Symmetrical law, indigenous territorial rights and the challenges to conviviality

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Abstract:

Very often law is highly regarded as a matter of explicit rules and self-referential concepts. This article argues otherwise the reliance of legal communications on implicit rules and tacit knowledge. By ascription of categories embedded in social epistemologies, law effects on the making of social status and hierarchies as well as the dynamic identification of groups. As such, legal communications play a pivotal role in shaping conviviality.

This general thesis will be discussed from the recent debate on indigenous territorial rights in Brazil. In administrative and judicial arenas, expert opinions by historians and anthropologists are produced and scrutinised. Judges in turn should interpret laws and evidences dating back to the nineteenth century and even earlier. In this paper thus the point is the negotiation between the expert/traditional knowledges and legal concepts in order to acknowledge indigenous rights to land. Or in other words the negotiation between the self-ascription backed by ethnohistory and legal ascription. In this context, symmetrical law is a label to the openness towards social epistemology which has been recently defied by Brazilian Supreme Court decisions.

1. Introduction

The definition of indian land rights is an issue still open in Brazil. There are several legal disputes in progress for both areas in process of demarcation as to lands already demarcated. The current disputes discuss the Federal Constitution in force, enacted in 1988, with broad participation of social movements.[1]

How to interpret these rights? For an influential literature, the Constitution belongs to the new latino constitutionalism which recognises a multicultural society. Instead of a multicultural interpretation, I offer a tentative contribution to interpret these debates on indian lands rights with the frame of conviviality.

The common interpretation claims the thesis from assimilationism to multiculturalism. Before the Constitution was in force an assimilationist perspective, for which the Indian condition was regarded as transitory, fleeting. It disappear with the modernization of the country.[2]

[1] DALMO DALLARI, "Os direitos humanos e os índios no Brasil", in: ALBERTO DO AMARAL JÚNIOR; CLÁUDIA PERRONE MOISÉS (Org.), *O Cinquentenário da Declaração Universal dos Direitos do Homem,* São Paulo, Edusp, 2003

[2] ANTONIO CARLOS DE SOUZA LIMA, *Um Grande Cerco de Paz: Poder Tutelar, Indianidade e Formação do Estado no Brasil,* Petrópolis, Vozes, 1995. JOÃO PACHECO DE OLIVEIRA, "Sem a tutela, uma nova moldura de nação", in: RUBEN OLIVEN; GILDO BRANDÃO; MARCELO RIDENTI (orgs.), *Constituição de 1988 na vida brasileira*, São Paulo, ANPOCS, 2008, p.251-275. JULIO JOSÉ ARAÚJO. A Constituição de 1988 e os direitos indigenas: uma prática assimilacionista? In: MANUELA CARNEIRO DA CUNHA; SAMUEL BARBOSA (Orgs.), *Direito dos Povos Indígenas em Disputa.* São Paulo: Unesp, 2018.

The Constitution, however, recognizes specific rights for indian people and, therefore, guarantees the physical and cultural reproduction of such groups.[3] Indians have a traditional way of life with the right to the future, it is not a transient condition.

The thesis from assimilationism to conviviality also speak of forced assimilation of the indians for the period before the Constitution. The controversy is how to characterize the period opened with the Constitution. The multicultural discourse stresses static identities and special rights. Conviviality otherwise emphasizes the dynamics of identification, negotiations and translations of the differences in many arenas. What I would like to discuss in more detail is how the constitutional law structures that negotiation of differences, how it put conditions to the negotiation between self-ascription and ascription by law.[4]

2. Negotiation between self-ascription and ascription by law

This is the main rule:

Article 231. Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the union to demarcate them, protect and ensure respect for all of their property.

Paragraph 1. Lands traditionally occupied by indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions.

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[3] Para um balanço mais geral sobre o funcionamento da Constituinte, ver ADRIANO PILATTI, *A Constituinte de 1987-1988: progressistas, conservadores, ordem econômica e regras do jogo,* Rio de Janeiro, Lumen Juris, 2008. Para a questão indígena especificamente, ver ROSANE FREIRE LACERDA, *Os Povos Indígenas e a Constituinte*, Brasília, CIMI, 2008; FREDERICO MARÉS DE SOUZA, *O Renascer dos povos indígenas para o direito*, Curitiba, Juruá, 2001 e PAULO THADEU GOMES DA SILVA, *Os direitos dos índios: fundamentalidade, paradoxos e colonialidades internas*, São Paulo, Café com Lei, 2015.

[4] SAMUEL BARBOSA, Usos da história na definição dos direitos territoriais indígenas no Brasil. In: MANUELA CARNEIRO DA CUNHA; SAMUEL BARBOSA (Orgs.), *Direito dos Povos Indígenas em Disputa.* São Paulo: Unesp, 2018.

For a multiculturalist reading, this rule creates special rights and recognizes the indian identity attached to lands. This rule stress identity marks such as customs, creeds, traditions and so on.

Inspired by conviviality literature I suggest that the identification of indians is more complex and dynamic. This rule call our attention to the demarcation procedure of "lands traditionally occupied by indians". By procedures, the negotiation between self-ascription and ascription by law develops both in administrative and judicial arenas.

The first phase of the demarcation administrative process is the creation of an expert group.. The work of experts (anthropologists, historians, geographers) produce reports during the administrative and judicial procedure by making use of primary documents (such as notary declarations, travel narratives, communication between the Indians and the state organs), use of oral history, ethnographic field observations and so on. These studies rework the available information on the occupation of indigenous people in the area. The report must be approved by a state specialized agency, then the Minister of Justice and finally by the president. New reports could be required. Justice can be triggered to suspend and cancel the demarcation process. After demarcated, the issue could go to litigation.[5]

Here a slide of the report about a guarani land, called Tenodé Porã, in Sao Paulo. It is a detailed report on ethnohistory with sources dating back the colonial period. All reports should fill a official template, defined by law, which topics as such:

General information about (s) group (s) Indian (s) involved (s), such as cultural and linguistic affiliation, any migration, census, spatial distribution of population and identification of criteria determining this distribution;

[5] ILKA BOAVENTURA LEITE (org.), *Laudos Periciais Antropológicos em debate,* Florianópolis, NUER/ABA, 2005. ORLANDO SAMPAIO SILVA; LÍDIA LUZ; CECÍLIA MARIA HELM (org.), *A Perícia Antropológica em Processos Judiciais*, Florianópolis, Ed.UFSC, 1994. *JOÃO PACHECO*, "O Antropólogo como perito: entre o indianismo e o indigenismo", In: BENOIT DE L'ESTOILLE, FEDERIDO NEIBURG, LYGIA SIGAUD (orgs), *Antropologia, Impérios e Estados Nacionais*, Rio de Janeiro, Relume Dumará, 2002, p.253-277. ARMANDO GUEVARA GIL; A.VERGARA; R. VERGARA (eds.), *El peritaje antropológico. Entre la reflexión y la práctica*, Lima, Centro de Investigación, Capacitación y Asesoría Jurídica del Departamento Académico de Derecho, 2015.

Research on indigenous land occupation history according to the memory of the ethnic group involved;

Description of the cosmological aspects of the group, the areas of ritual uses, cemeteries, holy places, archaeological sites, etc., showing the relationship of these areas to the current situation and how objective this relationship in this case.

Here photos of an "opy", a house of prayer, when I visited it in 2015.

How the indian/expert ascriptions is translated in law?

For the purposes of this talk, the important point is the function that is performed by these studies. In other words, university research, which has its own motivations, is reappropriated in the making of reports about indigenous peoples.

I identify two logics underlying the negotiation of ascription.

For the first one:

Expert research is called to participate in **the production of evidences.** Expert research answers questions such as: what is the indigenous group? What was the history of occupation of the area? To what extent the area is necessary for physical and cultural reproduction of the group?

This use of ethnohistory as evidence of facts is part of a more general concept of division of labor in litigation. Two legal proverbs express this view.

"Da mihi factum dabo tibi ius". The facts must be alleged and proved by the parties, then the judge says the law. This aphorism expresses a distinction between questions about facts (quaestio facti) and questions about legal interpretation (quaestio iuris). The participation of ethnohistory would be restricted to questions about facts. Questions about the entitlements would be the responsibility of the judge, according to the logic of the legal field. This is what expresses also the aphorism "Iura novit curia". The judge knows the valid law which need not be proved. In other words, the experts, able to prove the facts, do not give the interpretation of the law, that's the role of judges.

Let's see one example.

The main leading-case on indigenous land rights after the Constitution is the decision of the Brazilian Supreme Court in 2009 (twenty nine) about the demarcation of the Raposa Serra do Sol. The Court was guided by the distinction fact/interpretation. Facts should be proved by expert reports and the interpretation should be determined by the Court.[6]

In this case, the Court developed a criteria called "timeframe" (marco temporal) to be applied to land demarcation. The traditional occupation should be proved on the date of promulgation of Constitution, the exception is the case of expulsion of Indians from their land, called in legal terminology as "dispossession" (esbulho).

It should be proved that the effects of dispossession continue in the present, in the date of promulgation of Constitution. It is called "permanent dispossession".

In other words, it should be proved either the indians occupy the land or they can not occupy it due to permanent dispossession.

In 2014 (twenty fourteen) , a demarcated area (the indian land of Terena people called "Limao Verde") was annulled by the Supreme Court 2nd Panel.[7] The central question concerned the definition of "permanent dispossession". Expert reports proved the dispossession in the 1950s. For the Court, however, "permanent dispossession" is not "forced evictions occurred in the past." Its effects should be permanent until the date of promulgation of Constitution. The Panel defined two types of resistences: It is required to proof the physical resistence or at least a filed lawsuit in the date of Constitution.

The date of the promulgation of the Constitution thus acquired a dual function, as matter of proof to traditional occupation of an area or of proof the continuity of the effects of dispossession by evidences of physical resistence or filed lawsuit.

3. Self-ascription beyond evidence

[6] SUPREMO TRIBUNAL FEDERAL, *Petição 3.388 Roraima,* Brasília, 2009. ERICA MAGAMI YAMADA; LUIZ FERNANDO VILLARES, "Julgamento da terra indígena Raposa Serra do Sol: todo dia era dia de índio", *Revista DireitoGV,* 6, 1, 2010, p.143-157. JULIA TRUJILO MIRAS (org.), *Makunaíma grita: terra indígena Raposa Serra do Sol e os direitos constitucionais no Brasil,* Rio de Janeiro, Azougue, 2009.

[7] SUPREMO TRIBUNAL FEDERAL, *Acórdão do Ag. Reg. no Recurso Extraordinário com Agravo 803.462 Mato Grosso do Sul*, Brasília, 2014, p. ementa n. 3.

The first underlying logic of separation between questions of fact and questions of law reappears in this case. There is therefore a factual dimension of dispossession that is likely to prove and there is a hermeneutic dimension that is set by the court without reference to indigenous meaning of resistance ("Da mihi factum dabo tibi ius"; "Iura novit curia").

The second logic underlying the negotiation of ascriptions is another use of expert reports which have been mobilized by Indians, activists and academics. I argue that, in addition to proof function, the ethnohistory is used in the definition of the meaning of law.

The best and most recent example is combination of timeframe and permanent dispossession which I have already begun to discuss. For instance, it is proved that the indians lost area (dispossession) but continued resistance in 1988 (nineteen eighty eight), in this case they have right to the area. But what are the types of resistance? The indian understanding mediated by expert reports shows different types of resistance, different for each people. Not only is the case of the physical and violent resistance. Indians who remain close to the area, carrying out small thefts, gathering and fishing in areas of dispossession can set up a form of resistance. Indians who become farmers employees to remain close to land and perform their rites, that's also a form of resistance. There are a myriad (míriad) of invisible forms of resistance, "the weapons of the weak" (James Scott).[8] In this sense, the concept of dispossession of indigenous lands can not be a monological dogmatic construction of civil law. For each indigenous people, according their uses and customs, everyday forms of resistance are practiced that does not subsume to the types of resistance alluded (alíud) in Limao Verde case.

In other words, the broader understanding of what resistance means has consequences in defining the meaning of "permanent dispossession" and the definition of what occupation means. It is not a question of proof of facts only, but the dispute over the best interpretation of the Constitution. In the current disputes seems to be an ongoing mobilization of ethnohistorical knowledge more radically with unforeseen consequences.

[8] JAMES SCOTT, *Weapons of the week: everyday forms of peasant resistance,* New Haven, Yale University Press, 1985. DEBORAH DUPRAT, *Memorial no Ag.Reg. no Recurso Extraordinário com Agravo, 803.462, Mato Grosso do Sul,* Brasília, Ministério Público Federal, 2015.

An important French anthropologist working with the Yanomami Bruce Albert coined the concept of "implicated research".[9] Usually indians have been thought as object of anthropological research, or as population administrated and by the State. An important mutation was the passage of the Indian as an object, to the Indian as subject dealing with the state, Indian who collaborates with the anthropologist. This changes the way of doing ethnography, from classical participant observation for what Albert called observant participation, whose accent is placed on collaboration between anthropologist and indians without the epistemic privilege for the observer. Implicated research depends on the Indian agency, the collaboration between the Indian and the anthropologists. In this scenario, the indian is no more a voiceless object but appears as a subject who politicizes the debate, struggles for rights, does demonstrations and organizes itself in in associations.

[[Part of this constellation, is the work of the National Truth Commission established in 2012 by the Brazilian government to investigate serious human rights violations between 1946 and 1988 that brought a specific chapter on indigenous peoples. The Commission catalysed the training network of researchers and activists who produced reports, the discovery of new documents in recent history documenting the various dispossessions of indigenous lands with initiative or seal of the State. The Commission activities have given a boost to work on short-term memory whose effects are not yet fully understood and have unforeseen effects.]][10]

Thinking in terms of distinguishing fact / interpretation, the use of history as proof occupies one side and the legal professionals (especially judges) occupies the other. In other

[9] BRUCE ALBERT, "'Ethnographic Situation' and Ethnic Movements: Notes on post-Malinowskian fielwork", *Critique of Anthropology,* v. 17, n. 1, 1997, p.53-65.
[10] COMISSÃO NACIONAL DA VERDADE, *Relatório,* 3 vol., Brasília, CNV, 2014 (http://www.cnv.gov.br/). A principal descoberta documental foi o Relatório Figueiredo (www.documentosrevelados.com.br), feita por Marcelo Zelic, no Museu do Índio em 2012. Produzido em 1967 pelo procurador Jader de Figueiredo Correia, a pedido do então ministro do Interior, Albuquerque Lima, para investigar irregularidades e crimes aos índios praticados pelo então órgão de proteção e assistência. Um exemplo de relatório regional, IAN PACKER, *Violações dos direitos humanos e territoriais dos Guarani no Oeste do Paraná (1946-1988): subsídios para a Comissão Nacional da Verdade,* São Paulo, Centro de Trabalho Indigenista, 2013 (https://goo.gl/jwYMh0).

words, ethnohistory research, articulated by anthropologists and historians, is valued by the procedural law as evidence. While the legal expertise, articulated by legal professionals, gives the correct interpretation of the Constitution.

This logic, which has a very strong appeal among lawyers and even anthropologists, does not highlight other relationships between legal knowledge and ethnohistory. The implicated research, built between Indians and anthropologists, is charged with normativity and also participates in the definition of the meaning of the law. As our case suggested, the definition of permanent dispossession is not a concept that can be built with autonomy by dogmatic regardless of traditional forms of resistance. The use of history is usually focused production as administrative and judicial proof. I have argued here that this is not the only use, nor is it the most important to understand the current disputes. Historical research is also used to define the extension of rights.

Inspired by the conception of "symmetrical anthropology", I wish to talk of "symmetrical law". For symmetrical anthropology, indian perspective matters. Indians also interpret both the contact with state policies and the ethnological field research. My point is that the constitutional indians rights exemplify such kind of symmetry. Let's read article 231 again. Instead of special rights ou marks of identity, I argue that the constitution frames a complex negotiation between the self-ascription by indians mediated by expert knowledge and ascription by law. Article 231 opens itself to an ecology of knowledges beyond legal concepts. This article exemplifies the challenge of conviviality.