

Indigenous Lands, commons, juridical pluralism and sustainability in Brazil. The *Raposa Serra do Sol* case: nature conservation facing opportunities and risks of ethnocentrism

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Workshop: Latin America as supply of environmental goods in the XXI century

Indigenous Rights in Brazil: Indigenous Lands (TI) in the Constitution

- Artigo 231 - São reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições, e os direitos originários sobre as terras que tradicionalmente ocupam, competindo à União demarcá-las, proteger e fazer respeitar todos os seus bens.
- **Recognition of land rights is originary, i.e. preexistent to juridical system.** Obligation of Federal State to demarcate, protect and ensure respect of indigenous goods/assets/patrimony.
- §1. São terras tradicionalmente ocupadas pelos índios as por eles habitadas em caráter permanente, as utilizadas para suas atividades produtivas, as imprescindíveis à preservação dos recursos ambientais necessários a seu bem estar e as necessárias a sua reprodução física e cultural, segundo seus usos, costumes e tradições.
- **Definition of land = territory:** includes productive, ecological & cultural functions, through **respect of juridical and cultural specific features**

Indigenous Rights in Brazil: Indigenous Lands (TI) in the Constitution

- §2. As terras tradicionalmente ocupadas pelos índios destinam-se a sua posse permanente, cabendo-lhes o usufruto exclusivo das riquezas do solo, dos rios, dos lagos nelas existentes.
- **Land right regime:** not property but **permanent possession and exclusive usufruct**.
- §4. As terras de que trata este artigo são inalienáveis e indisponíveis, e os direitos sobre elas são imprescritíveis.
- **TI are inalienable** (cannot be sold - nor transferred otherwise), **unavailable** (nor can other rights on them), and **indigenous rights on them do not decay**.

Indigenous Rights in Brazil: Indigenous Lands (TI) in the Constitution

- §6. São nulos e extintos, não produzindo efeitos jurídicos, os atos que tenham por objeto a ocupação, o domínio e a posse das terras a que se refere este artigo, ou a exploração das riquezas naturais do solo, dos rios e dos lagos nelas existentes, ressalvado relevante interesse público da União, segundo o que dispuser lei complementar, não gerando a nulidade e a extinção do direito à indenização ou a ações contra a União, salvo, na forma da lei, quanto às benfeitorias derivadas da ocupação de boa fé.
- Any juridical act (or fact) which **limits or constrains the exercise of exclusive indigenous usufruct shall be considered nil**, except in case of relevant public interest of the Federal State, according to legal criteria to be set through complementary legislation. Only occupation in good faith (by whom did not know it was indigenous land) entitles to compensation for "improvements".

Indigenous Lands: "juridical anomaly" (circular concept)

- "Indigenous Lands are property of the **Federal Union (State)**, hence, **public good**. In Brazilian law public goods belong to three categories: dominical, of special use and of common use of the people. (...) Unlike these three categories, Indigenous Lands are unavailable to the public power, who cannot use them, their common use by the whole Brazilian people is forbidden, whereas they are devoted to use only by an indigenous people, according to their own uses, customs and traditions. **Therefore they do not fit into the category of public land. They are neither** the indigenous people's or community's **private land**. In other terms, they do not fit within the dogmatic concept of property, **they are no property**. However, if within them individual, private property as foreseen by law cannot exist, because (...they are...) Federal domain, **individual appropriation can exist according to uses, customs and traditions** of the people who lives there. **Uses, customs and traditions, in practice mean law**. Hence, **private or collective appropriation (...)** shall take place **according to indigenous law**, which shall resolve eventual conflicts which may take place. Therefore **the exercise of Brazilian property right is forbidden in indigenous lands**, whereas **the norms of indigenous customary law are cogent** instead (Carlos F. Marés de S. F.)

Indigenous Lands' juridical status

Inalienable Federal Property : cannot be privatized and/or sold

- Exclusive Indigenous Usufruct of natural resources
- Recognition indigenous jurisdiction: rules of appropriation and management / resolution of use conflicts defined autonomously, outside property law, whether public or private
- => common property

An alternative classification of property

Classification of property regimes
according to entitlement and transfer mode of use rights

⇒ Number of users/entitled, increasing ⇒

Property regime	Private Property	Common property	Public property	Absence of property or free access
Entitlement: who holds use rights? (type of access)	One individual: physical or juridical person	Members of community or definite group	Public power: State or Public Administration	Anyone
Transfer: How are use rights transferred?	Sale/purchase, donation or inheritance	Belonging to community or group (*)	Administrative act or regulation	Does not exist

(*) This can follow or respond to diverse criteria (birth, age, alliance, profession, etc.) and entry can take place for free or through some form of payment.

Common (collective) property regime

Institutional system in which the members of a group of users have:

- a) rights to access / use a resource
- b) right to exclude non members (outsiders)

The resource is appropriated, collectively or individually, according to rules autonomously defined by the same group members.

- Critique of the "*tragedy of the commons*" ⇒ benefits of the commons

Elinor Ostrom: 1st woman economics Nobel laureate 2009



Common property and sustainability

Ecological benefits & eco-eco (ecologic & economic) efficiency

Positive Relation between bio-diversity & sustainability: consensus

Field and theoretical studies on common property show positive relation between sustainability and Institutional Diversity (socio-cultural, juridical pluralism)

=> Institutional diversity increases the resilience of social systems

UCs and TIs in Brazilian Amazon			
Categoria	Área em km²	% da ALB (5.006.316,8 km²)	% da Floresta da ALB
Terras Indígenas	1,033,964,3	20,65%	57,4%
UC's de proteção integral	207.098,8	4,14%	7,5%
UC's de uso sustentável	438.763,8	8,76%	16,02%
Total UC's (bruto)	645.862,6	12,9%	23.53%
Sobreposições entre UC's e TI's	139.918,2	2,79%	n.d.
Total UC's – total sobreposições	459.769,8	9,18%	20% (estimativa)

Levantamento ISA : desmatamento 1997-2000 na Amazônia	
Área considerada	Taxa desmatamento total
Amazônia Legal (média)	16,83%
Terras Indígenas	1,10%
UC's federais	1,52%
UC's estaduais	8,96%
Média áreas protegidas	1,97%
Média áreas não protegidas	23,58% (> reserva legal)

Comparação Terras Indígenas – Áreas não protegidas

Estado	Taxa Terras Indígenas	Taxa Áreas não protegidas
Amazônia (média)	1,10%	23,58%
Rondônia	1,74%	48,18%
Mato Grosso	2,49%	33,91%
Pará	0,51%	29,17%
Roraima	? ?	? ?

Comparison average environmental direct spending per km² in TIs and UCs

Ano	GAM/km² de TI (FUNAI)	GDUCs/km² UC (IBAMA)	UC/TI
1997	5,74	67,75	11,8
1998	2,77	74,01	26,7
1999	2,41	53,84	22,3
2000	4,32	276,89	64
2001	6,97	302,26	43,3
2002	5,48	213,09	38,8
Média	4,61	164,64	35,7

**INDIGENOUS SHARE of INTERNATIONAL FUNDS
for ENVIRONMENT and BIODIVERSITY (million US\$)**

Financiador	Total Fundos (TF)	Porção Indígena do TF (PITF)	PITF/TF
PPG7	340,0	28	8,2%
GEF	122,5	0	0%
BIRD/KfW (PNMA)	127,1	0	0%
Total	589,6	28	4,7%

TIs and sustainability in the Amazon

- Conservation spending focus: man-excluding
- Different models (UCs = public (state) property
TIs = common property): similar efficiency
- Ethnoconservation (common property based): higher eco-eco efficiency
- Future challenge: political and judiciary powers
- Political: PNGATI lab for institutional diversity
- Judiciary: Raposa Serra do Sol case: important watershed, but "Pirrus victory" conditioning clauses "supreme ethnocentrism"
- Context: developmentism (PAC) & Convention ILO 169

Information - consultation to indios. Park?

Kaané ! (No!) - *conflict*

- Indigenous management rules exist. (*opportunity*) Ingarikó women speak:
- *"In this forest area we plant our gardens. The whole area is occupied: we plant in several places because if we do it always in the same place the forest will turn into field. We don't want that to happen. We plant gardens in a place, and after some time we change place, so the forest lives. This is how we take care of her"*
- *"This area (Park's intangible area) is for our gardens and where our men go hunting and travel for our feasts... It is already protected by us, in this way. It's our best area, the richest in game because we Ingarikó have decided not to build houses, not to live there. We have left this area to animals, for their reproduction, and for our hunting use. Our homes are outside around it, we don't want any changes"*

Pirrus victory and Supreme ethnocentrism

- Conditioning clauses 8 to 10 introduce "conservationist tutorship": in Parks (UCs) overlap areas are applied restrictions defined by ICMBio with *mere opinion participation* by indians and FUNAI;
- Despite the victory of TI RSS in continuous area, spirit and content of Supreme Court decision are worrying. The judiciary power squeezes indians in an ethnocentric, western and neo-colonial morsa (...) also between development and conservation. Indians are guilty anyhow: here to be obstacles to our predatory development model, there to spoil the images of "modern myth of untamed nature" which we insist on building through excluding conservation policies. Guilty, because obstinately and doubly unfaithful: first to our dichotomic split between nature and culture, second to our veneration for the Money God.
- Positive signals: indigenous increasingly play main actor role

Features of amerindian cosmology: Philippe Descola

"Contrary to modern dualism, which develops a multitude of cultural differences on the background of an immutable nature, amazon-amerindian thinking sees the whole cosmos as animated by a same cultural regime (...)

despite cheating appearances, plants and animals do not live in a distinct ontological plan from that of humans"

"Amazonian morale" (...) two incontestable precepts: the **condemnation of avarice** and the **need of self-control**. The first one follows (...) from an obligation to be generous with others and from **a certain despise** towards the **accumulation of material goods**"

Nature, forms of property and juridical pluralism

Relations between humans and between man and nature are increasingly crossed by market economy: generalization and globalization of "privatization enclosures"

Growth of market socio-economic regulation: central in modernity and development history

Today goods once considered "free gifts of nature" are increasingly "enclosed" and privatized

BUT:

Relations between humans and man-nature in «traditional» (primitive) societies: common/collective property

Indigenous societies and many «traditional» groups resist and oppose the way forward of privatization enclosures, by claiming collective rights within States as well as international recognition

Juridical systems of several States, especially in Latin America, are having to open to multiculturalism: juridical pluralism, « pacha mama », etc.

To think over on nature and modernity - 1

What we call land is an element of nature which is inextricably linked to human institutions. Maybe the strangest of all our grandfathers' enterprises was to isolate it and make a market of it. Traditionally, human labor and land are not separate; labor is part of life, land is a part of nature, life and nature make up an articulated whole (...)

The economic function represents only one of the many vital functions of land. Land gives stability to man's life; it is the place he lives in; it represents a condition of his material security; it is landscape and seasons. To imagine man's life without land is the same as to imagine him being born without arms nor legs. Yet, to separate land from man and organize society in order to meet the needs of a real estate market has been a vital part of the utopian concept of a market economy.

To think over on nature and modernity - 2

Once again, it is in the field of modern colonization that the true meaning of that enterprise becomes clear. Whether the colonizer need the land for the wealth it contains, or he simply wants to compel the indigenous to produce a food or raw materials' surplus, often it is not what counts; and it is almost the same if the indigenous work directly under the colonizer's surveillance or just under some kind of indirect constraint, because in any case, with no exception, it is beforehand necessary to have destroyed the indigenous social and cultural way of life.

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(Karl Polany, The great transformation, 1944).

THANKS

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