

Indigenous Lands and The (I) Legitimate Exploitation

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Abstract— In a historical context it is observed that since old times indigenous people were remarkable in the settlements and cultural fixation of the country, so much that the areas occupied by them are Union's goods. From this point of view, it is important to identify the constitutional and legal basis of indigenous lands, observing such configuration in a context of exploratory activities reinforced by rural leases and agribusiness practices.

Keywords— Exploratory activities, Historical Aspects, Indigenous Land, Legislation.

I. INTRODUCTION

Indigenous lands are for typical agrarian activities in addition to others, what makes relevant the research from an environmental and legal perspective, based on an assumption of the rural leases and its deployments, legal or not.

The legislation that deals with indigenous people is gaining space into Brazilian law. Law number 601/1850 (Land Acts) is pioneering in concern with indigenous people, reserving wastelands to settlement by these people, being beyond preliminary and even succeeded constitutions. The constitutional history was thus outlined:

Federal Constitution 1934:

Art. 129 – It will be respected land ownership by forest dwellers since they are permanently located there, however it is forbidden to alienate it (BRASIL, 1934).

Federal Constitution 1937:

Art. 154 – It will be respected to forest dwellers the land ownership where they are permanently located, however, it is forbidden to alienate it (BRASIL, 1937).

Federal Constitution 1946:

Art. 216 – It will be respected to forest dwellers the land ownership where they are permanently located on the condition that they do not transfer It (BRASIL, 1946).

Federal Constitution 1967:

Art. 186 – It is ensured to forest dwellers the permanent ownership of the lands they permanently live and it is recognized their exclusive right of use of natural resources and all values found there (BRASIL, 1967).

Constitutional Amendment 1 in 1969:

Art. 198 – The lands inhabited by forest dwellers are inalienable, in terms of the federal law, and its permanent possessing are reserved to them, and it is recognized their right to exclusive enjoyment of riches and all utilities existing there (BRASIL, 1969).

The concept of indigenous land to own Indigenous persons exceeds the survival issue. It means to them all the basis of their knowledge and beliefs, in addition to represents the place of their social interactions.

According to Magna Letter (1988)^[1] in its Section 232, §1º,

The lands traditionally occupied by indigenous people are that permanently inhabited by them, that used to their productive activities, that essential for preservation of environmental resources necessary to their well-being and that necessary to their physical and cultural reproduction, according to their uses, customs and traditions.

For Indigenous Statute (Law Number 6.001/1973),

Section 17. Indigenous lands are:

I – the lands occupied or inhabited by forest dwellers referred to in Sections 4, IV and 198 of Constitution;

II – the reserved areas dealt with in Chapter III of this Title;

III – the lands of indigenous communities or forest dwellers domain.

Indigenous Statute (Law Number 6.001/1973) expressly prohibits the tenancy of indigenous lands, activities practiced by persons unfamiliar to the community and even any act or legal business that is able to restrict the direct ownership by indigenous people:

Section 18. Indigenous lands shall not be leased or be under any legal act or business that restricts the full exercise of direct ownership by indigenous community or by forest dwellers.

§ 1º In these areas it is prohibited the practice of hunting, fishing or fruit gathering, as well agricultural or extractive activities to any person unfamiliar to tribal groups or indigenous communities.

§ 2º (Vetoed).

It is exactly on this point that is questionable the affront to the legal hindrance, considering the common contemporary practice of leasing and agricultural and extractive partnership on indigenous lands of the Country.

Although the prohibition, it is verified in practice some constitutional aspects that are imposing in the context of Environmental Law and Agrarian Law, as explained by Melo (2017) ^[2], correlating indigenous lands and environment:

There is a perfect compatibility between environment and indigenous lands, even these involve environmental “conservation” and “preservation” areas. This compatibility is what authorizes the Double Allocation, under competent body of environmental protection administration.

That is what happened in 2013 in an action brought by Fundação Nacional do Índio – FUNAI, pleading for nullity of a legal business signed by indigenous persons and renters of the Indigenous Land of Ivaí-OR, as well the restraint of crops illegally implanted, harvest and storage of crops with collective reversals, which sentence was valid

and ratified by the Tribunal Regional Federal da 4ª Região – TRF-4 (MPF, 2019) ^[3], *in verbis*:

ADMINISTRATIVE AND CONSTITUTIONAL. FUNAI. RURAL LEASE OF INDIGENOUS LAND. ILEGALITY. COMPENSATION. GOOD-FAITH. INEXISTENCE.

1. The indigenous lands, pertaining to the Union, are inalienable and unavailable, not susceptible to exploitation by third party except the Indians themselves, keeping the rules established by FUNAI.

2. The Federal Constitution ensures to indigenous people the exclusive enjoyment of the riches of their lands soil, reputing null and without legal effects the acts that have as purpose the exploitation of soil's natural riches.

3. It is not possible to recognize the validity of lease contracts with indigenous lands as subject, neither the tenants' good-faith, because it is not plausible that they did not know the illegality of the farming operation there, mainly due to the processing of Police Investigation, intended to investigate such facts.

(TRF4. Civil Apellate No. 5000913-22.2013.4.04.7006/PR. Apellate Judge-Rapporteur Vivian Josete Pantaleão Caminha. 4th Class. DJe 29.5.2017)

However,

The protection to forest dwellers is so eloquent in the Constitution that, after classifying the lands traditionally occupied by Indians as inalienable and unavailable and establishing the imprescriptibility of rights to them, it renders void the acts of occupation, domain and land tenure that involve them (p. 117). ^[4]

Although they are protected constitutionally, indigenous lands are still used with different purpose to that allowed by Law. In other words, the protection offered constitutionally does not inhibit the problem of economic exploitation.

Oliveira Filho's doctrine^[5] links the indigenous lands nature to sociocultural processes, bound to the sense of belonging and identity:

Constitution 1988 adopts an only criterion to definition of an indigenous land: that there the indigenous persons exercise a traditional occupation in a sustainable and regular way, in other words, that they use such territory according to their “practices and customs”. This is, therefore, replace a merely “negative” identification (of presence of white) by a “positive identification”, that can be made through field work and explanation of sociocultural process by which indigenous people take ownership of that territory (p. 111).^[5]

Cavalcante (2016)^[6], when discussing the legal concept of indigenous land from History and Anthropology, reinforces the construction and reconstruction of this idea and its enforceability importance to administrative and political order.

The construction process of the concept “indigenous land” was long and legally complex. However, a lot of ignorance still hangs above it, including in spaces where it should not happen, such as public administration. There is, in addition and primarily, a big mobilization of society’s conservative sectors that intends to suspend or even revoke the indigenous’ land rights, or even assign new meanings to the concept, either by direct politic influence in the performance of federal Executive Power or by initiatives in the context of the National Congress. A relevant example of this second alternative is the Proposed Amendment to the Constitution no. 215/2000 that intends to transfer to the National Congress the final word about the demarcations, what in practice would mean the total standstill of these proceedings. It is feasible that it is ongoing the political deconstruction of a legal concept (p. 17-18).^[6]

To Caldart et. al (2012)^[7],

[...] in relation to earth, what is observed in Brazil is a complex reality that involves, on the one hand, multiple forms of collective and wide access, and struggle for its democratic control, in terms of indigenous, quilombolas lands, traditionally occupied or occupied by social movements fighting for Agrarian Reform; and on the other hand, the reaffirmation of monopolistic forms of land

ownership control in Brazil, favored by several State actions of diverse levels, either when denies the titling of indigenous lands, rejects the quilombolas lands’ recognition and do not legitimize traditionally occupied lands, or when do not expropriate to Agrarian Reform the lands that do not fulfill the social function, favors the land grab, ensures the maintenance of untouched unproductive latifundia and preserves the land right of those who use slave labor (p. 444).^[7]

Thus, it is up to Public Power to delimit and recognize which are indigenous areas and, with the demarcation lack of all them, the indigenous lands are in various legal situations all over Brazil, what causes concern to indigenous people, indigenists, non-Indians, mainly due to the lack of definitive and definitely accepted judgements with regards to legality and reasonable demarcation with respect to existing laws^[4].

II. THE INDIGENOUS AREAS

Our 1988 Constitution ensured to indigenous people the respect for their social organization, customs, languages, beliefs and traditions and equally recognized the primary law of the lands traditionally occupied by them, being the last an important achievement.

In this standard, it should be highlighted that the indigenous right on the current Constitution are provided at eight isolated provisions in a Chapter with title “Social Order” and in an article of the Transitory Constitutional Disposition Act. Two important points should be emphasized, namely: the first is the abandonment of an assimilationist perspective that understood indigenous people as a transitory social category fated to oblivion. The second is that indigenous rights over their lands are established as primary law, in other words, it is prior to which law or act that declared such rights. This factor occurs in virtue of historical recognition that the indigenous people were the first Country settlers. Therefore, the novel Constitution establishes innovative milestones to relationships between State, Brazilian society and indigenous people.

In short, the legislation recognizes to indigenous the right of being different and stay unending this way, according to what can be surmised from Section 231 of Constitution 1988.

It is possible to surmise from the §1º of FC/88 same Section that the recognition made by Constitution 1988 is

in order to assert that if there are enough elements to define some lands as indigenous, the occupant indigenous group's right is legitimate, irrespectively of any constitutive act.

It is not negligible to add that the Supreme Law recognized the importance and the rights of indigenous people definitely, considering them to be the first owners *de facto* and *de jure* of Brazilian lands, adding their justice ideals. However, unfortunately there is much to do. Experience demonstrates that theory and practices are different since the respect for these rights, in the face of various economic interests, are not followed as a rule and with the proper importance the subject deserves. It is necessary the aid of support agencies and Public Power as well the indigenous peoples themselves to the full realization of what is established in the Constitution.

The §2º of the alluded Section 231 puts forward that "The lands traditionally occupied by indigenous people are fated to their permanent possession, ensuring to them exclusive use of the existing soil, rivers and lake riches".

The Magna Letter ^[1] did not recognize to indigenous people the property right, on the other hand It assigned to them the right of permanent possession of the lands traditionally occupied by them. Thereby, a few legal writings in the legal field brings a consensus of understanding in the sense that when the Constitution 1988 intends to indigenous the permanent possession of the lands occupied by them, it means that that right is pre-existent, in other words, it is, thus, a primary law.

In the case of indigenous possession, it is not the course of time nor the origin that determine or legitimize it, but the fashion of traditional occupation, in the terms of provisions of Section 231 of Federal Constitution.

Furthermore, it is necessary to emphasize that it is not possible to submit a territory classification as indigenous land to the benevolence and altruistic will of personnel of the State. This is an issue of objective character and it is based on undeniable facts, namely the traditional occupation of indigenous people.

III. ENJOYMENT AND ITS IMPACTS

The Federal Constitution 1988 clarifies that "lands traditionally occupied by indigenous persons are designated to indigenous' permanent possession, ensuring to them exclusive use of the existing soil, rivers and lake riches.

According to Santos *apud* LARANJEIRA (1999, p. 561)^[8],

The possession is exclusive to the Indian, it cannot be communicated even to partners, shareholders, financiers, tutors and etc. Stay means continuity, the quality of what does not stop or disrupt at any time. And exclusivity is quality of what excludes or marginalizes, removing any competition possibility with the same title, place or activity. Exclusive and permanent enjoyment implies privative usage and fruition at all times.^[8] (emphasis added)

The institute was initially integrated to Brazilian normative with Constitution 1967, which recognized the indigenous' right to exclusive enjoyment of natural resources and all utilities existing on indigenous lands. The legislator regulated this institute with Section 24 of Law No. 6.001/73 (Indigenous Statute).

Usufruct is about real right of use and fruition of certain property transferred from the owner to usufructuary, implying in the possibility of the fully use by indigenous of the natural riches existing on the ground, rivers, lakes of the lands, including by economically exploring them.

This issue does not offer bigger complications when it is considered the usufruct to reality of indigenous communities that use natural existing riches to their subsistence, due to little interaction with Brazilian society. This can be considered the economic model traditionally known and practiced by indigenous communities when, even because the little degree of contact, they reveal themselves as self-sufficient in their needs.

The concern appears due to the exposure of indigenous communities to technologic advances and the relationship with economic reality of other societies, thus causing inevitable dependency on industrial goods. This situation impacts on these communities' estate, as far as their needs pressure them to use their riches to satisfy that new consumer requirements.

In addition to this reality, another variant should be considered because it means the worsening and harmful speed-up of this dependency on consumer goods: the reduction of support and assistance by Public Power to indigenous communities. This has led these communities, or part of them, to sell their riches of which they have exclusive enjoyment. It follows some bleak problems like wood sale to economic activities consistent with timber harvesting; mining exploration by prospectors; and the disposal of natural and valuable riches at a vile price to supply basic needs as health care and food needs.

The use and exploitation of soil, rivers and lakes natural riches existent on the lands traditionally occupied by

indigenous people should be guided by the so desirable sustainable development, in other words, it must not endanger the existence and future use of these riches.

The use and enjoyment with economic purpose of the natural riches existent on their lands must not imply in lose or constraint on the permanent possession, under penalty that the activity licensing legal act shall be null and void due to violation of provisions of § 6º of Section 231, d, from Federal Constitution.

The lands traditionally occupied by indigenous people are inalienable: they must not be alienated, sold, donated, transferred to use of any person; unavailable: they must not be used to other purpose than the enjoyment by indigenous people, except the exceptions defined in law in FC; and inviolable the rights on them: the indigenous people will never lose the right to reclaim their rights on the lands they traditionally occupy.

The section 231, §6º, FC, clearly expresses that the acts that have as a subject the occupation, domain and ownership of such areas, or exploitation of soil, rivers and lakes natural riches existing there, shall be considered null and extinct. However, if there is a relevant interest to the Union, these areas can be occupied and exploited. Nullity and termination, meanwhile, have two legal consequences, if, in good faith, it was made betterments derived from occupation: right to compensation and actions against the Union.

The current Letter Policy provides four restrictions to indigenous land rights, in other words, exceptions to the general principle, which determines it shall be declared invalid or revoked the acts whose subject is the occupation, domain and ownership of indigenous lands, not having legal effects.

The first two restrictions shall occur when there is a need of research and mineral resources mining and enjoyment of water resources and its energy potential. The third restriction is when it is necessary the displacement of indigenous groups from their lands due to disaster, epidemic or interest of Country's sovereignty. The fourth and last exception remains configured when there are acts of relevant interest to the Union.

The question is in that fourth exception, as long as at paragraph 6 of article 231 of the Federal Constitution the legislator provided it would be created a complementary law to describe what is relevant, important to Union public interest to the point that restricts the indigenous right of use their lands.

IV. CONCLUSION

The presented study advances the sustainability field and the environmental preservation and conservation principles, linked, therefore, to capitalist and consumerism interests of today's society.

Unfortunately, the indigenous people are being led to a factual "need" of renting the Union's properties, trampling the legal restriction, in such way that the indigenous community may be damaged in relation to ruralists favored by back-channel negotiations.

There remains, of course, that the land ownership is an indigenous' right in our Country, in spite of this right has been "forgotten" by Public Power and barred by economic interests for a long time.

Thereby, assuring the indigenous involvement in the whole process of public policy improvements about their lands' demarcation and disposal is a necessary and coherent arrangement, ensuring a process of awareness concerning their rights, as well as using preventive elements, creating conditions to avoid new undue invasions and exploitations on indigenous lands.

It is concluded that as soon as demarcated and secured the indigenous lands, always seeking to preserve the already guaranteed rights to indigenous people, it shall be ensured to all existing indigenous communities a unique process of development, proper and satisfactory to the reality and yearning of this community, promoting and facilitating the achieve of these objectives.

ACKNOWLEDGEMENTS

We are grateful to the *Laboratório Intercultural de Ensino de Ciências da Natureza e Matemática nas Escolas Indígenas da Bahia* for encouraging the study, and to the program Propublic for financing the publication.

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