Tipití: Journal of the Society for the Anthropology of Lowland South America

ISSN: 2572-3626 (online)

Volume 18
Issue 1 *Mediating care: Amerindian health agents across worlds, bodies and meanings*

Article 10

10-28-2022

# Povos da terra and originary rights

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# *Povos da terra* and originary rights

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"One thing is indigenous and quilombola territorial rights as recognized by the Constitution, another is the fulfillment of these rights" (Marés 2021:11). Starting from what may seem a truism, this small piece has the merit of shining the spotlight precisely on the point in which the distance between recognition and fulfillment of constitutional rights ceases to imply an easy answer—invoking the obvious strength of competing interests and forces that block the fulfillment of such constitutional principles—not only by illuminating how this happens, but also identifying some important tensions, ambiguities, and traps that deserve to be considered.

The section that we comment on here—Difficulties in the Enforcement of Territorial Rights *(Dificuldades na efetivação dos direitos territoriais)* (Carneiro da Cunha, Magalhães & Adams 2021)—is presented as a kind of triad: two texts (Marés 2021, Arruti 2021) summarize and analyze the obstacles to the enforcement of indigenous and quilombola territorial rights, and a third (Carneiro da Cunha & Pimentel 2021) is focused on the topic of collective rights—which is an issue shared by indigenous, quilombola and traditional communities—and gives us an overview of, on the one hand, the particularities of the legal regime for indigenous lands and, on the other, the particularities of indigenous notions of territory. What this structure mirrors is the very history (and structure) of the legal recognition and elaboration (as well as the political and administrative disregard and dismantling) of the territorial rights of peoples "of the land"—and the paradigmatic place that the constitutional recognition of indigenous lands came to play regarding traditional and quilombola communities' territorial rights. Together, the three main pieces offer, by presenting these histories in a condensed and sequential form, an original perspective that may be worth exploring further.

The legal regime of indigenous lands in Brazil has, as Carneiro da Cunha and Pimentel (2021) point out, two major particularities worth noticing: the *Indigenato* institution, to which we will return; and, supported upon it, the principle that establishes and separates the property and dominion of the land, which is attributed to the Union, from indigenous possession, which is exclusive and inalienable. This separation, they note, protects indigenous lands from the risk of being sucked into the real estate market. Yet, it seems to me that there is more here than a clever maneuver to circumvent that outcome. In the first place, the separation is a corollary of the *Indigenato* itself, because if the latter refers to an originary right—"which means that it is not granted by the State, but that it pre-exists and precedes the State itself"—what this, in turn, means is that this right pre-exists and precedes Property itself (and its twin, Law). In other words, as many commentators have already emphasized, indigenous possession is not the same thing as civil possession. Whereas the latter appears as an incomplete form that could give rise to Property or restrict it, but nevertheless depends on Property in order to define itself, indigenous possession—that is, traditional occupation—is itself a complete regime (a regime that would be "juridical" if it could be separated from the life of the land, as Law pretends to be). The attribution of indigenous lands to the Union, in this sense, can perhaps be seen not as a restriction (a necessary, but minor, evil) of the right to self-determination of these peoples—as if property, the right to use and abuse, could guarantee self-determination—but as its guarantor, insofar as it would reserve a space for

indigenous possession *against Property,* the difference between the two being inscribed in the constitutional impossibility of converting one into the other.

This disjunction, or complementary distribution, between possession and property can be taken as defining a specific regime that we have called, following Alexandre Nodari (2018), "reciproperty" [*recipropriedade*]. If, despite constitutional protection, the right to have their own rights recognized—their uses, customs and traditions—is systematically denied to indigenous peoples, then it would not be because of any limits on their right to property. The stories told by Marés and Arruti illuminate this point: namely, the way in which the *enclosure of the commons*, which constitutes the permanent process of primitive accumulation of capital, has been advancing over the lands of indigenous peoples, quilombolas, and traditional communities, hindering the enforcement of their territorial rights.

Marés' analysis of this process is, as usual, illuminating. His starting point is the constitutional definition of indigenous lands as set forth in Article 231, but he emphasizes, from the outset, a rarely highlighted aspect of this definition: unlike private lands, but also public lands (whether privately acquired, of shared use, or of special use), indigenous lands *do not* depend on a legitimate act that would constitute them as such—whether by creating or demarcating them. Unlike the other modalities—which "all have to be delimited, measured and demarcated; therefore, any lands that are given boundaries, or enclosure, as the English would say" (Marés 2021:12)—as well as vacant lands not delimited but available for appropriation, indigenous land is not defined by the fence, the demarcation, the limit. Rather, "any land that fits the description and conceptualization of Article 231 of the Constitution is indigenous. It is sufficient for the lands to have been traditionally occupied for a people to have originary rights over them. This means that there is no constitutive act of indigenous land; it is, and it is assumed that it always was, indigenous [„,] The demarcation of indigenous lands is merely a consequence of the recognition of the existence of the peoples, it neither creates nor modifies rights, it neither constitutes nor transforms a people" (Marés 2021:12). Demarcation is merely a consequence of the recognition of the existence of a people/community. Therefore, all that can be demarcated is the land as known by that people—and, in this sense, every demarcation would be a self-demarcation.

This point is not theoretical. Marés' analysis of the demarcation decrees shows how the "anti-indigenous Brazilian legal intelligence" has been creating and increasing the distance between the recognition of a peoples' right to be a people (that is, the 1988 Constitution's reversal of the assimilationist perspective that infused, to a greater or lesser degree, all previous legislation) and the possibility of exercising that right over a given territory. The decrees comprise the administrative regulation of the demarcation process that, among other examples of the "worst of the Brazilian and Portuguese administrative tradition," clearly draws into the process issues related to the recognition of rights, *as if recognition depended on demarcation* (e.g., the "contradictory principle" in the 1996 decree, the *Marco Temporal* ("time frame limit legal theory") in the Raposa decision, and others). Going against the Constitution, what they sought to consolidate was the notion that demarcation is the means of recognition of indigenous rights, the "false discourse that without demarcation there are no rights". What should only be an administrative act that favors a right consubstantial to the recognition of the existence of a people, of its right to life, becomes the very means of disavowing this right: "Demarcation has been the most visible way to not apply the originary collective right inscribed in the positivity of modern Law." (Marés 2021: 14).

The definition of indigenous land as being traditionally occupied simply corresponds to the right of collective existence—as indigenous people—in a territory in terms of their own "uses, customs, and traditions." The fundamental right of an individual to life depends here on what has been called a "habitat" but which, for these peoples, consists simply in the life of

the land (of the forest-land, as the Yanomami say); it depends, therefore, on the sustaining of a way of being that is compatible with this life, as they live and know it. This cluster of ideas has served as an inspiration to understand—and legally recognize—other specific regimes of territoriality that, as in the case of indigenous lands, contrast with the regime based on Property. The power of this idea seems undeniable: if the forms of occupation and use of land are inseparable from ways of life, guaranteeing them becomes a condition for protecting those ways of life. This is also true for other traditional peoples: in the quilombola case, territorial rights are also rights to "specific and unique forms of appropriation and coexistence with nature" (Marés 2021: 30). Likewise for traditional communities: what is at stake in the guarantee of territory is their "physical, cultural, and economic reproduction." Yet, where there is strength there is also weakness, and, as the history of quilombola territorial rights, recounted here by Arruti, seems to show, obstructive practices also creep in at the interplay between the recognition of a territorial right and the practical conditions for enforcing that right. Additionally, for the quilombolas there is a considerable complicating factor: the brutal and transatlantic disjunction of bodies, collectives, and lands that constituted enslavement seems to allow for the erasing of the 'originary' title that any community (or people) has to the lands on which it depends for its life and whose life is intertwined with its own. The latter is a fundamental right, equivalent to every individual's right to life, and its disregard has the same magnitude as any crime against life. It is where ethnocide and genocide inevitably meet.

The *Indigenato* institution derives from the unquestionable historical antecedency of indigenous presence all along the length and breadth of what would become Brazilian territory. However, it is not only autochthony that gives indigenous territorial rights their *originary*—in the archaic sense of "constituting a source or cause"—character. What is meant by "traditional occupation" is *an intertwining of the life and health of people, collectivities, and lands that cannot fail to be at the origin of rights, every time it presents itself*. This is true for quilombolas and traditional communities; for all peoples "of the land". A Law that is incapable of recognizing this and guaranteeing the life thus generated will certainly end up taking the opposite side, prolonging the call of one whose name, following Kopenawa (2021: 39), we won't even mention—because there are many: "We will turn everything into merchandise." The alternative is to work so that the occupations, reclaimings, and self-demarcations, in the territories and in thought, may continue originating rights.

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