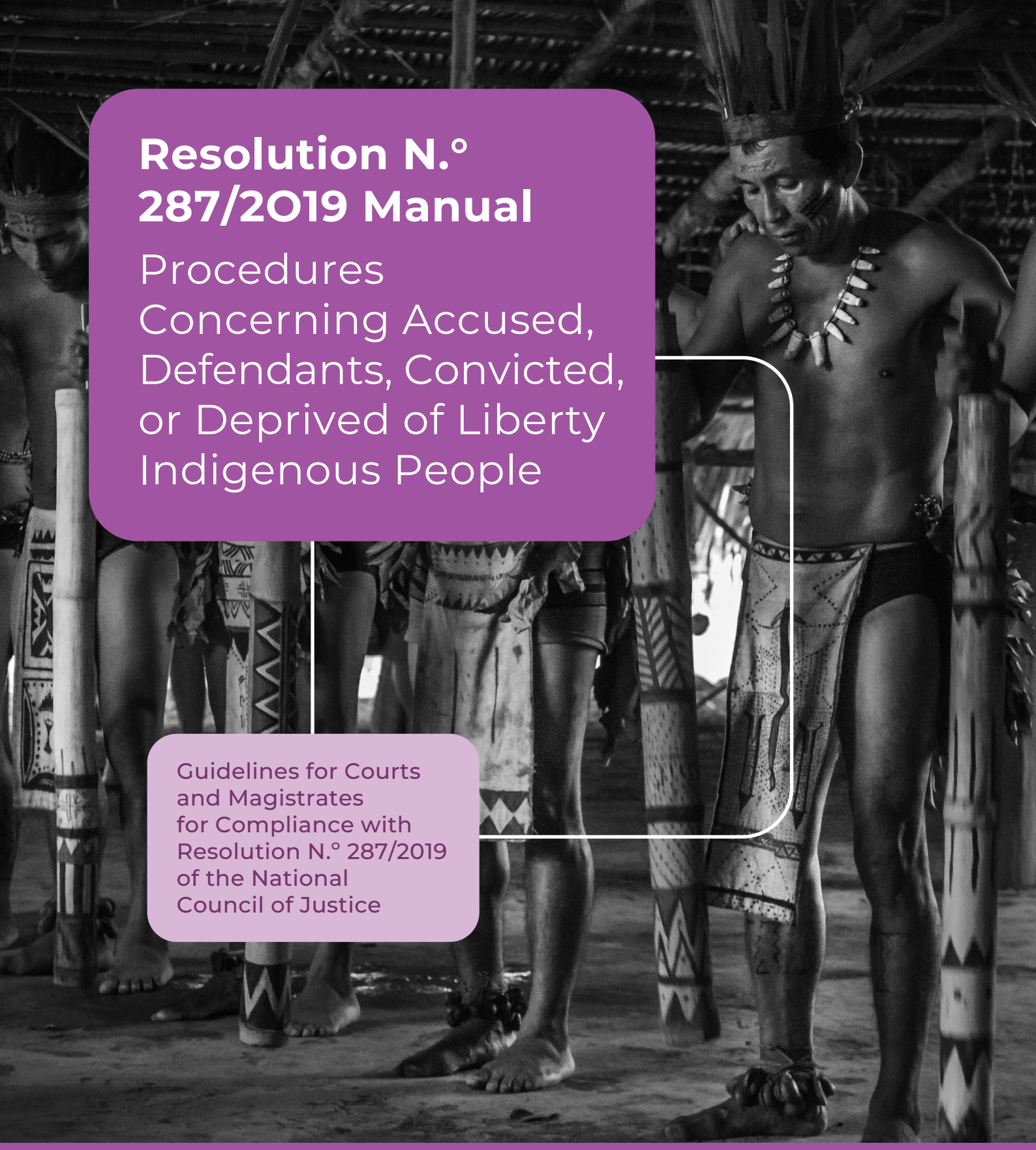

Resolution N.° 287/2019 Manual

Procedures Concerning Accused, Defendants, Convicted, or Deprived of Liberty Indigenous People

Guidelines for Courts and Magistrates for Compliance with Resolution N.° 287/2019 of the National Council of Justice

FAZENDO JUSTIÇA SERIES | MANAGEMENT AND CROSS-CUTTING THEMES COLLECTION

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BRASÍLIA, 2024

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CONTENTS

FOREWORD

The National Council of Justice (CNJ), in partnership with the Ministry of Justice and Public Security (MJSP) and the Brazilian office of the United Nations Development Programme (UNDP Brazil), develops the Program Fazendo Justiça (Doing Justice) establishing a significant milestone in the search for innovative solutions in the field of criminal and juvenile justice.

The program works to qualify structures and services, promotes training, supports the drafting of regulations and public policies, and develops informative documents. These materials include guides, manuals, researches and models that combine technical and normative knowledge with the reality experienced in different places across the country. These products identify good practices and offer guidance to facilitate the immediate and effective implementation of interventions.

The program is aligned with the decision of the Supreme Court in the Claim of Non-Compliance with a Fundamental Precept Lawsuit (ADPF) No. 347, which in October 2023, recognized that Brazilian prisons are in an unconstitutional state of affairs and demanded national and local plans to overcome this situation. The program also carries out various actions in the juvenile justice field, following the principle of absolute priority guaranteed to adolescents and young people in the country's norms and laws.

At present, 29 initiatives are being carried out simultaneously, taking into account challenges considering the complete cycle of criminal and juvenile justice, as well as cross-cutting initiatives. Among them is the International Articulation and Protection of Human Rights, which facilitates the exchange of experiences between Brazil and other countries in public policies related to the criminal and juvenile justice cycle.

We recognize that each country faces unique contexts and challenges. We also believe in sharing knowledge and experiences as a tool for collective transformation. To this end, titles selected from the program's different collections have been translated into English and Spanish, such as this publication.

The strategy behind international articulation also includes support for events, courses, and training in collaboration with international partners, as well as the translation into Portuguese of standards and publications aligned with the topics worked on by the program. This promotes a necessary exchange of ideas and practices for a future in which dignity and respect for fundamental rights are common values for all of us.

Luís Roberto Barroso

President of the Supreme Court and the National Council of Justice

PRESENTATION

Brazil is a continental-sized country in which there are 305 indigenous ethnic groups and more than 270 different languages. This ethnic diversity that sustains the cultural richness of the country also requires, from the point of view of the application of law, the recognition of specificities of customs and traditions. However, the Penal Code, the Code of Criminal Procedure, and even the Indigenous Statute have not been updated to incorporate the paradigmatic changes in respect for the rights of indigenous peoples brought about by the Federal Constitution of 1988, leaving several procedural gaps in the legal-criminal treatment of the indigenous person who is accused, defendant, or convicted of a crime.

In light of this diagnosis, the National Council of Justice organized a series of meetings with representatives from agencies and entities of the justice system, the Judiciary, the Executive Branch, and civil society with the intention of identifying procedures to ensure that actions involving criminal accountability or criminal execution of indigenous people were compatible with the Brazilian constitutional text and also with international treaties ratified by Brazil. As a result of this dialogue process, Resolution No. 287 was approved on June 25, 2019 and established guidelines that regulate the treatment accorded to indigenous people by the criminal justice system. Among the provisions of the Resolution are the identification of the person as indigenous by means of self-declaration, the provision for access to an interpreter and anthropological expertise, and the prioritization of respect for the justice practices of indigenous peoples and their traditional methods of conflict resolution.

In addition to the specific procedures, Resolution No. 287/2019 took an important step toward the incorporation by the Judiciary of the dictates of Convention No. 169 of the International Labor Organization (ILO) and the United Nations Declaration on the Rights of Indigenous Peoples by proposing to overcome the invisibility of indigenous peoples in criminal proceedings by recording this information in the computerized systems of the National Council of Justice.

The publication of this Manual meets a provision of the Resolution itself and aims to offer to courts and magistrates concrete ways on how implement the measures provided in the Resolution. This is one more step to strengthen the role of the Judiciary in facing the state of criminal crisis, recognizing its deep and structuring problems that cause even more serious impacts on vulnerable populations, as has been proposed by the Program *Justiça Presente*.

The overcoming of the unconstitutional state of affairs in the prison system requires the articulation of partnerships with the entities of the federation and the adoption of measures that pay attention, simultaneously, to the entrance door of the prison system, avoiding excessive incarceration and disproportionate sentences, and to the performance and quality conditions under which penal execution is carried out. This is exactly the meaning of Resolution No. 287/2019, which is based on: (a) the extreme exceptionality of indigenous incarceration, (b) the recognition of the possibility of accountability through non-state or non-custodial measures, and (c) the provision of specific guarantees for indigenous people in penal establishments.

With the implementation of the procedures described in this Manual, in compliance with Resolution No. 287/2019, the Brazilian Judiciary will assume the leading role in guaranteeing the rights set forth in the Federal Constitution and in international treaties to which the country is a signatory, redeeming part of the historical debt to the indigenous population.

I wish you all a good read!

Justice José Antonio Dias Toffoli

President of the National Council of Justice

PREFACE

The state of crisis and the violence emanating from the prison system are notorious, shock national society, and have been classified by the Supreme Court as an "unconstitutional state of affairs." However, like all rights violations, its effects fall most heavily on the most vulnerable prisoners: the poorest, the least educated, black people, women, LGBTI people, people with disabilities, the elderly, and indigenous people. Facing and reversing this scenario presupposes recognizing the existence of these violations, and it is exactly in this sense that CNJ Resolution No. 287/2019 and this Manual comes.

Indigenous peoples form a diverse group of almost one million people who live all over the national territory, in urban and rural areas, and who make up the least favored population segment from the economic point of view, from the access to formal education, to health, and to housing. Even so, until the approval of CNJ Resolution No. 287/2019, there were not even express and uniform normative provisions to identify the presence of indigenous people as accused in criminal proceedings or deprived of liberty. In this way, the constitutional duty to respect the customs, traditions, and social organization of indigenous peoples did not find regulatory instruments to make it effective in the criminal justice sphere.

The entry into force of CNJ Resolution No. 287/2019 has, therefore, a double meaning as a milestone in the protection of the rights of indigenous peoples: on the one hand, it represents the alignment of the legal-criminal treatment of the indigenous person with the Federal Constitution of 1988 and international human rights treaties; on the other, it points to the leading role of the organs of the Judiciary in actively promoting respect for fundamental rights.

As an instrument that brings the paradigm of the pluri-ethnic State into the dayly lives of courts and judges, CNJ Resolution No. 287/2019 has the following main aspects: the incorporation of the criterion of the indigenous person's self-declaration, attention to the indigenous person's right to be understood and to make him/herself understood in the legal proceedings through an interpreter, the adaptation of precautionary measures and sentences restricting rights to customs and traditions, and the possibility of the judge homologating traditional mechanisms of criminal accountability. The latest is one of the most important provisions of the Resolution because it manages to reconcile the constitutional right of indigenous peoples to their own social and legal organization, and the need to address the excessive use of imprisonment as a response to social conflict.

The second meaning of the entry into force of CNJ Resolution No. 287/2019 that also deserves to be emphasized is that of the role of the Judiciary in promoting the guarantee of rights. It is increasingly recognized that judges are not only responsible for remedying rights violations expressly brought to their attention by the parties, but also for acting actively to give effect to human rights in the course of legal proceedings. This is the position defended by the Inter-American Court of Human Rights through the doctrine of control of conventionality, according to which it is up to judges to analyze *ex officio* the compatibility between national norms and international obligations, applying internally the norms and jurisprudence that Brazil is obliged to comply with in good faith.

The theme of protecting indigenous peoples who are accused, defendants or convicted of crimes is one of the issues that most intensely imposes on judges the duty to ensure, internally, the application

of the international parameters of protection accepted by Brazil because most of the infra-constitutional legislation is still marked by an assimilationist conception of indigenous peoples, something that was definitively overcome by the 1988 Constitution, by Convention No. 169 of the International Labor Organization (ILO), by the jurisprudence of the Inter-American Court of Human Rights, and by the production of the human rights bodies of the United Nations. In this sense, this Manual offers the judge a consistent roadmap to promote the harmonization of criminal procedures with the protective framework of the indigenous peoples currently in force.

It is also worth mentioning that CNJ Resolution No. 287/2019 becomes an active instrument for the promotion of rights and consolidates the National Council of Justice's vocation to contribute to the improvement of the Judiciary's procedures. A striking example is the implementation of detention control hearings, which even though they were already provided for in the American Convention on Human Rights, which Brazil had committed to respect since 1992, only became an apt mechanism to assess the legality of the arrest, as well as to identify cases of torture and mistreatment, after decisions of the Supreme Court and the subsequent CNJ Resolution No. 213/2015, which administratively guided magistrates and courts regarding the implementation of such hearings.

It is evident, therefore, the willingness of the Judiciary to act jointly with the other branches of the Republic to overcome the human rights violations that have historically been rooted in several Brazilian institutions, especially in the prison system, giving a practical and effective character to the international obligations assumed by the Brazilian State.

Without the commitment of judges and courts, the protection constitutionally guaranteed to indigenous people will remain at the programmatic level, without us being able to materialize the rights to which this population is entitled. It is up to all of us, as magistrates committed to the Constitution and to the dignity of the human person, to modulate our practices and act for the concretization of the guarantees applicable to indigenous accused, defendants, or convicts in criminal proceedings, an indispensable assumption for the realization of justice in the best sense of the word.

Luís Geraldo Sant'Ana Lanfredi

Auxiliary Judge of the Presidency of the National Council of Justice and Coordinator of the Department for Monitoring and Inspection of Prison and Socio-Educational Systems

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Auxiliary Judge of the Presidency of the National Council of Justice, Department for Monitoring and Inspection of Prison and Socio-Educational Systems

INTRODUCTION

INTRODUCTION

Brazil is a pluri-ethnic country which, according to the 2010 Demographic Census, has about 900,000 indigenous inhabitants, belonging to 305 ethnic groups, and speaking 274 indigenous languages. In terms of population, the diversity of indigenous peoples appears not only in the cultural dimension, but also in the spatial distribution. The largest concentration of indigenous people is in the North Region and in the Amazon environment, with 37.4% declarations in the indigenous category, and among the people who live in urban areas, the largest population is in the Northeast region (33.7%). Even so, it is the municipality of São Paulo that has the largest demographic contingent of indigenous people in urban areas, with approximately 12 thousand people. In fact, São Paulo is the seventh largest unit of the federation in terms of indigenous population, ahead of states located in the Amazon biome such as Pará and part of Maranhão.

According to the 2010 Census, the indigenous population corresponds, among the other categories of color/race, to the least favored population segment from the economic point of view, in terms of access to housing, education, and health. For this reason, it is urgent to give effect to constitutional obligations and those arising from international human rights law, in order to respect and promote the rights of indigenous peoples that derive from their political, economic, and social structures, and their cultures, traditions, and conceptions of life, which are intertwined with their lands and resources.

The current normative framework for protecting indigenous peoples is based, firstly, on the Federal Constitution of 1988, which determines the valorization of cultural diversity and respect for ethnic plurality. The effectiveness of the Citizen Constitution marked the overcoming of the integrationist paradigm, which was expressed in Law No. 6,001/73, the Indigenous Statute, whose purpose was that the indigenous assimilate the values of the "national communion" and progressively lose their cultural characteristics such as language, religion, customs, and disappear as a differentiated ethnic group. As a result, the legal treatment of the indigenous question through the categories of *civilized people*, *acculturated* or *non-acculturated*, *villagers* and *non-villagers*, *integrated* or *in the process of integration*, became **incompatible with the current constitutional order**.

In addition to the Federal Constitution, the interpretation of legal norms in relation to indigenous peoples must be guided by Convention No. 169 of the International Labor Organization (ILO), ratified by Brazil in 2002 and promulgated by Decree No. 5,051, of April 19, 2004, which, as a human rights treaty, is part of the Brazilian normative framework with a supra-legal hierarchical position, in accordance with the understanding of the Supreme Court in HC 466,343/SP. Convention No. 169 also presupposes a paradigm shift in the treatment of indigenous peoples, recognizing their institutions and ways of life, the right to maintain and strengthen their entities, languages, and religions, and to take control over their development. Another important reference regarding the rights of indigenous peoples is the Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the United Nations (UN) in 2007, which establishes minimum parameters for national and international regulations, including the right of indigenous peoples to self-determination, the right to free, prior, and informed consent, the right to maintain their cultures, and the right to their lands.

In view of the set of normative commitments made by Brazil to respect the rights of indigenous peoples and in order to fill some regulatory gaps, the National Council of Justice approved, in June 2019, the CNJ Resolution No. 287/2019, disciplining the procedures to be adopted by judges and courts in the treatment of indigenous people in the criminal sphere, in addition to publishing this Manual that clarifies the main guidelines for the performance of judges in criminal cases involving an indigenous person in the condition of accused, defendant, or convicted of the commission of a crime.

In order for the rules provided for in CNJ Resolution No. 287/2019 to be properly applied, it is essential that the judge promptly recognize the indigenous identity by means of the indigenous person's **self-declaration** procedure, regardless of whether the person is Brazilian or a foreigner, of his/her place of residence, and of whether or not he/she speaks Portuguese, as provided in Article 2 of the Resolution.

The conduct of the judge must be clear and unequivocal in the sense that the self-declaration as indigenous has the consequence of **adding to** the ordinary rights and guarantees — that is, assured to **all** people — **specific guarantees** to indigenous peoples, reaching across all procedural acts. These specific guarantees derive from the pluri-ethnic model adopted by the Federal Constitution of 1988, through which the pretension of ethnic homogeneity was abandoned in favor of **protecting** the existing diversity of languages, beliefs, customs, traditions, and forms of social organization.

Assuming diversity of customs and ways of life as a right of constitutional status implies that, in no way, **the access and enjoyment of rights can be used as an argument to restrict other rights.** It follows that **the fact that indigenous people have access to fundamental rights** such as public education, work, health, or transportation — rights of equally constitutional status — has no impact on their indigenous identity and, therefore, **cannot serve as an argument to evade applying the rights and guarantees specifically back to protect indigenous people subject to criminal proceedings**.

In fact, the obligation of all the branches of the Republic is to ensure that absolutely all the rights provided for in the Brazilian constitutional order are guaranteed to the indigenous people without discrimination. This is the same meaning of the first article of the Declaration on the Rights of Indigenous Peoples, which states that indigenous people are entitled, collectively or individually, to the full enjoyment of **all** human rights and fundamental freedoms recognized by the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights law.

Not only **does access to rights provided for all people neither affect nor detract from indigenous identity**, but it is also possible to identify cultural elements considered non-indigenous among indigenous people (for example, the type of clothing worn on a daily basis) without this altering the universe of rights to which these people are entitled. This is because when there are elements that could be identified as belonging to the culture of "whites" incorporated by indigenous people, it is not understood that this process has occurred automatically as if it were a "contagion" of one culture by the other. As there is no static culture, what we have are continuous processes of resignification, transformation, and adaptation to the specific cultural logic of each indigenous people, so that elements apparently exogenous to their culture can assume the character of "traditional" when they undergo endogenous processes in which the indigenous people play the role of protagonist social actors.

This Manual and CNJ Resolution No. 287/2019 are based on the important understanding that if the Federal Constitution recognizes indigenous people's social organization, this necessarily means that the Brazilian **constitutional order recognizes the right of indigenous people themselves regulate their conduct, their justice practices, and forms of dispute resolution.** Even if the indigenous people have knowledge of some non-indigenous laws and legal norms, this does not make them the norms that organize their social life, since the Constitution itself assures them the right to their own social organization.

Having made this brief introduction to some of the assumptions that guide this Manual, we will now go on to list the of general principles that should guide the judges in all procedural acts involving accused, defendants, or convicted indigenous people.

GENERAL PRINCIPLES OF ACTION

1 GENERAL PRINCIPLES OF ACTION OF COURTS AND MAGISTRATES IN CRIMINAL CASES INVOLVING ACCUSED, DEFENDANTS OR CONVICTED INDIGENOUS PEOPLE

The 1988 Constitution was a watershed in the sense that it recognized that Brazil is a country characterized by ethnic-cultural diversity, recognizing rights for indigenous people and *quilombolas*. This paradigm shift was reinforced by the ratification of ILO Convention No. 169, which entered the national legal system through Decree No. 5,051, of April 19, 2004.

Since then, the legal status of the indigenous people has shifted from being under the guardianship of the State to being subjects of rights, fully capable, free, and able to make decisions and continue their way of life. In this way, it even **recognizes the dynamic character of indigenous practices and customs**, moving away from the assumption of physical isolation of human groups from each other to the existence of cultural particularities.

Self-declaration as a mechanism for attributing indigenous identity is a cornerstone of the current constitutional model. This is because ethnic identity is defined from the inside out, that is, ethnicity is a sociocultural phenomenon that takes place within ethnic groups in relation to the outside. As a rule, this situation resembles a game of mirrors in which one group perceives itself as different from the other due to the contrast that occurs in situations of interethnic contacts.

From the normative framework for the protection of indigenous peoples, some principles can be identified that the judge must take into consideration in all procedural acts involving indigenous people, including and especially when sentencing cases. They are:

1.1. Diversity of indigenous peoples

The 2010 Census identified in Brazil an indigenous population of about 900,000 people distributed among 305 ethnic groups, a diversity that cannot be reduced to a homogeneous category of "indigenous" for the purpose of abstractly and generically defining how indigenous people view different conducts considered as crimes or what their justice practices are.

In the same district, it is possible to find indigenous people belonging to different ethnic groups and different peoples, and who, therefore, may view the act seen by the State as a crime in a different way. For this reason, the judge must always be guided by the diversity of indigenous peoples and understand that **each new criminal case** involving an indigenous person **cannot automatically reproduce the answer given in a previous situation**.

The diversity of ethnic groups in the Brazilian territory is also reflected in the multiplicity of languages spoken by indigenous people, a characteristic that has direct impacts on the right of access to justice in its dimension of the right to understand and be understood in procedural acts. Due to this characteristic, it is essential that courts build registers of interpreters, as will be described in topic 3 of this Manual.

The judge must also consider that different indigenous peoples face different status of protection of their territory and therefore organize their way of life and live their customs in a way that is compatible with this situation. Indigenous peoples have the original right and usufruct over their traditional lands, but not all of them are adequately demarcated. Added to the lack of demarcation and the disrespect of the extent of traditional land in the demarcation process, some indigenous lands suffer from invasions for illegal exploitation of resources and the proximity of cities and roads. There are also indigenous people who live in urban contexts, including in large capitals. **None of these housing circumstances can be used by the judge to deny indigenous identity, since the criterion adopted is self-declaration and the categories of acculturated or integrated were banned by the Constitution of 1988.** However, the element of spatial occupation by indigenous people reinforces that there are several particularities that affect them and that must be taken into account during the criminal proceedings.

In each procedure there must be a specific analysis of the concrete case, including requesting a specific anthropological report and consulting the indigenous community about the decision to be adopted, even if there is a previous history of consultation with this community.

1.2. Duty to consult with indigenous communities

The indigenous individual suspected or accused of a crime belongs to a people in which a sociocultural system is distinct from that of the surrounding society. To understand this system it is necessary to look at the whole community, respecting its right to participate in the decision-making processes that affect it.

In addition, even if **the criminal proceedings** turns against the individual, it necessarily **has effects on the community as a whole**, whether by the greater stigmatization of the community because a member's conduct has been criminalized, or by the financial impacts of following the procedure, or even by the functions in the community that will no longer be fulfilled if the convicted person has to serve a sentence or a restraining order. Thus, considering that indigenous peoples have the right to freely determine their relations with the State where they live and also to participate in processes that affect them, the consultation of the judge with the indigenous community not only allows for more contextualized and well-founded decisions to be made, but is an act of respect for the right of the community as a whole to be heard. Ensuring the community an active role in the events in which it is involved also helps to maintain and strengthen its institutions, cultures, and practices.

It is a matter of understanding that since the Federal Constitution of 1988 there has been not only a change in the epistemological paradigm — which recognized the pluri-ethnic character of the State and the right of indigenous peoples to their social organization — but also a methodological change, which concerns **the way** in which the judge conducts proceedings involving indigenous people. It is in this sense that it is stated that criminal proceedings involving indigenous defendants, accused, or convicts must include consultation with their communities.

1.3. Respect for indigenous peoples' language, customs, beliefs, and traditions, as well as for indigenous social organization and political, legal, economic, social, and cultural structures

Indigenous peoples have the right to promote, develop, and maintain their traditional structures and their own customs, traditions, procedures, and practices, including customs or legal systems[1]. This is because **law** is a complex notion that is expressed in ideas and practices related to indigenous peoples' worldviews and **is intrinsically related to culture and tradition**. In general, for indigenous peoples the notions of justice and law are not separated from spiritual, religious, cultural aspects that give coherence to indigenous communities and their members. For this reason, the apprehension of indigenous notions of justice does not usually occur through codifications, but through oral histories, cultural and spiritual traditions, relationships and family obligations, and the relationship with the territory itself. Thus, it is not possible to talk about the protection of indigenous cultural manifestations, as determined by Article 215, §1 of the Federal Constitution, and exclude the recognition of justice practices and traditional methods of conflict resolution.

It is important to emphasize that the concept of traditional referred to by Article 231, 1st Paragraph, makes reference to what the indigenous themselves understand as traditional, which may differ from what non-indigenous say is traditional or typical of indigenous cultures. **The meaning of traditional is not fixed, but concerns what is seen by the indigenous people themselves as legitimate and fundamental to ensure the physical and cultural continuity of the indigenous community. It is not, therefore, a fixed point in a remote and unchanging past. Tradition is constantly re-elaborated and re-signified.**

The judge must always have as a reference that the respect for indigenous customs, traditions, and forms of social organization does not bring as a counterpart a reduction in access to State institutions. Indigenous peoples have both the right to conserve and strengthen their own political, legal, economic, social, and cultural institutions, and to participate fully, to the extent that they wish, in the political, economic, social, and cultural life of the State.

The ability of indigenous peoples to continue and strengthen their own justice systems is an integral component of the rights to self-determination and access to justice provided by international human rights treaties.

1 Article 34 of the Declaration on the Rights of Indigenous Peoples.

1.4. Importance of the right to the territory

Even if the conduct considered a crime in a given situation does not apparently deal with territorial issues, it is necessary to keep in mind that indigenous people have deep ties to their traditional lands and that their cultural identity, their knowledge, and their spirituality are closely associated with the territory. It will be difficult to understand their worldview without recognizing the importance of territory, even in the context of urban indigenous people or indigenous lands near cities.

Indigenous peoples, moreover, have historically been deprived of their lands and natural resources, undermining their enjoyment of rights and access to livelihoods. Considering the centrality of land to indigenous identity, combined with the fact that indigenous people have, over time, been expropriated from their territory, many of the conflicts involving indigenous people — including those with repercussions in the criminal justice system — are related to the situation of the territory.

For this reason, it is important that, in the process of judging indigenous defendants, the judge seeks to understand the situation of the traditional indigenous land, both by consulting the indigenous community and by requesting information from Funai.

1.5. Indigenous peoples' right to access to justice

The recognition of the social organization of indigenous peoples and their justice practices does not remove the duty to guarantee indigenous people access to state justice on equal terms with other citizens. In this regard, the report of the 2016 official visit to Brazil of the UN Special Rapporteur on Indigenous Peoples recommended the elimination of barriers that prevent indigenous peoples from realizing their right to justice.

Furthermore, it is necessary that the State takes an active stance in adopting measures to reverse discrimination against indigenous people. For this, a key mechanism is the production of data that helps identify where the main obstacles are and how to overcome them. For this reason, Article 4 of CNJ Resolution No. 287/2019 establishes that the judge must include in the record of all procedural acts the identification of the person as indigenous and information about their language and ethnicity, especially in the minutes of the detention control hearing. Similarly, the courts must ensure that information on indigenous identity, language and ethnicity is included in the Judiciary's computerized systems.

It follows from the right to judicial protection foreseen in several international instruments, such as Article 8 of the American Convention on Human Rights, approved in 1969 and promulgated by Decree No. 678, 1992, and of which indigenous people are holders, the right to the use of linguistic and cultural interpreters. Similarly, **the State has a duty to ensure that indigenous peoples can understand and be understood in political, legal, and administrative acts**, providing, where necessary, interpretation services or other appropriate means.

1.6. Extreme exceptionality of indigenous incarceration

Incarceration removes the indigenous person from his/her community, traditional territory, family relationships, and way of life. Moreover, the state penal establishment is a mechanism that is exogenous to the social organization of indigenous peoples and is not based on their traditional conflict resolution methods. This disrespect for indigenous social organization and their customs means that incarceration also has a severe and negative impact on physical and mental health of indigenous people.

Along these lines, Article 10 of ILO Convention No. 169, which has supra-legal status in the Brazilian legal system, determines that **in the case of indigenous prisoners, preference should be given to other types of punishment other than imprisonment**. It is worth reinforcing that if the incarceration of natives is extremely exceptional, even in the case of a final conviction, the application of prison as a precautionary measure must be even rarer.

IDENTIFICATION OF INDIGENOUS SUSPECTS, ACCUSED, AND DEFENDANTS

2 IDENTIFICATION OF INDIGENOUS SUSPECTS, ACCUSED AND DEFENDANTS

2.1. The identification of indigenous accused and defendants

The identification of an indigenous defendant or accused occurs through **self-declaration**, which can be expressed at **any time** during the process, including during the detention control hearing, as determined by Article 3 of CNJ Resolution No. 287/2019.

When faced with evidence that suggests the condition of indigenous, such as residence on indigenous land, population composition of the district with a relevant indigenous presence, or the use of languages other than Portuguese[2], it is up to the judge to ask whether the accused, defendant, or convicted person considers him/herself an indigenous person. This question must be asked **simply and clearly**, clarifying that recognition as an indigenous person in the criminal proceedings ensures rights that **protect** their indigenous status and specific needs, such as the right to have an interpreter who will help them understand and make themselves understood before the judge.

Due to the fact that indigenous people have experienced, over time, processes of denial of rights, the intimidating effect that contact with the justice system usually has on anyone, as well as difficulties with the Portuguese language and legal terminology, **many indigenous people may not understand the question about their ethnic** identity or even answer that they are not indigenous because of the stigma and discrimination they have historically faced. In this way, the judge must ensure that the accused, defendant, or convicted person understands that his/her self-declaration as an indigenous person will not generate discriminatory treatment, but will ensure rights.

It is admitted that, pursuant to Article 3, §1, of CNJ Resolution No. 287/2019, information about the indigenous condition of the accused, defendant, or convicted person is brought to the court by other parties, including by the professionals from the penal alternatives centers teams or civil servants from the court itself, as mentioned in topic 3.

2.2. Meaning and consequences of self-declaration as indigenous

If the accused, defendant or convict is identified as an indigenous person, the entire procedure must be oriented towards **adding to** the general procedural guarantees **the specific assurances for indigenous people subject to criminal justice**, explicitly provided for in **CNJ Resolution No. 287/2019**, namely:

(i) the right to have an interpreter at all stages of the process (Article 5);

(ii) the preferential application of the indigenous community's own accountability mechanisms (Article 7);

2 Article 3, §1 of CNJ Resolution No. 287/2019.

(iii) respect for customs and traditions in the application of precautionary measures (Article 8);

(iv) respect for customs and traditions in the application of rights-restricting sentences (Article 9, I);

(v) the conversion of the fine into community service (Article 9, II);

(vi) the preferential fulfillment of community service for the indigenous community (Article 9, III);

(vii) the application of the special semi-liberty regime provided for in Article 56 of the Indigenous Statute when sentenced to imprisonment and detention (Article 10); and

(viii) the adequacy of the conditions for serving sentences in penal establishments to indigenous cultural specificities in matters of social visits, food, health care, religious assistance, access to work, and education (Article 14).

It can be seen from this list that **the specific guarantees of the indigenous person in the criminal process are directly associated with the fact that this person has his/her identity recognized by an indigenous community**. Thus, **there is no way that a non-indigenous person** acting in bad faith **can benefit from** the subjective character **of the self-declaration.** For example, without the recognition of the indigenous community, it is not possible for traditional conflict resolution mechanisms to be applied and approved by the judge as an alternative to state sanctions. Similarly, it will not be possible to speak of a regime of semi-liberty — whose form of compliance is constructed jointly with the indigenous community and Funai — in the case of a non-indigenous person.

Immediately after the self-declaration, the judge must ask about the ethnicity, the language(s) spoken by the accused, defendant, or convict, and his/her level of knowledge of the Portuguese language. **Information on ethnicity and language, as well as identification as indigenous, must appear in the record of all procedural acts**, meeting the provisions of Article 4 of CNJ Resolution No. 287/2019. The courts must also ensure that information on indigenous identity and ethnicity appears in the Judiciary's computerized systems, especially in the minutes of the detention control hearing, in line with Article 7 of CNJ Resolution No. 213/2015.

It is worth noting that the indigenous person will not always know the ethnicity to which they belong. In the 2010 Census, the percentage of indigenous people who could inform the ethnicity or people to which they belonged was 75%. This number in the census was lower precisely in the states where there are more Indigenous who speak only indigenous languages. This way, the judge will not always have the identification of the person's ethnicity right after the self-declaration, but this information can be later incorporated into the acts coming, for example, from Funai or other entities that are part of the permanent support network for judges and courts, discussed in topic 3 of this Manual.

The judge must also forward, within 48 hours, copies of the case records to the nearest regional office of Funai, according to Article 3, §3 of CNJ Resolution No. 287/2019. It is understood that this requirement will be met if digital access to the records is provided within the same period. When forwarding the files or allowing access to Funai, the judge can question the existence of an Indigenous Administrative Birth Registration (RANI) if the accused person does not have basic documentation.

2.3. Evaluation of the understanding of the Portuguese language as well as of procedural acts

Article 2, §2, of CNJ Resolution No. 287/2019 states that as soon as the accused, defendant, or convicted person declares him/herself to be indigenous, the judge must inquire about his/her degree of knowledge of the Portuguese language. This is, however, a very complex issue, since what matters for procedural purposes is not whether the person can communicate and establish social relations in Portuguese, but rather the potential prejudice to his/her right to defense if he/she has to follow the proceedings only in Portuguese. In this sense, it is important that the judge take into account the context of access to education in which indigenous peoples live. According to the 2010 Census, **the literacy rate of indigenous people aged 15 and older is below the national average**. Among the indigenous people who reside on indigenous lands, 32.3% are illiterate.

The judge must be aware that even in cases where the indigenous people have knowledge of Portuguese and are able to answer questions formulated in Portuguese, the need for interpreters in the proceedings cannot be automatically ruled out. This is because having knowledge of the language and being able to establish communication does not mean that the indigenous person has linguistic competence equivalent to that of non-indigenous people. After all, language proficiency is also related to culturally located factors, for example, the way narratives and speech are organized. To illustrate this, one can take the relationship that exists between the way in which causal relationships are established and the perception of time. Time being understood in a cyclical way by certain communities, for example, certainly affects the way events are organized, explained, and what role is attributed to the most varied factors, which are hardly articulated in the direction of an ultimate event.

Therefore, **it is not because the person accused of a crime has transmitted some information in Portuguese that he/she is able to rework the past events related to an alleged crime within the linear argumentative structure required for the determination of procedural truth**. Indigenous people usually reconstruct their past within well-defined speech contexts such as family gatherings, fishing activities, collecting, traveling, etc., so that the occurrence of a particular act cannot be decontextualized from these narrative referentials. Therefore, **having some knowledge of Portuguese is not enough for the indigenous person to do without the presence of an interpreter**.

Furthermore, some linguists assess that the Portuguese spoken by several indigenous peoples is not the standard Portuguese spoken by the majority of the Brazilian population, but an "Indigenous-Portuguese", discursively unique to each indigenous ethnic group. That is, it would be possible to identify a *Portuguese-Guarani*, a *Portuguese-Terena*, etc. In addition, many indigenous people living in frontier regions also incorporate Spanish references into their mother tongue. Therefore, it is reinforced that even if the suspect seems to speak Portuguese reasonably well, there are numerous barriers for him/her to communicate effectively within the framework of a legal proceeding, which has the aggravating factor of having a very specific and technical terminology.

For this reason, **it is recommended that an interpreter be present in the proceedings whenever there is information that the accused or defendant has a primary language other than Portuguese**.

PERMANENT STRUCTURE OF SUPPORT FOR JUDGES AND COURTS IN MATTERS OF INDIGENOUS PEOPLE AND CRIMINAL JUSTICE

3 PERMANENT STRUCTURE OF SUPPORT FOR JUDGES AND COURTS IN MATTERS OF INDIGENOUS PEOPLE AND CRIMINAL JUSTICE

In order for judges and courts to be able to deal with cases involving indigenous accused, defendants or convicts, there must be a permanent activity to create and maintain a network of entities and professionals whose work is indispensable for acting in these cases, under the terms of Article 15 of CNJ Resolution No. 287/2019. To this end, the courts must keep a **register of interpreters** specialized in the languages spoken by the region's ethnic groups. It is necessary that these professionals don't just handle the language, but understand the culture and context in which it is inserted. For this reason it can be interesting that indigenous people play the role of interpreters.

Professionals specialized in the indigenous ethnic groups of the region and **able to prepare expert anthropological reports** must also be registered. These professionals must have a solid knowledge of the culture, traditions, and form of social organization of a given indigenous community, and can be trained anthropologists, social scientists, linguists, or other professionals specialized in the theme. In order to carry out this registration, the courts can publish notices of registration for professionals, requesting that at the time of registration they provide personal documents, a mini-curriculum highlighting the experience of working with indigenous peoples, the description of the area in which they will work, their availability to perform the role of interpreter or expert, and the district(s) where they can work. The procedures adopted for the registration of legal aid lawyers can be used as a reference as to the best way to proceed in recruiting the relevant professionals for cases of indigenous defendants and accused. It is recommended that there be wide dissemination of these notices, especially at state and federal public universities.

If the judge receives a case involving an indigenous person without the register of professionals being ready or complete, it is possible to resort to members of the indigenous communities themselves to act as interpreters, as already provided in Article 5 of CNJ Resolution No. 287/2019. In these situations it is also recommended to establish partnerships with state and federal public universities to accredit professionals, especially from the Faculties of Literature and Social Sciences. For the preparation of the anthropological report, contact with the Brazilian Anthropology Association (ABA) may be pertinent to identify professionals with knowledge about the culture of the accused indigenous person. It is also recommended that Funai be contacted so that its technical staff can indicate professionals from other institutions who have pertinent knowledge for the case.

In addition to these professionals, it is important that the courts articulate a network of organizations and professionals who can provide support in cases involving indigenous people. This may include civil society organizations in defense of indigenous peoples, such as the Indigenous Missionary Council (CIMI), the Socio-environmental Institute (ISA) and the Indigenous Pastoral; indigenous associations; Funai; universities and researchers.

The professionals that make up the **multidisciplinary teams** that support the judges and courts, such as the technical staff of the centers of criminal alternatives, **can collaborate in the articulation of**

this network, through the indication of civil society organizations that work in the protection of indigenous peoples' rights. The experience of these professionals in mobilizing civil society organizations to receive people under community service obligations can be invaluable in building and maintaining a solid network for monitoring cases involving indigenous people, including the indication of people able to act as interpreters or experts when there are no professionals previously registered.

In addition, it is up to the professionals in the multidisciplinary teams to help ensure that court procedures are culturally appropriate and that the particular needs of each indigenous person are taken into consideration by the judge. This includes the **possibility that the self-declaration of the accused or defendant as being indigenous may take place before members of these teams**, in the event that the person has not understood the question asked by the judge about his/her ethnic belonging or has said that he/she was not indigenous for fear of being discriminated. Especially when precautionary measures or rights-restricting sentences are applied, **the staff of the central office of penal alternatives must provide technical elements to help adapt the measure or sentence to the customs and traditions of each people**. The monitoring of the judicial order by the central office must pay attention to possible impacts on the experience of indigenous customs and traditions, informing the judge of the need to to adjust the penalty or measure imposed to the conditions, customs, place of residence, and traditions of the indigenous person.

DECISION-MAKING IN CRIMINAL CASES INVOLVING ACCUSED, DEFENDANTS OR CONVICTED INDIGENOUS PEOPLE

4 DECISION-MAKING IN CRIMINAL CASES INVOLVING ACCUSED, DEFENDANTS OR CONVICTED INDIGENOUS PEOPLE

Considering the normative framework of protection of indigenous peoples, in particular Article 10 of ILO Convention No. 169, **the rule in criminal proceedings involving indigenous defendants is non-incarceration**. Due to the duty to respect the indigenous communities' own social organization, **first of all one must consider homologating practices of conflict resolution and** accountability in accordance with the **indigenous community's own** customs and norms, as determined by Article 7, sole paragraph of CNJ Resolution No. 287/2019.

According to Article 9 of CNJ Resolution No. 287/2019, only exceptionally, in the face of, for example, express indication by the community that the most appropriate treatment is state punishment, or the non-existence of an indigenous community, may the judge render a conviction by applying rights-restricting sentences adapted to indigenous conditions and customs. It is recommended that, if a pecuniary fine is imposed, it must be converted into community service, which can be performed within the community, whenever the community authorizes it.

As it was exceptionally impossible to apply the rights-restricting penalties, Article 10 of CNJ Resolution No. 287/2019 clarifies that in cases of conviction to detention or imprisonment, the judge may apply the semi-liberty regime provided for in Article 56 of Law No. 6,001/73, upon consultation with the indigenous community.

In relation to precautionary measures, the rule is the non-application of any measure that restricts rights in the course of criminal proceedings under the presumption of innocence. If the imposition of a precautionary measure is proven necessary, the judge must adapt it to the cultural particularities of indigenous peoples, as determined by Article 8 of CNJ Resolution No. 287/2019, including in cases related to the application of the Maria da Penha Law.

Given this general overview of the possible outcomes of criminal proceedings involving indigenous defendants or accused, and it being evident that **incarceration in a state penal establishment is absolutely the last hypothesis**, we will now detail the procedures by which the judge must be guided in making a decision, under CNJ Resolution No. 287/2019.

4.1. Tools needed for decision-making: community consultation and anthropological expert report

The application of any type of state penalty to indigenous people is not indicated in two hypotheses: (i) **when the indigenous community** to which they belong has already **applied —** or intends to apply — its **own methods of conflict resolution**, on account of the principle of the prohibition of *bis in idem;* (ii) when the conduct charged **cannot be considered illicit from the point of view of indigenous customs**, in which case the application of any sanction would be an offense to the constitutional right of the indigenous people to their own customs, and social and legal organization.

In this case, in **order to assess the correspondence between the conduct practiced by the indigenous person and the values of the community to which he/she belongs,** as well as to identify the possibility of applying indigenous conflict resolution mechanisms, **there are two instruments to be used by the judge: the anthropological expert report and the consultation with the indigenous communities.**

The anthropological report is a fundamental tool for the judicial treatment of indigenous people because it allows us to understand the person being judged from the context of the community in which he/she lives. Understanding this context requires a specific knowledge that cannot be automatically grasped within ordinary procedural acts, because the **narratives**, the systematization of knowledge, the **criteria of truth, and** the organization of narratives are also elements that are **conditioned by cultural contexts**. The appropriate mechanism for providing the judge with pertinent information to decide on the approval of indigenous conflict resolution practices or the application of other accountability measures is the anthropological expert report. This may be prepared by anthropologists, social scientists, linguists or other professionals specialized in the community or ethnic group to which the accused or defendant belongs.

The anthropological report must be requested ex officio when the judge receives an accusation or complaint against an indigenous person **or at the request of the parties**, as provided in Article 6 of CNJ Resolution No. 287/2019. In order for the report to offer subsidies for establishing the responsibility of the accused person, it must contain the **qualification, ethnicity and language spoken by the indigenous person**, as well as their **ability to communicate in Portuguese** in the context of the criminal proceedings. It must also bring the personal, cultural, social, and economic **circumstances of the accused person**, always clarifying that within the current constitutional order of defense of cultural diversity and citizenship, information indicating, for example, **access to formal education, work activities, the exercise of voting rights, and possession of a national driver's license do not harm the identification of the person as indigenous**, since the theory that questioned the degree of assimilation into the national community has been overcome, the indigenous status is defined by self-declaration, which is sufficient so that the entire criminal process must respect indigenous customs, traditions, and social organization.

The anthropological report must clarify the **correspondence between the conduct practiced and the indigenous community's customs, beliefs, and traditions**. As the Constitution recognizes and respects indigenous customs, the judge cannot consider criminal conduct that is practiced in conformity with these values. It is important to mention that this is a hypothesis of exclusion of guilt and that it must not be confused with the mistake about illegality, which is a situation in which the subject commits a conduct without knowing it is criminal. The basis here is different, that the conduct practiced is in conformity with the indigenous traditions and customs to which the person belongs and that are recognized by Article 231 of the Federal Constitution of 1988.

Finally, it is up to the anthropological report to **indicate whether the imputed conduct is considered by the indigenous community itself as liable to be held responsible** and, if so, if there are and what are the proper mechanisms of justice to be adopted.

The second instrument to be mobilized by the judge **for decision-making in criminal cases with indigenous defendants is consultation with the indigenous community**, which must be conducted with

the purpose of respecting the rights of both the indigenous defendant and the community to which that defendant belongs. This is because, **on the one hand**, **consultation** is a mechanism that contextualizes and clarifies the meaning of the imputed conduct and **must be seen as one of the guarantees of the indigenous defendant's right to defense. On the other hand, consultation is a** way of realizing the **collective right of indigenous peoples** to determine the responsibility of individuals to their communities and to participate in decisions that affect them[3].

To initiate the consultation process, the judge must identify legitimate interlocutors within the community itself to inform them of the existence of the criminal process, its possible consequences, and the community's right to express its understanding regarding that conduct and the most appropriate means of accountability. To identify these legitimate interlocutors, the **judge may request that the anthropological expert report include information on the most appropriate way to initiate a consultation process with the community**, naming the relevant indigenous authorities. Another option is to request information about who are the leaders of the community from Funai, civil society organizations that defend indigenous peoples' rights, indigenous associations in the region, or researchers specialized in that indigenous community.

From the moment the community is informed through its legitimate representatives about its right to express its opinion on the accountability of the accused indigenous person, it **will be up to the community itself to determine the procedure to reach the conclusion that will be later informed to the judge**. In this sense, the judge must take into account that the time the consultation will take depends on the rhythms and procedures that each community uses. In **no way is the delay in consultation a ground for justifying the remand of the indigenous defendant** in custody.

It is important that consultation with indigenous communities on how to hold the accused accountability is done in good faith, offering in a clear and simple manner full information about the conduct imputed to the defendant and the possible legal consequences in state justice. As for the result, **consultation must be effective,** that is, the understandings expressed by the community through consultation must be taken seriously and adequately contemplated in the decision rendered by the judge. The consultation cannot be seen as a mere formality, otherwise its double dimension of collective right to participation and individual right to a full defense will not be respected.

If the indigenous community voluntarily presents itself to the court communicating its understanding about the imputed conduct and the pertinent mode of accountability, the judge may understand that the consultation requirement provided for in CNJ Resolution No. 287/2019 has been met, according to the evaluation of the concrete case. In any case, it is fundamental that in this voluntary presentation the indigenous community has its right to understand and make itself understood in the process attended to, and that, if necessary, an interpreter is made available.

The information about the result of the consultation can be brought to the attention of the judge through the anthropological report. In this case, the report must differentiate between the expert's own general assessment of the community's conceptions of justice, its legal organization, and its conflict

3 Article 35 of the UN Declaration on the Rights of Indigenous Peoples.

resolution practices, and the indigenous community's conclusion regarding accountability in the specific case that gave rise to the lawsuit. Furthermore, the report must expressly **state how the consultation took place**, the proper procedures used by the community, and how the expert accompanied it. In any case, **it is preferable that the consultation and the report are distinct and complementary procedures** which, when articulated, will allow the judge to reach the most appropriate decision for the case.

Considering that the judge may exceptionally apply rights-restricting sentences, precautionary measures, house arrest, or order the execution of detention or imprisonment in a regime of semi-liberty, the consultation with the communities must contemplate questions about how the community views these measures, that is: (i) if the community accepts the execution of house arrest within the community; (ii) if it is pertinent the execution of community service within the community; and (iii) if it is possible the execution of the regime of semi-liberty within the community.

4.2. Possible outcomes of criminal prosecution with indigenous defendant

4.2.1. The rule of respect for the indigenous community's own mechanisms

Identifying that there are indigenous community's own mechanisms to deal with the imputed conduct, the constitutional paradigm **of respect for indigenous beliefs, customs, and traditions assigns to the judge the duty to also respect the practices of justice and accountability practiced by the indigenous community. As a consequence, the judge must adopt or homologate these dispute resolution practices pursuant to Article 7, sole paragraph of CNJ Resolution No. 287/2019 and Article 57 of Law 6,001/73. This is the same orientation of Article 9 of ILO Convention No. 169, an instrument legally binding on Brazil, which determines that, to the extent compatible with the national legal system and internationally recognized human rights, the methods traditionally used by the peoples concerned to repress crimes committed by their members must be respected**.

Thus, one of the situations that can legitimately justify the non-application of the indigenous community's own mechanisms is that in which the traditional methods of repression are violative of human rights, such as cruel treatment and torture. Even so, in these **cases it is necessary that the evaluation of the possible disrespect of human rights norms by the application of indigenous traditional methods must be supported by the anthropological expert report, in the sense of signaling that within the indigenous community's own cosmovision such methods can be seen as forms of torture or degrading treatment**. Apart from this, the methods are compatible with the constitutional and international human rights system and must be respected by the judge regardless of a value judgment from outside this community. Furthermore, if in a **concrete case** it is considered that the penalty applied by the indigenous culture would not be compatible with the rules of international human rights law, the approval of the community's conflict resolution practices cannot be invalidated in a general and abstract way.

4.2.2. Application of rights-restricting sentences and precautionary measures

Exceptionally, if the indigenous community indicates a preference for state responsibility, or if the proposed traditional methods are considered to violate fundamental rights within the indigenous worldview, the judge that passes the criminal sentence should apply rights-restricting sentences, in the name of the guideline of avoiding as much as possible the incarceration of indigenous people.

In this case, as stated in Article 10 of ILO Convention No. 169, **when criminal sanctions are imposed by general criminal legislation on indigenous people, their economic, social, and cultural characteristics must be taken into account**. This means, for example, prioritizing the possibility of community service within the indigenous community itself, whenever the community agrees.

If the penalty of temporary interdiction of rights is applied, the hypothesis of prohibition to frequent certain places cannot offend the indigenous person's right to practice religious rituals or to guarantee his/her subsistence and that of the community by hunting, fishing, gathering, or agricultural cultivation.

The duty to adapt to cultural specificities also applies to precautionary measures, including those applied in detention control hearings or under the Maria da Penha Law. The frequency of court appearances, for example, must be determined by considering the economic vulnerability of indigenous peoples and the financial impact of commuting from their place of residence to the forum. Socioeconomic vulnerability must also be taken into account when applying bail, since the recognition of the lack of resources of indigenous peoples guided the determination by CNJ Resolution No. 287/2019 that, in the case of monetary fines, they may be converted into community service. Another example of a measure that takes into consideration the peculiarities of indigenous peoples is the night shift house arrest and the obligation not to make participation in cultural practices and religious rituals incompatible.

It is noted that if there are centers for alternative sentencing, the multidisciplinary teams must be attentive to the compatibility between the sentences or measures imposed and the traditions and customs of the indigenous people, bringing to the attention of the judge situations of conflict and the need for readjustment.

4.2.3. Application of the special regime of semi-liberty

The provision in Article 56, sole paragraph, of the Indigenous Statute for a regime of semi-liberty for serving prison sentences and detention was accepted by the current constitutional order insofar as it gives effect to the extreme exceptionality of indigenous incarceration. However, the place of performance of this regime must consider the specific circumstances of each locality and cultural particularities of the convicted indigenous person.

In the hypothesis of applying the regime of semi-liberty, the judge must construct, together with Funai — and taking into consideration consultation with the indigenous community — the most appropriate conditions for compliance with the regime, always having as a guideline the constitutional duty to respect the customs of indigenous peoples and their social organization.

4.2.4. Imprisonment or confinement in a penal institution

Because imprisonment of indigenous people in a penal institution restricts not only the rights of the convicted person, but also those of the indigenous community as a collectivity, it must be extremely exceptional. For this reason, it is recommended that the judge justifies in the sentence why he/she did not first ratify traditional methods of conflict resolution; secondly, why he/she did not apply rights-restricting penalties; and thirdly, why he/she did not apply the regime of semi-liberty.

Additionally, it must be considered that there are several specific obligations to be followed in the event that an indigenous person is placed in a penal institution. These obligations were listed in topic 6 of this Manual.

PARTICULARITIES OF THE INDIGENOUS WOMAN SUBJECT TO CRIMINAL JUSTICE

5 PARTICULARITIES OF THE INDIGENOUS WOMAN SUBJECT TO CRIMINAL JUSTICE

Cases involving **indigenous women** who are accused, defendants, or convicted of crimes require the judge to recognize that they **suffer multiple forms of discrimination** that cause, as a rule, greater difficulty in accessing rights. Thus, the judge must pay special attention to the full exercise of their right to defense and consider that in all procedural acts and decision-making the gender perspective must be considered. This kind of concern is manifested, for example, by the care taken with the number of people present at the judicial acts and the possibility that they are not only men.

In order for the judge to have elements to adequately address the gender perspective in procedural acts, it is important that this issue is submitted to anthropological expertise. In this way, the judge will have elements to understand the specific meanings that the conduct considered criminal assumes within the customs and social organization of the specific community, and thus adapt, within the gender perspective, the consultation procedure with the community that will define the way of accountability in the concrete case.

5.1. Extreme exceptionality of deprivation of liberty measures

As a rule, the application of criminal measures against women must favor non-custodial measures as a mechanism to avoid deepening the structural gender inequality in access to rights, and also because of the role that most women play as the primary caregivers of children, the elderly, and people with disabilities. This is the understanding that guides the Bangkok Rules and Law No. 13,769 of 2018.

In the case of indigenous women, the extreme exceptionality of deprivation of liberty measures is reinforced by the role that many of them play in the continuity of their culture and the survival of their peoples, in such a way that their imprisonment affects the collective identity of the community to which they belong and their traditional practices.

Thus, in the exceptional case of pre-trial detention order of indigenous women, house arrest must be applied as a substitute for pregnant women, mothers or those responsible for children or adults with disabilities, under the terms of Article 318-A of the Code of Criminal Procedure, which must be served within the indigenous community, according to Article 13 of CNJ Resolution No. 287/2019.

The monitoring of the special regime progression provided for in Article 112, §3 of the Criminal Enforcement Law will be carried out together with the indigenous community, under the terms expressed in Article 13, II of CNJ Resolution No. 287/2019.

TREATMENT OF INDIGENOUS PERSONS DEPRIVED OF THEIR LIBERTY

6 TREATMENT OF INDIGENOUS PERSONS DEPRIVED OF THEIR LIBERTY

The deprivation of liberty of an indigenous person in a penal establishment is an extremely exceptional situation. The preferred way to deal with crimes involving indigenous people is, in the first place, the recognition and enforcement of the indigenous community's own accountability mechanisms or, as an alternative duly grounded on information coming from the anthropological report and community consultation, the application of rights-restricting sentences. If it is not applicable and there has been a conviction for imprisonment or detention, the special regime of semi-liberty foreseen in Article 56 of the Indigenous Statute must be applied. Deprivation of liberty in a penal establishment only appears in the case where, by express manifestation of the community or other reason duly substantiated by the judge, it is not possible to apply the regime of semi-liberty. In the latter case, there are a number of particular obligations concerning the incarcerated indigenous person that the execution judge must oversee and which are provided for in Article 14 of CNJ Resolution No. 287/2019.

6.1. Rights of indigenous persons deprived of their liberty

6.1.1. Social visits

All forms of kinship and affinity relations recognized by the ethnic group to which the indigenous person arrested belongs must be taken into account when carrying out social visits. **The list of visitors for indigenous people must be as broad as possible** because of the severe impact that imprisonment has on indigenous communities. The visitation days must respect the indigenous customs and be on different days when necessary.

The culture of the community must be respected in all procedures that the visiting indigenous person has to undergo. It must be considered that personal search and body inspection practices can be particularly violent for indigenous people, and adapt them to make the continuity of visits and indigenous cultural requirements compatible.

6.1.2. Food

The prison administration must ensure that there is regular provision of food within the dietary customs of each indigenous community. Access to food from the outside by family members of the prisoner, the indigenous community, or indigenous institutions must also be guaranteed.

Respect for cultural particularities in the right to food includes access to water. In addition, respect for food customs encompasses not only the type of food that is served, but also the way it is prepared and the way food is offered and consumed, including with regard to the architectural features of the place of deprivation of liberty. For many indigenous peoples, for example, the place where families live, prepare and consume their food cannot be the same place where people urinate and defecate.

6.1.3. Health

Health care must follow the parameters of the National Policy for Health Care for Indigenous Peoples, in order to respect the ethnic, cultural, and epidemiological particularities of indigenous peoples. Among the important guidelines for access to health care for incarcerated indigenous people are respect for the healing traditions of each people and consent to perform any medical procedure or to prescribe medication.

The prison administration must monitor the health status of the indigenous person in prison upon entry to the penal institution and identify as soon as possible signs of deterioration in physical or mental health. **The judge responsible for monitoring the execution of the sentence must also be alert to evidence of risk to the personal integrity and life of indigenous detainees, especially the risk of suicide,** and consider the impact of continued deprivation of liberty in a penal institution on the deterioration of the health conditions of the indigenous detainee.

6.1.4. Religious assistance

Respecting the religious freedom of indigenous people and maintaining their religious practices demands access to qualified representatives of the respective indigenous religion, including on different days according to their customs and traditions.

In addition, access must be allowed to all material elements related to religious practices, such as props, objects of worship, painting materials, and food of a religious character, among others.

6.1.5. Labor

Indigenous people have the right not to be subjected to discriminatory working conditions, especially with regard to remuneration. The work activities as well as the working hours and other conditions must respect indigenous cultural particularities and customs.

It is recommended to provide access to the materials necessary for the practice of traditional handicrafts, which can be made inside the penal establishment as work for the purpose of sentence remission.

6.1.6. Education

Indigenous people are entitled to all levels and forms of state education without discrimination. Access to education for indigenous prisoners must consider the right of indigenous peoples to establish and control their educational systems and institutions, which offer education in their own languages and in line with their cultural methods of teaching and learning. For the attention to this right, it is recommended that the respective state secretariat of education is contacted to verify the availability of indigenous education policies.

Respect for the indigenous language must be observed both in access to didactic material and in access to books for the purpose of remission through reading.

6.1.7. Gender particularities

It must be considered that indigenous women accused of crimes face multiple discriminations that tend to perpetuate a condition of less access to rights. For this reason, the enforcement court must closely monitor the conditions in the penal establishments where these women will be held, continuously throughout the execution of their sentences. It is the role of the judge to ensure that indigenous women enjoy full protection and guarantees against all forms of violence and discrimination.

Indigenous women imprisoned in penal establishments must have their gender particularities taken into consideration when **adapting the conditions for serving their sentence to indigenous** cultural characteristics, especially their needs for health, but also for work, religious assistance, education, and food.

Historically, indigenous women have faced many obstacles to exercising their sexual and reproductive rights, including disrespect for their right to self-determination and cultural autonomy. Therefore, access to health care for indigenous women must be promoted with respect for their customs and traditions, including in cases where pregnant or lactating indigenous women are in state custody, in which case the rules on house arrest and regime progression also apply, in accordance with Law No. 13,257/18. In this sense, it must be emphasized that just as in the case of non-indigenous people, **a criminal conviction of an indigenous woman does not imply removal of family power**, in the terms of Article 23, §2 of the Child and Adolescent Statute. If the indigenous woman is imprisoned with her child in the penal establishment — as provided for in Article 83, §2 and Article 89 of Law No. 7,210 of July 11, 1984 — the mother's autonomy to conduct breastfeeding, feeding, and all care practices in accordance with her customs must be respected.

If the indigenous woman gives birth in state custody, state officials must ensure that there is no form of violence before, during, and after the birth, and that the procedures are in accordance with the customs of the mother's culture. Among the practices that could constitute violence are the use of handcuffs — prohibited by Article 292, sole paragraph of the CPP —, non-consented medical interventions, denial of resources requested for pain relief or the requirement that the birth occurs in the lithotomic position (lying face up).

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APPENDIX

National Council of Justice Resolution No. 287 of 25/06/2019

Ement: Establishes procedures for the treatment of indigenous people who are accused, defendants, convicted, or deprived of their liberty, and provides guidelines to ensure the rights of this population in the criminal sphere of the Judiciary.

THE PRESIDENT OF THE NATIONAL COUNCIL OF JUSTICE, in the use of his legal and regimented attributions;

CONSIDERING the National Council of Justice is responsible for the inspection and normatization of the Judiciary Branch and of the acts practiced by its bodies (Article 103-B, §4, I, II, and III, of the Federal Constitution);

WHEREAS, the United Nations Declaration on the Rights of Indigenous Peoples recognizes their right to maintain and strengthen their own political, legal, economic, social, and cultural institutions (Arts. 5 and 34);

WHEREAS, the United Nations Declaration on the Rights of Indigenous Peoples establishes that States must take effective measures to ensure the protection of the rights of indigenous peoples, including providing interpretation services and other appropriate means (Article 13.2);

CONSIDERING the recognition of the social organization, customs, languages, beliefs, and traditions of the indigenous populations (Article 231 of the Federal Constitution);

WHEREAS, the report of the 2016 mission of the UN Special Rapporteur on indigenous peoples in Brazil recommended that the Judiciary, Legislative, and Executive Branches of government consider, as a matter of urgency, and in collaboration with indigenous peoples, the elimination of barriers that prevent them from realizing their right to justice;

CONSIDERING the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders — Bangkok Rules (Rules 54 and 55);

CONSIDERING the exceptionality of indigenous incarceration under Convention No. 169 on Indigenous and Tribal Peoples (Arts. 8, 9, and 10) and the terms of the International Labor Organization — ILO (Article 10.2);

CONSIDERING provisions of the Indigenous Statute (Arts. 56 and 57 of Law No. 6,001, December 19, 1973);

CONSIDERING the provision for substitution of pre-trial detention with house arrest for pregnant women or women who are mothers or responsible for children or persons with disabilities and the discipline of the regime for serving a custodial sentence (Law No. 13,769/2018);

CONSIDERING decision handed down by the 2nd Panel of the Supreme Court in *Habeas Corpus* No. 143,641/SP;

CONSIDERING the deliberation of the CNJ Plenary, in Act Procedure No. 000388063.2019.2.00.0000, 293rd Ordinary Session, held on June 25, 2019;

DECIDES:

Article 1. To establish procedures for the treatment of indigenous people who are accused, defendants, convicted, or deprived of their liberty, and to provide guidelines to ensure the rights of this population in the criminal ambit of the Judiciary.

Article 2. The procedures of this Resolution will be applied to all people who identify themselves as indigenous, Brazilians or not, speakers of both Portuguese and native languages, regardless of where they live, in urban contexts, camps, settlements, repossession areas, regularized indigenous lands and in different stages of land regularization.

Article 3. The recognition of a person as being indigenous will be by means of self-declaration, which can be made at any stage of the criminal process or during the detention control hearing.

1st Paragraph. Faced with evidence or information that the person brought before a court is indigenous, the judge must inform him/her of the possibility of self-declaration, and inform him/her of the guarantees arising from this condition, as provided for in this Resolution.

2nd Paragraph. In the case of self-declaration as indigenous, the judge must inquire about ethnicity, spoken language, and level of knowledge of the Portuguese language.

3rd Paragraph. In the event of the identification of an indigenous person foreseen in this article, copies of the case records must be forwarded to the closest regional office of the National Indigenous Foundation (Funai) within 48 (forty-eight) hours.

Article 4. The identification of the person as indigenous, as well as information about his/her ethnicity and the language he/she speaks, must be included in the register of all procedural acts.

1st Paragraph. The courts must ensure that information about indigenous identity and ethnicity, brought at any time during the proceedings, is included in the computerized systems of the Judiciary.

2nd Paragraph. This information must be included especially in the detention control hearing, in line with Article 7 of CNJ Resolution No. 213/2015.

Article 5. The judge will seek to guarantee the presence of an interpreter, preferably a member of the indigenous community itself, at all stages of the proceedings in which the indigenous person appears as a party:

I — if the spoken language is not Portuguese;

II — if there is doubt about the mastery and understanding of the vernacular, including in relation to the meaning of procedural acts and the manifestations of the indigenous person;

III — upon the request of the defense or Funai; or

IV — at the request of an interested person.

Article 6. Upon receiving an accusation or complaint against an indigenous person, the judge must determine, whenever possible, *ex officio* or at the request of the parties, that an anthropological expertise will be conducted, which will provide support for the establishment of responsibility of the accused person, and must contain, at least:

I — the qualification, ethnicity, and spoken language of the accused person;

II — the personal, cultural, social, and economic circumstances of the accused person;

III — the uses, customs, and traditions of the indigenous community to which he/she belongs;

IV — the indigenous community's understanding in relation to the typical conduct imputed, as well as the judgment and punishment mechanisms adopted for its members; and

V — other information it deems pertinent to the elucidation of the facts.

Sole paragraph. The expert report will be prepared by an anthropologist, social scientist, or other professional designated by the court with specific knowledge in the subject matter.

Article 7. The accountability of indigenous people must consider the indigenous community's own mechanisms to which the accused person belongs, through prior consultation.

Sole paragraph. The judge must adopt or ratify conflict resolution and accountability practices in accordance with the indigenous community's own customs and norms, in accordance with Article 57 of Law No. 6,001/73 (Statute of the Indigenous).

Article 8. When imposing any precautionary measure alternative to imprisonment, the judge must adapt it to the conditions and terms that are compatible with the indigenous person's customs, place of residence, and traditions, observing Protocol I of CNJ Resolution No. 213/2015.

Article 9. Exceptionally, not being the case of Article 7, when defining the penalty and the compliance regime to be imposed on the indigenous person, the judge must consider the cultural, social and economic characteristics, their statements and the anthropological expertise, in order to:

I — apply rights-restricting sentences adapted to the conditions and terms compatible with the indigenous person's customs, place of residence, and traditions;

II — consider converting the monetary fine into community service, as provided by law; and

III — determine the performance of community service, whenever possible and after prior consultation, in an indigenous community.

Article 10. If the conditions for applying the provisions of Articles 7 and 9 do not exist, the judge must apply, whenever possible and in consultation with the indigenous community, the special regime of semi-liberty foreseen in Article 56 of Law No. 6,001/1973 (Statute of the Indigenous), for sentences of imprisonment and detention.

Sole paragraph. In order to comply with the provisions in the *caput*, the judge must seek to articulate with the indigenous community authorities of the judicial district or section, as well as establish partnerships with Funai or other institutions, with a view to qualifying the flows and procedures.

Article 11. For the purposes of determining house arrest for an indigenous person, the territory or geographical circumscription of the indigenous community must be considered a domicile, when compatible and after prior consultation.

Article 12. In the case of concomitant application of measures alternative to prison as provided for in Article 318-B of the Code of Criminal Procedure, the appropriate form of compliance must be assessed according to cultural specificities.

Article 13. The criminal treatment of indigenous women will consider that:

I — for the purposes of the provisions of Article 318-A of the Code of Criminal Procedure, house arrest imposed on indigenous women who are mothers, pregnant women, or women responsible for children or persons with disabilities, will be served in the community; and

II — the monitoring of the execution of indigenous women benefiting from regime progression, under the terms of articles 72 and 112 of the Penal Enforcement Law, will be carried out in conjunction with the community.

Article 14. In prisons where there are indigenous persons deprived of their liberty, the criminal execution court, in the exercise of its supervisory powers, must ensure that the indigenous person is guaranteed material, health, legal, educational, social, and religious assistance, provided in accordance with their specific cultural characteristics, taking into consideration, especially:

I — To conduct social visits:

a) the forms of kinship recognized by the ethnic group to which the indigenous person arrested belongs;

b) visits on different days, considering indigenous customs; and

c) respect for the culture of visitors to the respective community.

II — For food in accordance with the food customs of the respective indigenous community:

a) regular supply by the prison administration; and

b) the access to food from the external environment, with their own resources, from their families, communities, or indigenous institutions.

III — For health care: the national parameters of the policy for health care for indigenous peoples;

IV — For religious assistance: access by qualified representative of the respective indigenous religion, including on different days;

V — For work: respect for indigenous culture and customs; and

VI — For education and remission through reading: respect for the language of the indigenous person.

Article 15. The courts must keep a register of interpreters specialized in the languages spoken by the region's ethnic groups, as well as of expert anthropologists.

Sole paragraph. In order to comply with the provisions in the *caput*, the courts may promote partnerships with public and private bodies and entities that work with indigenous peoples, in order to accredit professionals who can intervene in cases involving indigenous peoples under the terms of this Resolution, preferably with the support of Funai.

Article 16. To comply with the provisions of this Resolution, the courts, in collaboration with the Schools of Magistrates, must promote courses aimed at the permanent qualification and functional updating of the magistrates and servants who work in the Criminal Courts, Special Criminal Courts, Courts for Domestic and Family Violence against Women, and Criminal Execution Courts, especially in the Courts and Judicial Sections with the largest indigenous populations, in collaboration with Funai, higher education institutions, or other specialized organizations.

Article 17. The Department for Monitoring and Inspection of Prison and Socio-Educational Systems of the National Council of Justice will prepare, within ninety days, a Manual to guide the courts and magistrates on the implementation of the measures provided for in this Resolution.

Article 18. This Resolution goes into effect ninety days after its publication.

Justice DIAS TOFFOLI

President

OTHER NORMATIVE REFERENCES

Constitution of the Federative Republic of Brazil of 1988

Article 231. The Indigenous are recognized for their social organization, customs, languages, beliefs, and traditions, and the original rights over the lands they traditionally occupy, which are responsibility of the Union to demarcate them, protect, and enforce respect for all their assets.

Article 215. The State will guarantee everyone the full exercise of cultural rights and access to the sources of national culture, and will support and encourage the appreciation and dissemination of cultural manifestations.

1st Paragraph. The State will protect the manifestations of popular, indigenous, and Afro-Brazilian cultures, and those of other groups participating in the national civilizing process.

International Labor Organization Convention No. 169 concerning Indigenous and Tribal Peoples

Article 8

1. In applying national legislation to the peoples concerned, due regard must be given to their customs or customary law.
2. These peoples must have the right to retain their own customs and institutions, as long as they are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Whenever necessary, procedures must be established to resolve conflicts that may arise in the application of this principle.
3. The application of the 1st and 2nd Paragraphs of this Article must not prevent members of these peoples from exercising the rights recognized for all citizens of the country and from assuming the corresponding obligations.

Article 9

1. To the extent that this is compatible with the national legal system and internationally recognized human rights, the methods traditionally used by the peoples concerned to repress crimes committed by their members must be respected.
2. Authorities and courts requested to rule on criminal matters must take into account the customs of the mentioned peoples on the subject.

Article 10

1. When criminal sanctions are imposed by general legislation on members of these peoples, their economic, social and cultural characteristics must be taken into account.
2. Other types of punishment than imprisonment should be preferred.

United Nations Declaration on the Rights of Indigenous Peoples

Article 5

Indigenous peoples have the right to conserve and strengthen their own political, legal, economic, social, and cultural institutions, while maintaining their right to participate fully, if they desire, in the political, economic, social, and cultural life of the State.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to assign names to their communities, places and people, and to maintain them.
2. States must take effective measures to guarantee the protection of this right and also to ensure that indigenous peoples can understand and be understood in political, legal, and administrative acts, providing, where necessary, interpretation services or other appropriate means.

Article 27

States must establish and implement, in conjunction with the indigenous peoples concerned, a fair, independent, impartial, open, and transparent process, in which due recognition is given to the laws, traditions, customs, and land use systems of indigenous peoples, for recognizing and adjudicating the rights of indigenous peoples to their lands, territories and resources, including those that they have traditionally owned, occupied or otherwise used. Indigenous peoples will have the right to participate in this process.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their own customs, spirituality, traditions, procedures, practices and, where they exist, legal customs or system, in conformity with international human rights standards.

Article 40

Indigenous peoples have the right to equitable and fair procedures for the settlement of disputes with States or other parties and a prompt decision on such disputes, as well as an effective remedy for any injury to their individual and collective rights. In making such decisions, due consideration will be given to the customs, traditions, norms, and legal systems of the indigenous peoples concerned, and to international human rights standards.

American Convention on Human Rights

Article 8. Judicial guarantees.

2. Everyone accused of a crime has the right to be presumed innocent until proven guilty according to law. During the process, everyone is entitled, in full equality, to the following minimum guarantees:

    a. the right of the accused to be assisted free of charge by a translator or interpreter if he/she does not understand or speak the language of the court.

United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (Bangkok Rules)

Rule 54

Prison authorities should recognize that women prisoners from different religious and cultural traditions have different needs and may face multiple forms of discrimination in gaining access to programs and services whose implementation is linked to gender and cultural factors. Thus, prison authorities should offer comprehensive programs and services that include these needs, in consultation with the prisoners themselves and relevant groups.

Rule 55

Pre and post-release care services will be reviewed to ensure that they are adequate and accessible to prisoners of indigenous and ethnic and racial minority backgrounds, in consultation with the corresponding groups.

TECHNICAL DATA SHEET

Department for Monitoring and Supervision of the Prision System and System for Execution of Socio-Educational Measures (DMF/CNJ)

Auxiliary Judges of the Presidency

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