

THE DISPUTE OVER THE RAPOSA SERRA DO SOL
RESERVE DEMARCATION: A MATTER OF INDIGENOUS
CONSTITUTIONAL RIGHTS OR NATIONAL SOVEREIGNTY?*

*LA DISPUTA SOBRE LA DEMARCACIÓN DE LA RESERVA RAPOSA
SERRA DO SOL: ¿UNA CUESTIÓN DE DERECHOS INDÍGENAS
CONSTITUCIONALES O DE SOBERANÍA NACIONAL?*

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RESUMEN: A pesar del gran número de comunidades indígenas que habitan las regiones brasileñas, los derechos indígenas nunca han sido clasificados como un asunto de prioridad para el país. Utilizando los conflictos más recientes que evolucionaron de la demarcación de la tierra que constituye la Raposa Serra do Sol en Roraima, este artículo analiza la demarcación de las tierras indígenas en Brasil y la interconexión de la institución de la demarcación con aspectos de constitucionalidad, tales como soberanía del país y su defensa nacional. Los derechos indígenas deben ser asegurados, aunque la seguridad del país y su soberanía no deben ser ignoradas.

Palabras clave: “indigenato”, Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas, delimitación de tierras, derechos de los indígenas, seguridad nacional, soberanía.

ABSTRACT: *Despite the number of indigenous communities inhabiting Brazilian areas, indigenous rights have never been classified as a matter of top relevance to the country. Using the latest conflicts evolving from the demarcation of land that constitutes the Raposa Serra do Sol in Roraima, this article aims at analyzing the demarcation of indigenous lands in Brazil and the interconnection of the institute of demarcation with aspects of constitutionality, such as the sovereignty of the country and its national defense. It will be defended that although the rights of indigenous must be assured, the security of the country and its sovereignty must not be disregarded.*

Descriptors: “indigenato”, United Nations Declaration on Rights of Indigenous Peoples, land demarcation, indigenous rights, national security, sovereignty.

RÉSUMÉ: *Malgré le nombre de communautés autochtones vivant dans les régions du Brésil, les droits des peuples autochtones n'ont jamais été classé comme une question de grande importance pour le pays. Utilisant les derniers conflits dans la démarcation de la terre qui constitue la Raposa Serra do Sol, dans l'État de Roraima, cet article vise à analyser la démarcation des terres indigènes au Brésil et à l'interconnexion de l'établissement de la démarcation des questions de constitutionnalité, tels que la souveraineté du pays et de sa défense nationale. Fait valoir que, bien que les droits des peuples autochtones doit être assurée, la sécurité du pays et de la souveraineté ne doit pas être pris en compte.*

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SUMMARY: I. *Introduction*. II. *The Demarcation of Indigenous Lands in Brazil*. III. *Conclusion*. IV. *Bibliography*.

I. INTRODUCTION

1. *Preliminary thoughts*

Several social segments have been left out of the process of civil construction of the Brazilian nation. Among these groups it can be said that the indigenous communities are one of the most affected sectors (if not the most) having a major inclusion deficit. In addition to the dramatic reduction in the size¹ of its population, observed throughout the last five centuries,² a sheer consequence of the immediate violence to which the aboriginals have been submitted and the mediate subtraction of their territories,³ the mentality towards the indigenous communities in Brazil has always been one of depreciation. Despite the fact that the natives have been cited and intended to be “protected”⁴ since the pre-republican

1 It is estimated that the number of indigenous peoples living in Brazil by the time of the discovery ranges from 1 to 10 million; “O Direito do índio”, *Revista Consulex*, Brazil, núm. 102, p. 13. Only in the Amazon region is estimated that in 1500 a total of 5.6 million indigenous were inhabiting the region and speaking a total of 1.300 different dialects; Funai, “Há 500 anos”. August, 2nd of 2008, <http://www.funai.gov.br/>.

2 According to a recent research from the Brazilian Institute of Statistics and Geography (IBGE), a growth on the number of natives have been observed from 1991 (when the number of natives was estimated in 0.2 percent of the national population or 294 thousand people) to 2000 (when 0.4 percent of the population or 734 thousand people have self declared as parts to the indigenous community).

3 Bruno Lobo, Luiz Felipe, *Direito Indigenista Brasileiro, Subsídios à Sua Doutrina*, São Paulo, LTr, 1996, pp. 44 y 45.

4 During the colonial times, Portugal has edited several laws with the apparent intent to protect the indigenous community. However, the goal to occupy and conquer the recently discovered land did not necessarily walk hand to hand in harmony, and for a long time, the ‘good treatment’ could be only addressed to the natives that accepted the teachings from the Jesuit priests, for example. The policies of ‘protection’ did not necessarily foresaw a legal safeguard to the rights of the indigenous communities. Therefore, despite the existence of legal texts, the native community was not seen as a group to be respected for its differences or background. Their land was a reason for dispute and their ownership to it was deeply neglected by the colonizers. The Portuguese legislation from the XVI Century for example allowed the destruction of indigenous villages or the killing of natives whenever these were unwilling to cooperate with the colonizers; Souza Filho,

norms, it was only in 1988, with the reception of the new Federative Constitution that the indigenous communities began to receive more advanced legal treatment.⁵

Up until 1988 the legal protection intended to be provided towards natives was dependent on a policy of integration or assimilation. In this sense, the idea of the legal texts was that whenever indigenous people achieved a level of total integration into the society, they should no longer be subject to an official protection from the State.⁶ This policy ended up reinforcing the perpetuation of exclusion towards the natives, as this group was supposed to lose its cultural identity to be seen as part of the society.

In a similar fashion indigenous people could be further legally seen as ‘children’ as they were only intended to receive protection from the State until they could reach their full development (*i. e.*, could get totally socialized), a process which could be compared with the course of development of a child. When the natives reached “adulthood”, *i. e.* they attained their ‘full maturity’ and therefore became mature human beings; they were no longer required to receive their deserved protection from the state.⁷

The Brazilian Federative Constitution of 1988, therefore, while instituting parameters of protection to the indigenous communities based on the ideal of human rights serves as a mark to indigenous constitutional rights in Latin America and influenced several Latin American constitu-

Carlos Eduardo Marés, *O Renascer dos Povos Indígenas para o Direito*, Curitiba, Juruá, 1998, pp. 56 y 57. Furthermore it can be said that the distribution of the ‘sesmarias’ (portion of lands to Portuguese with the goal of ‘whitely’ populating the new country) totally disregarded the inhabitants of the territory. Thus, aboriginals have been exiled from their own lands with the purpose of giving their lands to the newly arrived Portuguese.

5 One of the biggest problems of the current constitution is the fact that its language is far complex and therefore, it is not accessible for all. In the words of Geraldo Ataliba, “Só conhecendo a Constituição poderemos estimá-la. Ninguém pode estimar o que desconhece. E, estimando-a, façamo-la eficaz, para benefício de seu povo”; Ataliba, Gerardo, *Comentários à Constituição Brasileira de 1981*, Rio de Janeiro, Jacintho Ribeiro, 1918, p. 108.

6 Barreto, Helder Girão, *Direitos Indígenas: Vetores Constitucionais*, Curitiba, Juruá, 2008, p. 39.

7 The current Civil Code (Introduced with the Decree-Law no. 10.406 from 2002) has changed the treatment towards the indigenous communities and is in accordance with the parameters established with the Constitution of 1988.

tions such as the Colombian (1991), Paraguayan (1992), Peruvian (1993) and Bolivian (1994). In addition to establishing the sole legitimacy of the Brazilian State to legislate over native populations,⁸ the Constitution of 1988 establishes the duty to demarcate and protect indigenous lands.⁹

In order to do that, the Constitution defines as indigenous lands all of the territories occupied and inhabited permanently by natives, as well as the lands used for their production and necessary to their well being.¹⁰ Although this legal document radically favored indigenous communities' in Brazil, it is imperative to mention that a solid and extensive doctrine over aboriginal rights is still rare in this country and conflicts over the land owned and possessed by natives are still an unfortunate reality. This article, therefore, was written taking into consideration limited bibliographical sources.

While indigenous rights in Brazil are constitutionally protected by the Magna Carta, they have never been subject to an in-depth analysis. In fact, indigenous rights are hardly elucidated by the media and are mostly ignored by the academia. As an example on how neglected the matter is, the majority of Brazilian Law Schools do not incorporate the subject as part of the curriculum to be studied or simply worked upon. Law students are mostly deprived from an in-depth analysis on institutes such as demarcation of lands and the human rights of indigenous communities. For this reason, the concept of 'indigenous rights' is hardly known of, and despite being constitutionally protected, indigenous communities remain a marginalized group in the society. For this reason many times members of Brazilian indigenous groups are ashamed to self declare as natives.

Furthermore, it can be said that the Constitution does not change radically the mentality of the society as whole, especially because the Brazilian Federative Constitution uses a higher language and therefore its articles, unfortunately are not easily accessible for all. Without understanding, or perhaps, simply neglecting the letter of the law, the majority of the society still sees the natives in the same pejorative way that the colonizers used to see the aboriginals when they first arrived to the country.

8 Brazilian Federative Constitution, art. 20, XI.

9 *Ibidem*, art. 231.

10 *Ibidem*, art. 213, § 1.

The high pressure from rice farmers, politicians, *madeireiros*, and others, allied with the disruptive violence against indigenous communities in the last years, however, have been responsible for directing larger legal attention towards the issues regarding the constitutionality of the protected institute of demarcation. In this sense, few conferences have been organized as well as some legal reports have been issued in Brazil over the matter of demarcation.

In fact the taboos over the maintenance of the indigenous rights to the lands can be understood as a consequence of the collision of views that whites and natives share towards the conception of 'land'. While for the white population the territory is simply equal to an economic asset, for the natives it signifies their means for survival. Natives see the land as a visceral part of their lives; in this sense, they are not only inhabitants of a mere piece of ground, but integral parts of it. Their reference and connection to the world is inherently linked to the area where they live.

Despite the lack of social attention observed towards aboriginal matters in Brazil, current incidents evolving around the demarcation¹¹ of the indigenous lands of the Raposa Serra do Sol in Roraima (the northernmost state of Brazil), that comprises a population of an estimated 14 thousand indigenous in a demarcated area of 1.7 million of hectares, have brought some high publicity to the matter that has made it to the cover of several newspapers and magazines for the last months.¹² Above all, the violence to remove some of the non-natives from the area, who did not receive from the government a compensation to leave the territory, and the statements of the military commander of the Amazon region, general Augusto Heleno Severo, against the governmental indigenous laws and policies, which he deemed "regrettable and chaotic", in April of 2008 have triggered the anger of the Brazilian President Luis Inácio Lula da Silva, who requested apologies from the chief of military missions in the Amazon Region and helped to draw the public attention to the matter.

11 The Raposa Serra do Sol reserve was demarcated according to a Presidential Decree of Luis Inácio Lula da Silva in 2005.

12 For more information see: "Entenda o Conflito na Raposa Serra do Sol", Globo Notícias, available at: <http://g1.globo.com/Noticias/Brasil/0,,MUL464471-5598,00.html>.

According to Heleno's claims, which are supported by some of the indigenous tribes protesting against the demarcation, the division of lands for natives and non-natives creates an environment of discrimination and hatred. He believes that the natives must recognize themselves as Brazilians and not as separate group outside of the Brazilian society as a whole. In this sense, the speaker for the army's interests rejects the adhesion of Brazil to the United Nations Declaration on the Rights of Indigenous Peoples, arguing that this treaty does not favor indigenous peoples or the indigenous structure within the Brazilian nation.

Furthermore, the increasing influence of NGOs and various international groups in the region is feared to become a serious threat to the national sovereignty over remote Amazonian areas. There is an increased concern in the army and certain political circles, that without the Brazilian control of the territory, these foreign entities may use their increased influence to control the indigenous communities and even usurp the effective control over the whole region. Additionally, as a large area is located within Brazilian, Venezuelan and Guianese borders and where a number of insurgent militant groups are based, often related to massive drug trafficking, the issue of national security is raised and posed as an aspect to be carefully assessed.

According to the military officer and to the director of the Society in Defense of the United Indigenous of North Roraima, the native of the *tuxaua* ethnicity Jonas Marcolinom, without a serious intervention from Brazilian Forces the area is constantly threatened by various armed groups including the intervention of FARC.¹³ Moreover, the forced separation of indigenous people from the rest of the population of the region may result in the impoverishment of the area, since most of the evicted non-native inhabitants are responsible for a large amount of the state's economy.¹⁴

The constitutionality on the presidential decree responsible for the demarcation of these lands has been questioned by several different fronts and a motion was adjudicated in the first months of 2009. The decision in favor of the demarcation has been applauded by groups who defend indigenous rights, as an 'historical decision' to the Brazilian de-

13 Information available at <http://www1.folha.uol.com.br/folha/brasil/ult96u393029.shtml>.

14 *Idem*.

mocracy. The decision has also led part of the society alarmed with its possible outcomes.

2. Structure of the work

Due to the importance of the topic to the indigenous rights in Brazil and to other several matters of constitutionality, such as sovereignty and national defense, this article aims at analyzing the current laws of demarcation in Brazil, using as a study case the example of the demarcation of land that constitutes the Raposa Serra do Sol in Roraima. In terms of this conflict, in addition to clarifying its reasoning's and origins, the work intends to observe what possible outcomes the latest decision of the Brazilian Supreme Court in regards to this quarrel may hold for the future of both the Amazon region and the development of indigenous rights in Brazil as a whole. The research will briefly tackle the assertion on whether the United Nations Declaration on the Rights of Indigenous Peoples influences the chaotic situation that the demarcation has evolved into: a quasi 'constitutional' civil war. Finally, the research intends to answer whether the dispute over the Raposa Serra do Sol reserve demarcation is a matter of Indigenous Constitutional Rights or of National Sovereignty.

In order to analyze these proposed matters this work will be divided into three parts. The first section will provide in addition to a general analysis over the concept of demarcation in Brazil and therefore, the major aspects surrounding a constitutional framework for indigenous rights in this country, a historical study explaining the major reasons for the quarrel over the Raposa Serra do Sol reserve demarcation.

The second part will analyze the reasons why the demarcation of these lands is so controversial. A brief discourse over the national security as well as on the economic development of the region will be engaged. This section will take into consideration the anthropological study on the indigenous cause in Brazil and will analyze why the demarcation over the Raposa Serra do Sol reserve is being harshly refuted by several sectors of the society. It will be in this segment that the United Nations Declaration on the Rights of Indigenous Peoples will be tackled and it will be verified whether its understanding seems beneficial or not to the Brazilian reality. The third and final section will comprise the conclusion of the work.

II. THE DEMARCATION OF INDIGENOUS LANDS IN BRAZIL

1. *The Brazilian Federative Constitution of 1988 and the new paradigms for the indigenous rights*

As it has already been mentioned, the Federative Constitution of 1988 is a mark on the process of the Brazilian re-democratization.¹⁵ Throughout the history of this country no legal document has been as vast and denoting so much awareness to the ideal of human rights and, particularly devoted so much attention to the protection of the indigenous communities such as the Constitution of 1988. It must be observed, however, that the safeguard of indigenous communities or of natives' rights is attempted in legal documents since the Federal Constitution of 1934. According to this incipient legal document the main goal towards the natives was the achievement of integration with the rest of the society or, in other words, their 'national communion'.¹⁶

Helder Girão¹⁷ divides the undertakings over the indigenous rights in Brazil into two distinct periods: the first lasting until 1988 when the indigenous rights recognized in the country were basically restricted to the rights of possession of the occupied lands, which is strictly an expression of civil rights, and a second moment, that begun in the period post-1988 Constitution, when the native's rights have been maximized, mostly as a consequence of the recognition of the indigenous rights as a specie of a higher goal which is the protection of human rights.

The 1988 Constitution definitely signals a shift in the paradigm over the indigenous rights. While recognizing in its article 231 the natives' rights to customs, language, faiths and traditions, in addition to the recognition of the primary rights to the territories that they occupy, allowing this way the institute of the demarcation for their lands, the legislator has abandoned ideas that have previously occupied older legal documents

15 The process of 're-democratization' is cited as the country has been governed by the Military forces for over 20 years, being 're-democratized' with the new Constitution of 1988. The new constitution is the richest legal document, in terms of the protection of human rights ever adopted in Brazil. Piovesan, Flavia, *Direitos Humanos e o Direito Internacional*, 5a. ed., São Paulo, Max Limonad, 2002, pp. 55, 57.

16 Art. 5, XIX, m, Brazilian Federal Constitution of 1934: "Cabe à União legislar sobre a incorporação dos silvícolas à comunhão nacional".

17 See *supra* note 6 at 100.

such as the requirement for the integration of the natives into the society. Rather than an ideal of integration, the 1988 Brazilian Federal Constitution begins to adopt new ideas based on the interaction between the aboriginal groups and the rest of the Brazilian society. Therefore, the ideal of assimilation is abandoned and an ode to the respect of the differences is embraced by the Magna Carta of 1988.

This Constitution, therefore, can be seen as unique for imposing the respect of groups that are ethnically different. It tries to depart from older ideals that had the intention to value solely the equality between citizens, to apply a principle that prizes, above all, the respect over the differences. Therefore it can be said that the Brazilian Constitution of 1988 inspires the recognition on the rights to be different, and the duty to respect and protect the individualism of peoples. In this sense it especially emphasizes the distinction of the ethnically differentiated groups such as the indigenous.

Although this Constitution establishes a radical shift in the Brazilian policy towards natives' rights and in this sense is a mark for several countries in Latin America, in one particular aspect it differentiates from the constitutional framework of other nations. While the Federal Constitution of 1988 guarantees to the indigenous the rights to the lands, the property of lands belongs to the Federal government and not to the natives (the indigenous can live and use the land for all possible means of survival, but cannot alienate or simply sell it, as the property belongs unquestionably to the Federative Republic of Brazil).

2. Indigenous lands and the institute of the 'indigenato'

The foundation of indigenous rights is not restricted to an idea over the mere control of territories, but is definitely highly connected to the issue regarding the possession of lands, as undoubtedly the survival of natives is radically dependent on the grounds in which they live in. It is from these pieces of land that they will extract all that is necessary for their subsistence.

The rights of the indigenous to the lands in Brazil have its origins rooting back to an institute called 'indigenato'.¹⁸ This legal institute was

18 Silva Neto, José Moreira da, Castro, Artur Soares de and Cunha Almeida, Alisson da, *Demarcação de Terras Indígenas*, available online at: http://www.escola.agu.gov.br/rvista/Ano_VI_novembro_2006/demarcacao_terras_alisson.pdf retrieved in 03-09-2008.

introduced while Brazil was still a Portuguese Colony, or more specifically, when the Alvará Régio of the 1st of April of 1680 established by the Law of 6th of June of 1755 confirmed the principle according to which in the lands given to private individuals, the indigenous rights would always be preserved as they were the actual owners or the ‘senhores naturais da terra’.¹⁹

As it was observed by legislators and scholars later on, the ‘indigenato’ cannot be understood as a mere occupation or possession of the land; it is a concept that is legitimate *per se*, not requiring any further acts to legitimize it.²⁰ In this sense, while the occupation of lands depends on requisites to legitimize it, or the existence of the *res nullius* or *res derelictae*, the indigenato does not require any requisites.²¹ This can be said since it is incorrect to suggest that the acquisition of indigenous lands is a consequence of their occupation of it; after all, the lands are ‘primary’ and inheritably theirs. In this sense natives were originally the owners of all Brazilian lands and, and as a consequence of colonization, were expelled from their own territories.²²

Currently the institute of the ‘indigenato’ is expressed on article 231, § 2o of the Federative Constitution. In legal terms the relationship established between the indigenous communities and the land is not regulated by the private law, or is simply a matter of civil rights. It definitely extrapolates this condition. According to José Afonso da Silva²³ the presence of indigenous people is not a simple occupation of the land; but the core of their habitat. In other words, the indigenous possession of lands is linked to their physical and cultural subsistence. At the same token, the registry of the indigenous lands by the farmers does not imply the title of these territories. The registry of these territorial areas constitutes solely

19 *Idem.*

20 *Idem.*

21 Santos Filho, Roberto Lemos dos, *Apontamentos sobre o Direito Indigenista*, Curitiba, Juruá, 2006, p. 95.

22 This idea, however, of ‘inherent rights to the land’ is refuted by many scholars. Ives Gandra da Silva Martins mentions in his book (Silva Martins, Ives Gandra da, *Comentários à Constituição do Brasil*, 8 vol., São Paulo, Saraiva, 1998, p. 184) that he will not be “surprised if in a near future the a proclamation of a new Ianomami republic strikes into the news to preserve the power of the richest countries of the world”.

23 Silva, José Afonso da, *Curso de Direito Constitucional Positivo*, 23a. ed., São Paulo, Malheiros, 2004, pp. 836 y 837.

the *juris tantum* over these pieces, because it is the title which is the cause for the acquisition of a right, and the title belongs to the indigenous (primary inhabitants of the region).²⁴

3. *The demarcation of indigenous lands in Brazil*

The institute of demarcation in Brazil is a reason for several controversies in the country. While the Federal Constitution provides an umbrella for its use and expresses the duty of the Federation to demarcate indigenous lands, some of the most distinguished Brazilian legal scholars refute this institute with sectary and biased views against the native communities.²⁵

Before analyzing the matters evolving from the contentious topic over demarcation of natives territories, it is important to have in mind that the 1988 Brazilian Federal Constitution did not create any ‘new rights’ to the indigenous communities. It has merely recognized the fact that indigenous people have congenitally the rights to the lands that they occupy traditionally. In this sense the Constitution corroborated a tendency that is being observed internationally, as it can be verified in the section 25 of the Canadian Charter of Rights and Freedoms and with

24 See *supra* note 15, at 3.

25 Among these scholars one of the greatest Brazilian constitutionalists, Paulo Bonavides, observes that: “Não é sem razão que a demarcação das reservas indígenas, ocorrendo mediante sub-reptícia pressão internacional, em verdade não corresponde aos interesses do nosso índio, mas aos desígnios predatórios da cobiça imperialista, empenhada já na ocupação dissimulada do espaço amazônico e na preparação e proclamação da independência das tribos indígenas como Nações encravadas em nosso próprio território, do qual se desmembrariam. Essa demarcação desde muito deixou de ser uma questão de proteção ao silvícola para se converter numa grande ameaça à integridade nacional”. Bonavides, Paulo, *Do País Constitucional ao País Neocolonial: a derrubada da Constituição e a recolonização pelo golpe de estado institucional*, 2a. ed., São Paulo, Malheiros, 2002, p. 183. Sharing similar ideas, another prestigious scholar who has worked as a presidential assessor, Professor Ives Gandra, affirms that: “o constituinte brasileiro garantiu ao índio dez por cento do território nacional para que ele não evolua, visto que, para manter uma Disneyworld primitiva, preservará, todo seu ambiente pré-histórico, a fim de que suas crenças, costumes e tradições continuem os mesmos, proibidos de evoluir para os costumes civilizados do século XX/XXI, uma vez que o objetivo do constituinte foi preservar o atraso do indígena”; Ribeiro Bastos, Celso e Silva Martins, Ives Gandra da, *Comentários à Constituição do Brasil*, 8 vol., São Paulo, Saraiva, 1998, pp. 1049 y 1050.

Australian jurisprudence, especially on the case of *Mabo vs. Queensland* (1988).

The issues surrounding the institute of demarcation can be seen as a highly controversial topic as usually extensive territories with a high economical value are involved. Further than that, the lands are subjected to being distributed to populations that are still very much neglected by the society, as a whole.

In addition to this fact, many times these lands are located near borders and with the demarcation of these areas the displacement of the army cannot occur as it should otherwise. With limited access of the army and federal police towards these areas the national sovereignty may appear to be in jeopardy.

Moreover, while demarcating areas, the requirement for ‘classifying’ groups as indigenous might prove to be a quite dangerous task to be fulfilled, as it might discriminate certain individuals. In this sense, the anthropologist Oscar Calavia Sáez²⁶ points out to the question involving the ethnicity of the Yaminawa in Brazil. This particular group has only started to interact with the white community of Acre in the mid 1970’s. However, although the connection with whites has not been intensive, members of the Yaminawa ethnicity have been classified as ‘cultured’ indigenous by the FUNAI and by some NGOs. In fact the imaniauás do not see their interaction with other groups as a form of denial to their own tradition, but as part of their culture. Nonetheless representatives of the FUNAI claim that this group has ‘lost its indigenous culture’. For this reason, they must not be considered as indigenous, or in other words, they do not qualify to be granted with these rights. This being said, it becomes uneasy for them to claim their rights as an indigenous community. Therefore, their civil and human rights to the lands might be restricted because their tradition of intermingling with the local community is misinterpreted by whites. This situation points out to the fact that the classification of communities as ‘indigenous’, may restrict the rights of individuals. The demarcation therefore, may turn into a process led by unfair and highly discriminatory judgments.

26 Calavia Sáez, Oscar, “Iminauás: os ‘índios dos índios’”, *Jornal do Brasil*, 14 september 2008, p. 23.

A. *National security*

An initial reason for concerns over the national security can be seen as a consequence to the fact that the Conselho de Segurança Nacional – CSN (a council established with the intent of providing insights over matters concerning the national security), does not have any active voice in regards to the demarcated indigenous areas. The CSN is supposedly formed by members with high qualifications on national security policies and extensive knowledge over the areas in discussion. While these members cannot manifest their opinions the region loses the opportunity to benefit from the experience of persons who could provide great inputs to the region, especially on the maintenance of population safety.

In this sense, although the 1988 Federal Constitution of Brazil through its article 91§1, III, classified the CSN as a council supposed to provide opinions in regards to the demarcated areas, the latest understanding on the matter concluded that this commission must not be effectively taken into account, since articles 231 and 232 of the Magna Carta are sufficiently elucidative in regards to the understandings to be proceeded on natives lands. This latest understanding presupposed that the institutions required to provide national security contribution have reduced powers and for this reason are left aside from the whole process of demarcation.

Moreover, in regards to the national security it can be said that even though the Constitution understands that all Brazilian citizens must be protected equally, affirming for this end that the army and the federal police must continue patrolling all areas of the country to guarantee the safeguard of the nation, in demarcated areas the presence of these forces is largely reduced and hardly noticed. In this sense, the FUNAI has already manifested its goal to keep demilitarized the indigenous reserves, in a way to preserve the Indian tribes from any source of violence and external influence. By leaving the protection of these areas reduced to a bare minimum, however, the sovereignty of the State in the region may seem in jeopardy. Along the same lines the Project of the Organization of American States to produce an American Declaration on the Rights of Indigenous Peoples understands in its preamble that the army must limit its activities in demarcated areas and abstain from committing any act that might constitute abuses or violations to indigenous rights.

With the debates on the demarcation of the Indian lands, concerns over the national security and over the sovereignty of the State remain currently as part of the public agenda. Several sectors of the Brazilian society remain zealous of this matter, that constitutes a reason for big concern for the Army, who is directly involved in the protection of the Brazilian borders. A vote from a Minister of the Supreme Court regarding the demarcation of the Raposa Serra do Sol²⁷ seems, however, to have disregarded this concern. The Minister Carlos Ayres Britto concluded that indigenous tribes do not necessarily need any help from the army. His explanation was preceded by an anthropological and historical study according to which as natives have previously helped the safeguard of the Brazilian lands, protecting their territories in the current days would not be a exception nor viewed as an impossible task.

Nonetheless the Minister affirmed that the presence of military forces cannot be impeded in demarcated regions. They must be able to enter the lands, if their help is required. For the Minister Ayres Britto, even though military forces might protect the regions with reduced contingent, they must not have their presence banned from the area. He continued his discourse observing that the ideas expressed by the Army (especially the ones pronounced by the Head of the Military Forces in the Amazon, General Augusto Heleno) which emphasize the fact that the poor protection of the area may signify a decrease in the sovereignty of the country is nothing but a ‘sophism feed by politicians and farmers’.²⁸

Perhaps for believing in the requirement of a, even if reduced, constant permanence of the Military forces over the Amazon region the Minister Ayres Britto noted that the UN Declaration on the Rights of Indigenous Peoples should not be taken into account while resolving the matter over the demarcation of Raposa Serra do Sol.

In fact his vote cannot be characterized as contrary to the Declaration of the United Nations over the Rights of Indigenous Peoples as it will be seen next, however, by explicitly affirming that the Constitution of 1988 can be used without the help of this international declaration, the Minister has definitely shown some awareness in regards to the application of this legal document.

27 Vote of the Minister Carlos Ayres Britto to the Brazilian Supreme Court. Available at <http://www.stf.gov.br/arquivo/cms/noticiaNoticiaStf/anexo/pet3388CB.pdf>.

28 See *supra* previous note.

Even if not mentioned by the Minister, the rejection over the use of this international legal document may be justified by the existence of aspects colliding with national interests, or at least, the existence of aspects which are not entirely suitable for the maintenance of the current national legal system.

In any case the Minister's vote and his ideas regarding the declaration serve as an alert towards this legal document. A few questions seem to be relevant in terms of the relationship between Brazilian laws and the UN Declaration on the Rights of Indigenous Peoples. In this sense: Was this declaration not contrasting with any current internal legal value, why shouldn't it be used to base a decision in such a contentious matter? In other words, if the Declaration serves as an international guide to provide a peaceful dialogue between States and Indigenous communities, why shouldn't it be used by the Supreme Court to emphasize its vote (especially if his decision approached the same ideals of declaration)?

The non application of this legal document may point the attentions into two different directions: either the Supreme Court is unaware of the possible implications of the declaration to the future of indigenous rights in Brazil and is fearful to adopt such dispositions, or the Court totally disagrees with certain aspects over the core of this Declaration. Either way the decision makes us question why Brazil has decided to ratify such a declaration considering its geographic configuration and the fact that a few demarcated areas are located within the borders with other countries. This aspect, however, will be briefly analyzed next.

*Brazilian national security and the UN Declaration
on the Rights of Indigenous Peoples*

If the interference of policing mechanisms over demarcated indigenous reserves in Brazil was supposed to be minimum prior to the UN Declaration on the Rights of Indigenous Peoples,²⁹ after the signature and ratification of this declaration the goal is to nearly nullify this presence. This international declaration establishes in its preamble as well as in article 31(1) and 31(2) the inadmissibility of any kind of army or po-

29 The United Nations Declaration on the Rights of Indigenous Peoples has been adopted by the General Assembly Resolution 61/295 on 13 of september 2007. Available at: <http://www.un.org/esa/socdev/unpfii/en/drip.html>.

licing operations within indigenous lands. Article 31(2) shifts the duty of the Federal State to decide when or not to use the military force to the indigenous communities who must be consulted and be on a consensus in order to allow any military acts in the regions. Without their consent a military action cannot take place in the region.

Although this article may chose to follow a path which might be branded as a ‘sophist’ observation, as highlighted by the Minister of the Supreme Court, it defends the idea that in terms of the Brazilian reality, despite being acclaimed as a manifesto for the maintenance of indigenous traditions and culture, the UN declaration on the Rights of Indigenous Peoples severely disturbs the ideal over the preservation of the national security. This assertion can be justified by the fact that several demarcated indigenous areas are located within the limits of the country, *i. e.* in areas encompassing borders. As examples one can observe the region comprised of the Raposa Serra do Sol and the Ianomami Indigenous reserve. With the impossibility to supply vast areas with the required military forces to protect the region, the borders remain open to all sorts of possible crimes, in addition to the possibility of invasions and use of the area for the development of FARCS or even part of international schemes over the traffic of drugs.

It must be further noticed that the region is vast and some of the countries in the vicinity are recurrently fighting against violent action from groups such as the FARCS. Leaving the region unguarded represents not only a problem to the national defense but also to the well being of the indigenous communities inhabiting the area. Trying to make some real sense on the words of Ayres Britto, the Minister of the Supreme Court who in his vote mentions the historical bravery of indigenous people and the possibility of the natives to ‘self protect’ their own groups in order to justify a minimum presence of the army in the region is at least laughable.

With these comments the article does not try to deny the fact that indigenous peoples must have the rights to their own lands, living in peace and in accord to their customs and traditions. It is also not the aim of this paper to dissociate the institute of the ‘indigenato’ with the ideals of colonization. It is however important to take into account the fact that the indigenous peoples just like any other citizens of the country must receive a massive protection from the State, especially because they inhabit areas of constant danger and many times, because they do not speak the

language of the neighbors', they may be deceived and have their lives in hazard. The protection they deserve does not disqualify the ideal of demarcating Indian reserves, after all, as demarcated areas are as such still property of the Federal Government, they cannot be left unprotected and vulnerable to all sources of concerns.

Having said that, if the protection of indigenous rights is truly what is aimed; their safety and well being must be taken into consideration in first place. The same must be said about the protection of all the rest of the citizens and the national soil. If the areas such as the borders with Venezuela are totally opened, not only the safety of the indigenous may be in jeopardy, but also the safety of the rest of the citizens from the State of Roraima and, to some extent, the sovereignty over the Amazon region.

Although Brazil has rejected such a declaration for most of its process of elaboration, it has accepted to be part of it when the declaration process was nearly concluded. Following the ideas of several countries who have pointed objections to the UN declaration, such as Canada, for instance, it is reasonable to question the acceptance of Brazil to this declaration.

In regards to the Brazilian reality the compromise with new aspects over human rights and indigenous rights cannot be incompatible with the ideals of national security and national sovereignty. Different ethnicities can only express their internal values if placed in a safe environment that must be reached with constant policing.

B. The legal nature of demarcations

Even more contentious is the idea surrounding the nature of the demarcations, in other words, whether the demarcations must have a declarative or constitutive nature. In regards to this matter this research defends that the process of demarcation does not imply a merely constitutive administrative Act. It is rather an Act with declarative nature. This idea is justified having in mind the fact that the indigenous rights to possess lands do not depend on any administrative Act intending the demarcation of this territory. The later institute simply recognizes a right that is inherent to the natives and is responsible for solely drawing a physical perimeter of land to be protected. With the highly contentious aspects of this matter, however, the only certainty in regards to the demarcations is

the fact that each time lands are subjected to demarcation in Brazil, indigenous rights are further questioned,³⁰ and violence towards them is likely to occur.

In order to proceed with the demarcation of a certain territory, the Federation needs to initially identify the area to be demarcated using for that complementary studies in several fields such as legal, anthropological, historical and environmental, among others. The due process of law is assured as it is requested by the Federal Constitution, since all the parties directly involved in the discussion may manifest their opinions as well as contest the procedures of demarcation,³¹ as long as the contests are presented up to ninety days from the release of the original information regarding the area to be demarcated by the Federation. It is therefore, the onus of the interested third party to prove that facts enumerated by the Federation are inaccurate; since the presumption is that the facts presented by the Federation are of *juris tantum*.³² Due to the controversial characteristics of the matter even the idea of a due process of law is argued, as some believe that no contestations should be allowed to refute a right that is inherently indigenous.

4. Case study: the demarcation of the Raposa Serra do Sol

A. Origins of the matter – understanding the Case

The land conflict established between rice farmers and several indigenous tribes in Roraima, northernmost state of the country, and located at the core of the Amazon region, has turned into one of the most violent clashes for land ever seen in Brazil. With dozens of casualties, the violence and fear that the quarrel could escalate into a civil war alarmed not only the citizens and Supreme Court of this country, but also international institutions such as the United Nations and the Organization for the American States, who required speedy responses from the government as well as the retrieval of the indigenous lands.

A recent visit to the contentious region from the UN special rapporteur on Indigenous human rights and freedoms, James Anaya, however,

30 See *supra* note 15.

31 According to the Decree Law no. 1.775/96.

32 See *supra* note 15.

has further enraged Ministers from the Supreme Court,³³ who affirmed that Brazilian Constitution strongly defends indigenous rights and for this reason, the country does not need any help from foreign NGOs nor from the UN to safeguard the rights of its Indian communities. Although the top United Nations Indigenous rights official denied that his visit to the reservation of the Raposa Serra do Sol was an attempt to influence a Supreme Court decision on its legality, press reports, however, pointed that Anaya was trying to sway the court toward finding in favor of the Indians.³⁴

The Raposa Serra do Sol is an area comprised of 4.2 million acre³⁵ or 1.7 million hectare spread over mountains (mostly near the borders with Venezuela) hills and valleys along the borders with Venezuela and Guyana. The indigenous population throughout the area is estimated to be a total of 18 to 20 thousand, mostly from the macuxi ethnicity. Among the smaller groups are the uapixanas, ingaricós, taurepangs and others.

B. *Historical aspects*

The process for the demarcation of the area of the Raposa Serra do Sol has begun during the decade of 1970. It was only in 1998, however that the Brazilian Ministry of Justice declared the land of the Raposa Serra do Sol as a permanent indigenous possession. As the demarcation of Indian reserves implies the eviction of all non indigenous from the area, whenever the land was declared as possessed by indigenous, the Fundação Nacional do Índio (Funai) and the Instituto Nacional de Colonização e Reforma Agrária (Incra), as by the disposition of art. 231§ 6 of the Magna Carta, begun to verify all the improvements that have been made throughout the years by the occupants of good faith in the region, aiming to facilitate, this way, the work of the Federative Government in assessing their expenditures in the area to provide future restitutions.

33 OESP, 13-09-2008, Nacional, p. A21.

34 "UN denies attempt to influence Brazil on Indians", *International Herald Tribune*, online at <http://www.ihf.com/articles/ap/2008/08/19/america/LA-Brazil-Indians.php>.

35 "Brazilian Court's Military Question", *International Herald Tribune*, online at: <http://www.ihf.com/articles/ap/2008/08/04/news/Brazil-Indian-Conflict.php?page=1>.

In 1999 the homologation of the Raposa Serra do Sol has turned into a reason for a judicial contestation. Discontent with the Federal decision, the State of Roraima has contested the motion and the law³⁶ that declared the land as a definitive possession of indigenous peoples. In 2005 the president Luiz Inácio Lula da Silva finally signed a decree homologating continuously the area of the Raposa Serra do Sol. This recognition represented a historical achievement for the indigenous tribes of the region and, as a whole, for the natives' rights in the entire country. The presidential homologation was warmly welcomed by the Organization of the American States³⁷ and showed the steps of the country towards a more humanistic society. In April of the same year the Supreme Court has extinguished all the motions that were originally contesting the demarcation of the Raposa Serra do Sol indigenous reservation. Subsequently, in June the Supreme Court determined that all non natives occupying the area should vacate. A letter was signed by the indigenous chiefs of the five tribes that inhabitate the area as well as by representatives of the Federal Government with the intent to form a compromise avoiding further conflicts in the area.

By the end of 2005 rice farmers made a formal request to the Ministry of Justice asking to remain in the area until the end of the harvesting season, however, after having this request allowed, they did not depart by the end of the established period. Several operations have attempted to remove the non indigenous from the area. A chaotic scenario filled

36 *Portaria*, no. 820/98.

37 Comunicado de Prensa 18/05. "Satisfacción de la CIDH por homologación de tierras en favor de los pueblos indígenas Ingarikó, Makuxi, Taurepang y Wapixana de Brasil. La Comisión Interamericana de Derechos Humanos (CIDH) expresa su satisfacción porque fue homologada la demarcación del área denominada Raposa Serra do Sol, en favor de los pueblos indígenas Ingarikó, Makuxi, Taurepang y Wapixana de Brasil. El 15 de abril de 2005 el Presidente de la República firmó el decreto de homologación que reconoció la posesión permanente para los pueblos indígenas Ingarikó, Makuxi, Taurepang y Wapixanana sobre una superficie aproximada de 1.7 millones de hectáreas, situada en los Municipios de Normandia, Pacaraima y Uiramutã, Estado de Roraima. Esta acción del Gobierno de Brasil ha sido realizada en el contexto de una petición y medidas cautelares que actualmente se están tramitando ante la CIDH, y en este sentido la Comisión continuará observando el desarrollo de la situación. La Comisión otorga un especial valor a este tipo de acciones de reconocimiento del derecho de los pueblos indígenas a sus territorios". Available at <http://www.cidh.org/Comunicados/Spanish/2005/18.05.htm>.

with violence, became the reality of the region and followed the endeavors to evict the non Indians from the territory. In order to request an end to the violence of the region and have its voice heard the Government of Roraima offered a motion³⁸ to the Supreme Court demanding the suspension of all police operations that had the sole goal of evicting non natives from the land. Most importantly the Government of Roraima ordered the end of the ‘Upatakon III’.³⁹ Answering this request the Supreme Court decided in March of 2009 to grant to the indigenous the rights to the area of the Raposa Serra do Sol. The decision was accepted as a mark in the history of indigenous rights in Brazil. The Supreme Court has however included conditions for the demarcations of lands and these are current reasons for constitutional concerns in the country.

C. Contestation by the plaintiffs

The motion which was decided in March of 2009 by the Supreme Court of Brazil had as its main objective the nullification of the presidential decree responsible for homologating the area of the Raposa Serra do Sol. The plaintiffs (a litisconsorsium established by the State of Roraima and a few private actors in the region) set as a key point to the complaint the fact that the due process, as by the requirement of article 5 of the Federative Constitution, was not respected. This was justified with the assertion that not all interested parties to the discussion were heard prior to the demarcation of the lands. Furthermore the plaintiffs affirmed that the anthropological study over the indigenous living in the area was performed solely by a single professional, and not by a group of experts on the matter. For this reason they believed the report made was vicious, and filled with a high degree of partiality.

This thesis was further enriched by allegations of fraud and insufficiency of data over reports that should have been made in order to check the historical development, environmental and economic aspects

38 “Roraima entra com ação para paralisar operação da PF em reserva indígena”, *Jornal O Globo*, available at <http://g1.globo.com/Noticias/Brasil/0,,MUL393441-5598,00-RORAIMA+ENTRA+COM+ACAO+PARA+PARALISAR+OPERACAO+DA+PF+EM+RESERVA+INDIGENA.html>.

39 The Upatakon III was the operation intended by the Federal Police to remove from the demarcated reserve all the non natives that rejected a peaceful evacuation of the land.

of the land subject to demarcation. The complainants affirmed that rice farmers were established in the region for several years and ever since, were maintaining a productive and very prosperous land. It further classified the production of these farmers as an imperative activity to the development of the region, since this is responsible for most of the economic development of the region. Therefore, according to the plaintiffs view point, while shifting the productive and prosperous land to indigenous tribes the Brazilian government would not only be frustrating legitimate interests of non-indigenous, but also in a way ripping the economy of the region.

Finally the plaintiffs suggested that the demarcation endangers the national security and produces a severe imbalance over the federative configuration. This assertion is followed by the idea that by transferring the region to the federal dominion, the State of Roraima turns into a mutilated region.

In fact, in regards to this assertion it can be said that previous reports over the demarcation of the lands foresaw the division of the territory into 'islands'. The original plan was not one deciding for a continuous demarcation, the idea was rather to divide the region in several islands. This configuration would reduce the impacts of the demarcation to the State of Roraima as a whole. Additionally, it would benefit the indigenous as they would have their territories singled out and demarcated. Currently, with the demarcation made in a continuous way all the tribes have a vast unique area that cannot be protected as it would be were the region demarcated in islands, *i. e.* into singled groups.

III. CONCLUSION

Implications of the decision of the Brazilian Supreme Court

In fact the decision of the Supreme Court over the demarcation of the indigenous area of the Raposa Serra do Sol is a very contested issue and the resolution of the matter may have far reaching consequences not only to the future of indigenous rights to lands, but also to the ideal of national security and internal sovereignty. Due to the two fold nature of the matter and the high controversy of the issues involved, the decision is likely to bring outcomes of great proportions.

The demarcation of the lands of the Raposa Serra do Sol is *per se* a reason for national and international rejoicing. The process of demarcation in this territory exalts the achievement of long discussions, and above all, the development of a Federative Constitution towards civic, democratic and constitutional goals. Furthermore it expresses the noble wish of the country to establish as part of its agenda the concerns with the human and indigenous rights.

Thus, considering the importance of the institute of demarcation, the verdict in favour of the demarcation of the Raposa Serra do Sol undoubtedly serves as jurisprudence for similar issues involving the demarcation of several indigenous reserves⁴⁰ both internally and externally. In this sense it has the capability of operating as a standard, or high example of constitutionalism and achievement of human rights in Latin America.

By favoring however, the human rights of its native citizens, the Supreme Court ended up neglecting all the concerns regarding the national security and the protection of its own individuals (in this sense, the security of the indigenous inclusively). While allowing the establishment of unprotected and vulnerable borders, the Federation closes its' eyes to the imminent dangers and for the possibility of deep problems that may erupt in the near future.

Moreover, with this verdict the Federal Government severely damages the relationship established with the institutions encharged to protect the nation, such as the Army and other policing institutions, that with the decision may only reach the area in extreme situations. Furthermore, by taking this position the Supreme Court further weakens the economy of the State of Roraima and may end up in a way impoverishing the area.

Perhaps the best option to avoid further conflicts in the region, the disfranchisement of the natives and the lack of sovereignty of the nation at once would be leaving the borders free from the presence of indige-

40 The president of the Brazilian Supreme Court affirmed that the decision over the Raposa Serra do Sol reservation area can be used as an example for several indigenous areas throughout the country. For Gilmar Mendes the decision may even be used to base a motion over the demarcation of the Caramuru-Catarina Paraguaçu reserve area that is located in the south of Bahia and is for nearly twenty six years at the Supreme Court without any resolutions; *O Estado de São Paulo*, país, 21-august-2008, A 31.

nous tribes. This would allow the free movement of national forces affording this way the protection of the region, citizens (indigenous or not) and above all, the sovereignty of the nation.

Opting for a non continuous demarcation or a demarcation in islands, leaving this way the limits of the country without tribes the Supreme Court would diminish the constitutional rights of the indigenous communities, who would remain safe in their own country. Demarcating the lands, without however, respecting the sovereignty rights of the country might be an advance in terms of human rights, but a large pace backwards in terms of national security. Indigenous peoples are now in their lands, but unsafe to the possible dangers.

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