front of the public prosecutor: 'I'm leaving, because I'm tired,' and he had been 'stalling' us for hours. 'I'm not going to listen to the other indigenous people', [he said] [...]. She stood up and said: 'You are really leaving, because you have been dismissed from your position'. [...] The public prosecutor began to preside over these hearings in the 6th Chamber, and several statements were made there. [...] These statements were fundamental in the process of proving the criminalization and [...] in the defense that we made in the Marcos case.

During the police investigation, Servilho Paiva, the Federal Police chief commanding the investigations, replaced Jorge Cunha. There was another change in the focus of the investigation: from the destruction of houses by the indigenous people, with chief Marcos as the main suspect, to the investigation of the double homicide. In the end, the police investigations indicated José Lourival Frazão ("Louro Frazão", who fired the shots) and José Vicente de Carvalho ("Zequinha Vicente", who contributed to the fight with Louro Frazão) as suspects. In his final report, however, chief Marcos was listed as the agent provocateur of the crime, being drunk at the time of the events, but not as the victim. The dead indigenous people were, in this version, armed.

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The Federal Public Prosecutor's Office (MPF)[11] reproduced this content in its official accusation. Nevertheless, the public prosecutor dropped the indictment of José Vicente because he acted in "legitimate defense of a third party". During the process, the Federal Public Prosecutor's Office also opposed the participation of Maria Gorete, mother of José Ademílson, as an assistant to the prosecution (FIALHO et al, 2011).

4. The informal institutional arrangement: the logic of the enemy

a. The game that determines the pattern of violence

The demarcation of indigenous lands is regulated by Decree No. 1775 of 1996 (BRASIL, 1996a) and by Ministry of Justice Administrative Rule No. 14 (BRASIL, 1996b) of the same year. Without exceeding the limits of the present text, the initiative and orientation of this process is the competence of Funai and it is composed of five stages: identification and delimitation, declaration, physical demarcation, homologation, and registration. During or after these five stages of the demarcation process, Funai is responsible for promoting the eviction from indigenous territories, that is, the removal of non-indigenous occupants. Evictions occur through the compensation payments for *bona fide* improvements and the physical transference of these occupants, voluntary or involuntary, with no specific order between these acts.

From the identification phase (or even before, as the chief Xicão showed when he appeared before the Constituent Assembly), the rival parties build expectations about the outcome of this process and know which outcome will be the most favorable to them. The indigenous people have their utility maximized by the demarcation progressing as quickly as possible. Landowners have their utility maximized by the demarcation process being completely halted, or as slow as possible. Both parties may or may not use the legal, illegal, or extra-legal instruments in their disposal.

The dispute over territory during demarcation can be translated by the following game theory matrix:

[11] Here we do not talk about the 6th Chamber of the same institution. This public prosecutor was chosen randomly and according to the official distribution process. She/he became the official prosecutor of the case after this distribution.

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		Landowners	
		Inaction	Action
Indigenous	Inaction	(0, 10) status quo maintenance	(0, 5) status quo maintenance
	Action	(10, -5) Demarcation advances without repossessions	(5, -5) Assassinations, institutional violence (criminalization) and repossessions

In the first quadrant, both parties to the conflict remain without action. It is the ideal situation for the landowners who have already seen the beginning of the demarcation process since the territorial power situation remains the same without them taking any initiative to do so. It would occur because Funai does not usually carry out demarcation without constant demand from the indigenous side, as the case of the Xukuru people demonstrates. The same result appears if the indigenous people remain inactive while the landowners use some resources to protect the lands registered in their names, which is the case in the second quadrant. These landowners may comprehend the mere existence of the demarcation process or the constitutional right as a threat to their landholdings even if they do not feel threatened by the indigenous people's actions. Thus, they would resort to occupation strategies, such as the above-mentioned "Vale do Ipojuca" project, and use the unproductive lands as a sign of legitimate possession. In this last case, the landowners' utility would diminish by the mere expenditure of energy to guarantee their territory. The result, however, would be the same: maintenance of the status quo, that is, non-indigenous invasions legitimized by legal instruments alien to indigenous rights (CAVALCANTI, 2020).

In the expectation of such results, the indigenous people, as rational actors, will choose to act. They have no gains from inaction, since Funai relies on the collaboration of the indigenous communities during the entire demarcation process. The facts of the Xukuru case confirm that this is the common way to handle the situation, since the advancement of the demarcation depends on the pressure exerted by the indigenous people on Funai. A great pressure from the indigenous side can even fail, as the "Pedra D'Água" incident illustrates. Therefore, we should leave behind the first and second quadrants and move the analysis to the third one.

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In the third quadrant, the indigenous people act while the landowners remain inactive. It is the ideal situation for the indigenous people because they can demand that Funai take action without obstacles. It would be the case in which the demarcation process is happening while the landowners accepted the application of the constitutional norm, yielding the areas necessary for the subsistence of the indigenous people and/or awaiting compensation for the bona fide improvements. However, this situation is also implausible since the landowners would not extract any utility and would still face losses. If both parties know that the opposing party is rational, the landowners will expect the indigenous people to act, and they will immediately react as well. Therefore, the balance of this game is in the fourth quadrant.

The fourth quadrant translates what happened in the Xukuru case. When both parties act, they tend to use all available resources to guarantee their maximum utility. The indigenous people put pressure on Funai, and if Funai does not give them the expected response, they carry out autonomous repossessions of the territory. The landowners employ hitmen, file suits to defend their titles on indigenous lands, file actions that are merely procrastinatory and, finally, influence state agencies such as Funai, the Federal Public Prosecutor's Office and the Federal Police to criminalize the indigenous people and their defenders. The indigenous side will, in this dynamic, be less useful given all the violence, physical and institutional, that they face. However, its usefulness remains positive in the face of the advance, although slow, of demarcation.

It is not to deny the immense loss that the murders, attacks, arbitrary arrests, and torture faced by the Xukuru people. Neither is it implying that the score assigned translates the calculation of gains and losses for the parties. The goal is to point out that the indigenous people understand that the conquest of the right to collective property is worth more than all the losses faced. Chief Xicão and several other leaders, after all, gave their lives for the cause. Otherwise, the whole community would have ceased the fight for this right after the first threats. It is a reduction of the facts to a calculation, but it can bring an analytical gain to the territorial disputes between indigenous and non-indigenous people. The calculus reveals the trade-offs faced by the Xukurus and their opponents, and it is plausible to extend it to all indigenous peoples in the country.

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b. How Brazil breached its obligation to provide domestic law provisions by not regulating the land situation during the demarcation

We can see, therefore, that the period from the beginning of the demarcation until its end is balanced by the proactivity of both parties, which results in a veritable war covered in blood and "due legal process". Thus, the assassinations, the autonomous repossessions, the institutional violence and the criminalization of the indigenous people and human rights defenders will be protracted in time if the demarcation does end the dispute. The question is, however, whether it would be possible to guarantee the legal security of the indigenous territory during the demarcation itself.

There is a limbo of legality after the beginning of the territorial demarcation. The Federal Constitution (BRASIL, 1988), the Indigenous Statute (BRASIL, 1973), Decree nº 1.775 (BRASIL, 1996a) and the Ministry of Justice's Administrative Rule nº 14 (BRASIL, 1996b) guarantee the right to demarcation and define the procedure, but do not state at what point the land becomes legally recognized as indigenous land. It is possible to argue that the property is only transferred to the Union, with exclusive indigenous usufruct, after the end of the five phases of the demarcation process, since the landowners' property titles have not yet been erased, nor have they been compensated for their good-faith improvements. It is possible, however, to argue that the land becomes indigenous as from the approval of the anthropological report by Funai, that is, since the end of the first phase of the demarcation process (identification). It happens because the anthropological report is the ideal document to certify which territories correspond to the "lands traditionally occupied by Indigenous peoples" in the terms of Art. 231, caput and § 1 of the Constitution.

Read the arguments used by the representative of the Attorney General's Office in the State of Pernambuco[12] in the context of the repossession suit filed by one of the landowners:

> The Attorney General of the Republic-PR/PE, Francisco Rodrigues dos Santos Sobrinho, in a legal Opinion prepared for the repossession suit filed by Milton do Rego Barros Didier and others against the Xukuru Indigenous for occupation of the rural property called Caípe, stated that he was in favor of granting the plaintiffs a preliminary injunction for repossession, even though the rural property in question was entirely within the perimeter of the area that had already been formally recognized as Indigenous since 1989, with the

[12] As explained above, the Public Attorney's Office represents all Executive Power agencies, national or subnational. Here the represented institution is the Government of Pernambuco.

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> Identification and Delimitation and had already been declared the permanent possession of the Xukuru Indigenous by Administrative Rule 259/ MJ/92. In his Legal Opinion, the Attorney argued that the lands in question were not being occupied by the indigenous people, so much so that they invaded the area in question. Given the existence of Xucurus villages in the region, and that there have been reports of the presence of these indigenous people since 1599, the demarcation procedure was initiated, with, for the time being, only the identification and delimitation stages... The disputed area, therefore, neither *de facto* (indigenous occupation) nor *de jure*, can be considered an indigenous area. (FIALHO et al, 2011, p. 36).

On the other hand, read the summary of the Ministry of Justice's decision responsible for rejecting the Xukuru indigenous land's objections in the contradictory administrative process:

> These appeals were all dismissed because the administrative procedure obeyed the legal and regulatory norms in effect at the time of the procedure and the constitutional principle of ample defense was attained through the opportunity to contest, under the terms of Article 9 of the aforementioned Decree No. 1775/96; the ownership titles presented by the claimants, which date back to 1938 and the alleged "long time" possession of part of the area do not have legal force to de-characterize the indigenous nature of the lands because, according to the express provision of Art. 231, § 6º, of the Federal Constitution, such titles are ineffective in relation to indigenous communities, a situation that goes back to the Letter of 1934; the anthropological report of identification and delimitation of the area in question, with regard to its legal aspects, demonstrates, as a whole, substantial adequacy of its foundations to the assumptions listed in art. 231, § 1º, of the Republican Charter in effect and, with regard to the factual matter, the contestants have not provided any proof that could elude the veracity of these fundamentals. (Order 32/MJ, published in DOU; 10.07.96). (FIALHO et al, 2011, p. 23).

Judicially, the question of legitimate possession of indigenous lands during the demarcation process has been solved based on the civil institute of the "right of retention". The regulation of possession in the Brazilian legal system is inherited from the Roman *Corpus Iuris Civilis*. Even when the law is silent, jurists must use the techniques, terminology, and principles of Roman Law. Even though this millennial heritage, the legal definition of possession is still obscure and controversial, although it is possible to deduce that different understandings characterize it as "a factual situation, in which a person, regardless of being or not being the owner, exercises over a thing ostensible power, preserving and defending it" (PEREIRA, 2017, p. 34). One of the effects of this factual situation would be the right of retention, according to which the one who has the obligation to return something may refuse such return on the grounds that he has a claim

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against the one who will receive the thing. Thus, it would remain allowed to oppose the return until the discharge of the debt (PEREIRA, 2017).

This is precisely the institute that the Federal Court[13] applied to the Xukuru lands to recognize the legitimate possession of the landowners (FIALHO et al, 2011). Examples of the most recent judgments of the Federal Regional Court of the 5th Region on the subject are provided[14]:

> PJE 0800476-23.2016.4.05.8001 CONSTITUTIONAL MENU. CIVIL PROCEDURAL. ACTION OF REPOSSESSION. INVASION BY INDIGENOUS TRIBE OF LANDS THAT WERE IN THE POSSESSION OF THE PRIVATE PARTY. DEMARCATION PROCESS IN PROGRESS. SENTENCE MAINTAINED. 1. Appeals filed by the UNION, the FEDERAL PUBLIC MINISTRY, FUNAI and the KARIRI-XOCÓ INDIGENOUS Tribe against the judgment which, in a repossession suit, upheld the request to determine the repossession of the plaintiffs JOSÉ NASCIMENTO FREIRE, MAGNA DOS SANTOS ROSENDO, MARIA CLARA ALVES, EDNA FREIRE E PEDRO SEBASTIÃO DOS SANTOS in the possession of the properties mentioned in the initial petition and in the accompanying documents, under penalty of a daily fine of R$ 3,000.00 (three thousand reais) in case of noncompliance with the order. No award of attorney's fees. [...] **19. Although there is information about the existence of the cited Ministerial Ordinance 2.358/2006, it can be seen that the land demarcation process is still in progress, as Funai itself states in its appeal. 20. Therefore, until the acts of land regularization are completed, with the effective demarcation of the land, compensation to the possessor for the improvements and promulgation of the homologation decree, the right of retention of possession by the plaintiffs is demonstrated to be legitimate. 21 In the same vein, a precedent of this Second Panel, in a situation similar to the one in the case: "the fact that the property is supposedly located in an indigenous area does not rule out the right to possession of the property of the aggrieved party, since, as stated above, until the demarcation procedure is concluded, it must be assumed that the property belongs to the party in whose name it is registered in the Real Estate Registry Office"** (TRF5, 2nd T., PJE 0808726-55.2017.4.05.0000, rel. Federal Justice Paulo Roberto de Oliveira Lima, judged on 02/20/2018). 22. This was the understanding espoused by the Third Panel in a judgment that considered Funai's appeal in the records of the possession action 0800094-64.2015.4.05.8001: **"Recognition by the Ministry of Justice, through an Ordinance declaring possession traditionally exercised by an indigenous community, in the exercise of the competence established by art. 2, §10, Decree 1.775/96, does not have the power to confer legal protection of the land under the terms of art. 231, CF"** (TRF5, 3rd Panel, PJE 0800094-64.2015.4.05.8001, rel. Federal Justice Fernando Braga Damasceno, judged on 08/09/2018). 23. Appeals dismissed. No appellate fees. (CASE: 08004762320164058001, CIVIL APPEAL, FEDERAL DISMISSAL PAULO MACHADO CORDEIRO, 2nd COURT, JUDGMENT: 07/12/2021.) Emphasis added.

[13] Like the Public Prosecutor's Office and the Public Attorney's Office, the Brazilian Judicial Power has national and subnational branches. Federal Justice competence is defined in article 109 of the Chart and includes "the disputes about indigenous rights" (SILVA, 2014).

[14] See also: PROCESS: 08001449120144058303, CIVIL APPEAL, FEDERAL JUDGE RUBENS DE MENDONÇA CANUTO NETO, 4TH CLASS, JUDGMENT: 07/24/2018; PROCESS: 08113629120174050000, BILL OF REVIEW, FEDERAL JUDGE ROGÉRIO DE MENESES FIALHO MOREIRA, 3rd panel, judgment: 06/14/2018.

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The aforementioned article 19, §2, of the Brazilian Indigenous Statute determines that "against a demarcation processed under the terms of this article, a possessory interdict may not be granted, with the interested parties having the option of resorting to petitory suit or demarcation suit" (BRASIL, 1973). Although the court's interpretation is valid in the sense of legitimizing the possessive actions in court, it is also possible to understand that the "petitory" or "demarcation" actions refer to the administrative demarcation process itself. In that sense, contests should only be sent to the Executive branch, as it is possible to do accordingly the demarcation regulament. Consequently, judicial challenges would not be applicable because an adversary procedure already exists according to the Decree nº 1,775 of 1996 (BRASIL, 1996a) and under the terms of art. 5, LV, of the Federal Constitution (BRASIL, 1988).

Therefore, the Federal Court has interpreted the legislation in the sense of conferring the right of retention to landowners during the entire course of the demarcation process or until the payment of compensation for good faith improvements by the Union. As the own Xukuru's judicial struggles demonstrate, it is not unusual to force eurocentric juridical institutions into indigenous rights issues (NÓBREGA e LIMA, 2021; CAVALCANTI, 2020).

This court's understanding imposes a considerable obstacle on use of indigenous lands by indigenous people, because the allocation of resources for such payments depends exclusively on the resources destined to Funai by the budgetary process, as well as the discretionary nature of the Funai administration. The Xukuru people, for example, have made several agreements with the Ministry of Justice and Funai in order to promote the payments of such compensations. Several deadlines were established and even determined the order of preference among the lands for payment. However, Funai repeatedly failed to pay the compensations within the timeframe agreed upon. At the date of the IAHR Court's judgment, February 5, 2018, forty-five non-indigenous occupants had still not received their compensation despite the (formal) conclusion of the demarcation process.

Therefore, the absence of legal provisions about legitimate possession during the demarcation process fuels the conflict between indigenous people and the landowners. While the landowners have been able to obtain favorable verdicts from the Federal Court, the indigenous peoples face the budgetary bottleneck of Funai to obtain the right to occupy the land that has already been legally recognized. Not surprisingly, this

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scenario leads to autonomous indigenous reoccupations (or "disseisin" in the language of the Federal Courts) and to waves of violence, both physical and institutional, typical of a civil war.

c. Neo Institutional analysis: the informal arrangement that determines criminalization

Finally, let us look at the possible existence of an informal rule. The first question is whether the objectives of the formal rules, i.e., the protection of the right to indigenous collective property, are being fulfilled. If not, why not? As demonstrated, the litigiousness inherent to the demarcation process indicates that the mere existence of the right is not enough to guarantee the "exclusive usufruct" (BRASIL, 1988) of the indigenous lands by the indigenous people during the long period that corresponds to the demarcation process.

It would not be the first time the rules protecting traditional peoples have failed. The studies of economic neo-institutionalism reiterate that the interactions with informal rules largely determines the effectiveness and stability of the formal ones (BRINKS; LEVITSKY; MURILLO, 2019). Marcela Torres Wong's studies on the right to prior consultation provided in ILO Convention 169 are an example. She concludes that the norms of prior consultation did not determine the interruption of intervening projects in case of disapproval by the community. Thus, the same result repeated itself: intervention in indigenous lands always continued, so that the formal rule was insignificant (WONG, 2018).

One of the possible hypotheses to explain the ineffectiveness of the formal rules is the presence of an informal rule that establishes the permanence of possession with the non-indigenous people during the demarcation process. Maybe there is one informal rule reinforcing a divergent behavior from the law, causing the purpose not to be fulfilled. Moreover, the existence of such norms may be a consequence of the weakness of the formal rules. As Brinks, Levitsky, and Murillo (2019) said, several patterns of behavior can only be explained by institutional weakness. We will analyze two of them in this section.

Firstly, however, we need to evaluate the actual existence of an informal rule, as this concept can take on broad meanings with little practical relevance. Among the various factors that indicate the presence of such an unofficial norm, the punishment mechanisms used by non-indigenous people and organizations should be its primal

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expression (NÓBREGA et al, 2022). Therefore, it is necessary to consider the sanction used to reinforce compliance with the informal rule (VOIGT, 2018).

The informal rule that existed in this period was the permanence of the territory with non-indigenous people (NÓBREGA et al, 2022). This informal institutional rule was implemented by means of the following sanctions: (1) acts of violence against indigenous leaders and defenders of indigenous rights; (2) delay and indolence in the investigation of crimes perpetrated against indigenous peoples; (3) criminalization of indigenous leaders and defenders of indigenous rights; (4) filing of possessory actions to guarantee the right of retention until the payment of compensation; (5) distortion of the organs whose function is to protect indigenous rights. All of these sanctions guarantee that possession remains with non-indigenous people throughout the demarcation process.

The analysis of the case of the Xukuru do Ororubá People is able to reveal the application of all these sanctions. The assassination of Chief Xicão and the attack on Chief Marcos are only the most prominent examples of acts of violence in the territorial dispute (1). The long duration and indolence of the police investigation into the death of Chief Xicão exemplifies the burden associated with criminal prosecution when indigenous people figure as victims (2). The validity of the repossession suits filed by the landowners who own the Xukuru lands exemplifies how the judiciary helps in the effectiveness of the informal rule (4).

Sanctions 3 and 5 deserve an appropriate breakdown. Regarding the undermining of the state bodies that protect indigenous rights (5), Fialho et al. (2011, p. 137-139) describe with excellence the "worrying" acts of Funai, the Federal Police, and the Federal Public Prosecutor's Office (MPF). Regarding Funai, we highlight the "slowness in the identification, compensation, and eviction of squatters", as well as the "unacceptable omission or delay in dealing with the banishment issue". Regarding the Federal Police, the problems highlighted are "inefficiency and negligence" in the investigations into the assassination of Xicão, as well as attributing to Chief Marcos the role of "provocateur" of the attack itself and attributing the death of the two indigenous people who accompanied him to the mere possibility that they were armed. With respect to the MPF, the investigation of José Vicente de Carvalho, a participant in the attack on Marcos and co-author of the assassination of the two indigenous people, was filed away on the grounds of legitimate self-defense. Finally, the MPF shows evidence of distortion in that it "did not fully exercise due critical control over the evidence produced by the

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federal police in the José Barbosa dos Santos and José Lourival Frazão cases. Such acts are mere highlights in relation to the facts described in this article.

Finally, criminalization corresponds to the movement of the criminal justice system against indigenous leaders and defenders of indigenous interests to delegitimize or delay the struggle for territorial demarcation. It is a sanction documented in several other countries where the conflict between the territorial rights of traditional peoples and private property interests persists. In Chile, Francisca Linconao, a Mapuche spiritual leader, was arrested in 2016 for being involved in a conflict against landowners. Beatrice Hunter, of the Inuk people of northern Canada, was also arrested in 2016 for being part of an occupation against the construction of a hydroelectric dam. Both were elderly. For Bernauer, Heller, and Kulchyski (2018), these cases demonstrate that:

> The criminalization of indigenous resistance is both the legacy of colonial conquest and an expression of contemporary capitalism's need for ever-expanding sources of energy and other resources. Indigenous peoples of the Americas remain on the front lines of resistance to the environmental and social costs of this unthinking drive for capital accumulation. The machinery that propels this process is the state, whether in the United States and Canada or in countries of the global South, including Brazil and Chile. Their preferred tool is criminalization, including of spiritual and political indigenous leaders, the bedrock of their communities. It is a deeply depraved economic system in which indigenous grandmothers are routinely imprisoned simply for defending their communities.(BERNAUER; HELLER; KULCHYSKI, 2018, p. 7-8).

One can easily see criminalization in the case of the Xukuru People, with the landowners and the state bodies themselves being responsible for promoting it. First, chief Xicão and other indigenous people were indicted for violation of private property. Second, the context of animosity prior to the repossessions led to the arbitrary arrest of three Xukuru indigenous people along with the prohibition of the Toré dance. Third, the human rights organizations involved in the defense of Chief Marcos were indicted for the constitution of armed militias. Fourth, Chief Marcos himself was allegedly the mastermind behind the murders of those who defended him. Fifth, the deaths of Jozenilson José dos Santos and José Ademílson Barbosa de Silva supposedly occurred because they were carrying weapons, so that one of those responsible for the murder acted in self-defense of a third party.

Together, sanctions 3 and 5 were the "logic of the enemy." In the intrinsically litigious context of the demarcation process, land owners lead the state apparatus to take one side of the conflict. Resuming the matrix exposed internally, the agencies involved do not remain neutral, so their actions will always benefit (or harm) the

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indigenous side or the side of the landowners. In the case of the Xukuru do Ororubá people, the Funai, the Federal Police, and the Public Prosecutor's Office (MPF) have shown themselves to be intensely taken by the logic of the enemy in their attitudes, which (almost) always benefit the non-indigenous side of the conflict.

Still, the case demonstrates the formal rules have proven weak. The MPF has the constitutionally established duty to act in defense of indigenous rights (BRASIL, 1998), as does Funai (BRASIL, 1967). Thus, the very posture of its state agents is divergent with the formal rules.

There are two possible types of interactions when formal and informal rules diverge from each other: competition and accommodation. Competition occurs when the structure of the informal institution is completely incompatible with the formal institution. So, in order to follow one of them, one should completely disregard the other. In contrast, the accommodation relationship occurs when informal institutions create incentives for behavior by altering the effects of formal institutions, but without directly violating them (HELMKE and LEVITSKY, 2006).

First glance, one might think that the informal rule acts through competition. In truth, the Criminal Code typifies murder and threats, and the position of the Public Prosecutor's Office was contrary to what is established by law. However, interaction by accommodation better the subtle nuances of the enemy's logic. As Helmke and Levitsky explain, informal accommodative rules are usually created by actors who do not like the effects generated by formal rules but are unable to change or violate them openly (HELMKE and LEVITSKY, 2006). Therefore, landowners would be acting out of accommodation because they do not have sufficient power to change what articles 231 and 232 of the Federal Constitution establishes (BRASIL, 1988).

Thus, the Federal Police representative was exercising his legitimate duty to make accusations (no direct violation of the formal rule) but was doing so in order to weaken the defense of the indigenous side of the conflict (violation of the purpose of the formal rule). As evidenced in Manoel Almeida's narrative, "if you come along, you will be sued". It serves as a way to generate wear and anguish (UFPE, 2019). The MPF, in turn, continued to figure as a party in the lawsuits (no violation of the formal rule), but the positioning was to establish a "symbiosis" with the Federal Police instead of defending the interests of the Xukuru do Ororubá people (violation of the purpose of the formal rule). Finally, Funai still held the title of the Xukuru demarcation process and still promoted

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agreements on evictions while substantially contributing to the delay of this administrative process.

Therefore, the informal rule of remaining in possession with the non-indigenous people acted by accommodation with the formal norms. One cannot say that all sanctions represent an informal rule enacted by accommodation, since the use of violence is beyond any legal or socially established parameter. Furthermore, the agencies involved are themselves divided as to the side of the conflict they take, as is the case of the pro-indigenous position taken by the 6th Chamber of the MPF. The same bodies have acted, at other times, as mechanisms favorable to indigenous rights and, therefore, attenuators of the sanctions described above. As reiterated by the authors of new institutionalism, the interactions between formal and informal rules is, above all, dynamic (NÓBREGA, 2013, p. 39).

5. Conclusion: informal institutions and criminalization of the indigenous people

The Indigenous Missionary Council Report for 2021 indicates that there are a total of 832 indigenous lands "with administrative pending issues" (CIMI, 2021, p. 66). Demarcation processes are at the lowest presidential approval numbers since the resumption of democracy in 1985. Funai's administration is publicly repudiated by indigenous peoples and by organizations representing their interests (ABA, 2019; AFP, 2020; VALENTE and SANTOS, 2020). There is no way to expect anything different from a scenario of war and constant criminalization.

As demonstrated in this article, warfare inside and outside the judiciary is inherent in the course of the demarcation process and is reinforced by the absence of norms regarding the legal status of indigenous property during this period. Both actors are rational and have incentives to use all tools in their power to secure their own interests, so that the "analytical equilibrium" lies precisely in physical and institutional violence. This game determines the existence of the informal rule of tenure permanence with non-indigenous people, which can be identified by the various sanctioning mechanisms by which landowners, and government agencies that take their side, guarantee the protection of private property while eviction is not complete. Part of these sanctions can be translated into the logic of the enemy, which corresponds to the

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criminalization of indigenous leaders and indigenous rights defenders, as well as the undermining of the bodies whose function is to protect indigenous rights.

In this sense, news such as the murder of Bruno Pereira and Dom Philips (VENCESLAU, 2022) demonstrates the permanence of a war in which the state omission acts as the protagonist.

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Sobre as autoras

Flavianne Fernanda Bitencout Nóbrega
Professora permanente da UFPE. Email: flavianne.nobrega@ufpe.br. ORCID: https://orcid.org/0000-0002-2349-0167.

Alexsandra Amorim Cavalcanti
Mestranda em Ciência Política pela UFPE, advogada criminalista e bacharela em Direito pela UFPE. Email: alexsandra.cavalcanti@ufpe.br. ORCID: https://orcid.org/0000-0003-2643-8134.

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