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Territorial Rights in Brazil: Chronic Difficulties and New Approaches to Sustaining Traditional Landscapes

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Territorial rights recognized by Brazil's 1988 Constitution are one thing; quite a different matter is the implementation of these rights in practice. So begins this comprehensive account of the difficulties facing Indigenous peoples and quilombola communities in the defense of their territorial rights, which have come under increasing attack over the past decade. Rightly heralded as a signal achievement in the *de jure* protection of the rights of traditional peoples, the Brazilian Constitution has proven difficult to enforce when it comes to the identification and demarcation of traditional territories. While the framers of the Constitution imagined it would take only five years to demarcate Indigenous territories throughout the country (as outlined in Articles 231 and 232 of the document), thirty-four years later some 241 territories are stuck at various stages in the bureaucratic process of demarcation and protection. The situation is bleaker with regards to quilombola territories: 1,700 currently await full legalization, despite rights recognized in the Constitution's Articles 215 and 216. Worse still, the protections once thought to accompany full legalization are being eroded as calls for mining on Indigenous lands and for reducing reserves gain strength in Brazilian society.¹ Clearly, rights that exist on paper are far from being enforced in reality.

There is generalized confusion over the precise nature of territorial rights, and the political right in Brazil has both fomented this confusion and benefited from it. Conventional wisdom in Brazil holds that the state grants rights to territory, and that therefore it is up to the government to determine who is (and who is not) qualified to enjoy the rights conferred. Logically, it's a short leap to the politicization of Indigenous and quilombola identity, and soon accusations of "opportunists" and "false Indians" clutter the airwaves and social media feeds. The ascent of Bolsonaro, fed by anti-Indigenous rhetoric and decades of political mobilization by the agribusiness lobby that covets unfettered access to lands, is explained in part by efforts to confuse and confound the process of territorial recognition. Populist revanchism has cast Indigenous and quilombola communities as anti-democratic swindlers, breathing new life into the old saw of there being "too much land for too few Indians."

The chapters' authors helpfully clarify matters, on a number of fronts. First, on the very nature of rights: the 1988 Constitution is unequivocal in its recognition of Indigenous territorial rights as *originary*—that is, they precede even the founding of the Brazilian Republic—and that these rights are co-constituent with Indigenous people's status as a differentiated community which "utilizes territory in their physical, cultural, social, religious, and economic reproduction" (Pres. Decree 6.040/2007). In other words, the Brazilian state does not *grant* Indigenous people the rights to anything; those rights to territory exist by way of the communities' very existence, which are always already understood as communities that, juridically speaking, precede the existence of the state. Rather than *granting* (or withholding) rights or benefits, the state's role is to *recognize* and hold in trust the territories that are co-extensive with the living cultures and communities that utilize them. Demarcation does not *create* rights, since the Constitution clearly understands that these rights to territory already exist. As Carlos

1. At the time of writing, 487 Indigenous territories are fully demarcated in Brazil, along with a mere 404 of the estimated total of 4,000 quilombola communities (ISA).

Marés puts it: “Demarcation of Indigenous lands is only a consequence of the constitutional recognition of the existence of these people; it neither creates nor modifies these rights, and demarcation neither constitutes nor transforms a people” (21).

If the right to territorial protection goes hand-in-hand with the recognition of a culturally differentiated community, the question remains: who gets to decide? The Constitution, and Brazilian political history stretching back to the 17th Century, is clear on this matter as well. The principle of self-identification—the right of a community to define its own social and political character—is enshrined in Brazilian law via a number of instruments, including the 1988 Constitution, the National Policy on Sustainable Development of Traditional Peoples and Communities (Decree 6.040 of 2007), and the UN Declaration on the Rights of Indigenous Peoples (which Brazil adopted in 2007). Indigenous and quilombola identity is not up for a vote of the majority, and never has been in Brazilian political culture. From the very establishment of the Portuguese colonial system, Indigenous territorial rights have enjoyed some form of recognition and legal protection. The Colonial Charter of 1680 recognized Indigenous peoples as “the primary and natural owners of their lands;” soon after the Crown also recognized rights of Indigenous peoples to refuse missionization and remain undisturbed in their lands. Even through centuries of forced “villagization” and participation in various economic regimes, Portuguese and subsequent Brazilian Imperial legal codes recognized the choice of Indigenous peoples to define their own prerogative and remain in their own lands. It is especially striking, given the right’s contemporary nostalgia for the military dictatorship, that it was actually the *ditadura* (1964-88) that codified the principles of demarcation of Indigenous lands, the non-alienability of those lands, and the nullification of state or federal laws that aimed to separate traditional peoples from their territories. Through five centuries, the legal principles adopted in the 1988 Constitution—and which are the target of so much ire and disinformation today—appear to emerge organically through the elaboration of juridical acts and norms: the state recognizes Indigenous and quilombola communities as culturally distinct peoples who pursue their own values and forms of social and physical reproduction in particular landscapes. The Brazilian legal imagination has always imagined those territories as belonging to, and being coextensive with, the communities themselves.²

Clarifying the conceptual bases of territorial rights as elaborated in Brazilian law is crucial, as it is only with a firm understanding of the state’s role that progress can be made in securing the originary territorial rights of self-identified communities. Predictably, however, difficulties arise in moving from principles to practice. The very act of demarcation—a lengthy technical and bureaucratic process set up in 1996—has perversely incentivized reprisals and threats of violence aimed at traditional communities. Legal challenges have bogged down demarcation processes in the courts, leading to yearslong delays marked by land grabbing, deforestation, and targeted assassinations of community leaders. The state’s attempts to partially demarcate areas and provide at least a modicum of protection to traditional communities have had the opposite effect, and the resulting confusion only feeds the right wing’s calls to blow up the entire demarcation process. Of course, the most dire policy prescriptions that Brazil’s conservative wing hopes to implement today fly in the face of established legal tradition. For example, Constitutional Amendment 215 would consign the power to demarcate lands to Congress, effectively ending all territorial demarcation since new requests for the demarcation of Indigenous lands would need to achieve a majority vote in the Congress. Furthermore, the Supreme Court is currently weighing the fate of the *marco temporal* legal theory, which would introduce an exogenous and arbitrary limitation on traditional communities’ rights to self-identification. In the multifront war on traditional rights, PEC 215 and *marco temporal* have moved from fringe to mainstream, lending political and legal credence to those who use violence to intimidate at-risk communities.

2. The authors of this section provide a very useful timeline of the legal acts taken with regards to Indigenous territorial rights and the legal tenure of traditional lands more broadly; see Marés et al. (2021: 42-47).

Though the threats are dire, there are reasons for hope. As the authors note, we are coming to understand the meaning of territory—and the juridical and legal imaginations of those who defend it—with the help of Indigenous leaders, writers, and ethnographers. The fearless work of Munduruku leaders to defend their territory when the state refused, the Zoé’s notion of territory that collapses interspecies interactions with a notion of “well-being,” and quilombola practices of community gardening and place-making all put the lie to the notion that individual human ownership of lands, via privatization, is the singular path towards “order and progress.” By defying the predatory logic of private property, these communities pursue relationships that transcend mere subsistence or the profit motive. And this is why the fate of traditional territories should concern us all. Legally entitled to roughly 10% of the world’s land, Indigenous peoples actually use and sustainably manage closer to 30% of the world’s surface, lands that are tied to roughly 80% of the planet’s biodiversity (see Garnett et al., 2018). Indigenous environmental management safeguards a range of ecosystem services that benefit all of us. But those benefits proceed from precepts other than “efficiency,” “scale,” “incentives,” and “property rights.” The way forward, the authors suggest, to realizing the radical promise of Brazilian law is to take seriously the social and territorial concepts that traditional communities enact as they co-create spaces of mutual thriving with other beings (see Carneiro da Cunha 2019). Rather than treating these living practices as anathema to the progress of the market or as precious relics to be preserved in a forest-museum, we had better accept the invitation to think with and learn from our Indigenous collaborators before it’s too late.

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