

With the *Housing and ESC Rights Law Quarterly*, the COHRE ESC Rights Litigation Programme aims to present advocates and other interested persons with information on national and international legal developments related to housing and economic, social and cultural rights.

INDIGENOUS' LAND RIGHTS IN BRAZIL: AN ANALYSIS OF THE RAPOSA SERRA DO SOL DECISION OF THE SUPREME FEDERAL COURT THROUGH THE LENS OF ILO CONVENTION NO. 169

by Leticia Osorio

THE CASE

The demarcation of the indigenous reservation Raposa Serra do Sol, Brazil, finally reached a decision in the Federal Supreme Court (STF) in March 2009, after 11 long years of being a matter of high controversy within the judiciary as well as key concern of civil society. The indigenous territory Raposa Serra do Sol is located in the northeast area of the State of Roraima, bordering Guiana and Venezuela.

The area of 1.7 million hectares, home to 18 thousand indigenous persons, had been demarcated by a Presidential Decree in 2005, and it occupies 7.8 per cent of the total area of the State. The indigenous population conform 49.2 per cent of the total rural population of the State, and 46.01 per cent of its area is designated as indigenous territories.

In 1998, the indigenous communities were granted

permanent possession over such territory and have been relying on the work of the National Indigenous Foundation (FUNAI) and the National Institute of Agrarian Reform (INCRA) to demarcate the area and issue legal title (Administrative Ruling n. 820/98). The reservation is home for the indigenous communities Ingarikó, Makuxi, Taurepang, Wapixana and Patamona. Six private landowners, who have illegally encroached on and

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<ul style="list-style-type: none"> Indigenous' land rights in Brazil: An analysis of the Raposa Serra do Sol decision of the Supreme Federal Court 	<ul style="list-style-type: none"> SUMMARY 	<ul style="list-style-type: none"> CASE NOTES: <i>Abahlali baseMjondolo Movement of South Africa and Another v. Premier of the Province of KwaZulu-Natal and Others</i>
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<ul style="list-style-type: none"> CASES TO WATCH - Federal Supreme Court of Brazil, Popular Action n. 3388/2005, <i>Senator Augusto Affonso Botelho Neto and Senator Francisco Mozarildo de Melo Cavalcant v. Union</i> 	<ul style="list-style-type: none"> UPCOMING EVENTS: <i>Committee on Economic, Social and Cultural Rights</i> 	

SUMMARY

This edition of the Quarterly opens with an article on an important case dealing with indigenous land rights in Brazil. The article examines the groundbreaking case of *Raposa Serra do Sol*. While welcoming the case generally, the article provides a critical analysis of several requirements proffered by the Court that may contravene the International Labor Organization Convention No. 169 concerning indigenous and tribal peoples.

Following is a Case Note on the case of *Abahlali baseMjondolo Movement of South Africa and Another v. Premier of the Province of KwaZulu-Natal and Others*. This case involved a successful challenge to the Kwa-Zulu Natal Elimination and Prevention of Re-emergence of Slums Act which had been resting in forced evictions of impoverished communities.

Cases to watch include a case filed in domestic courts in the Czech Republic dealing with racial segregation and inadequate housing of Roma. This case is not only one of the first to bring international standards to bear in domestic litigation in the Czech Republic, but one of the first to establish the practice of *amicus curiae* intervention.

Finally, there is a brief item on upcoming events dealing with economic, social and cultural rights.

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For additional information on the justiciability of ESC rights, see www.cohre.org/litigation and the Case Law Database at www.escr-net.org.

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farmed the land, have refused to leave the territory when it became entirely assigned to the indigenous communities. These farmers created their own private militias for personal and real estate security. They also rely on the support of the Mayor of the municipality of Pacairama, located within the nearby indigenous reservation of Sao Marcos.

The Presidential Decree n. 534/2005 has recognised the rights of the indigenous peoples over the contiguous indigenous territory Raposa Serra do Sol, including the area of the municipalities of Normandia and Uiramutã. It determined that the land be vacated by non-indigenous entities within the period of one year. An office of the Federal Police was established in the area to provide support for the enforcement of the Decree. However, the private landowners who cultivated rice on 14 thousand hectares of land located within the indigenous reservation refused to leave. They relied on the political support of the State Government and from local politicians.

Since 1999 the State Government and the private owners have been contesting the demarcation proceeding before the judiciary. Due to the filing of a significant number of suits, the Federal Public Prosecutor requested that the STF retain exclusive jurisdiction of the judgment of any suit challenging the demarcation procedure. They contested the demarcation of Raposa Serra do Sol as an integral and continuous indigenous territory and claimed that there should be a non contiguous demarcation. In 2004, 2005 and 2006 a series of attacks were carried out by the farmers' private security forced against indigenous villages, resulting in injuries and deaths. Thirty-four houses were burnt down in the attacks.

INDIGENOUS PEOPLES' CONSTITUTIONAL RIGHTS

According to the 1988 Federal Constitution, indigenous peoples “shall have their social organization, customs, languages, creeds and traditions recognised, 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” (Art. 231). As such, it is not the demarcation procedure itself which creates an immemorial possession, an indigenous habitat; it only demarcates the area occupied by the indigenous peoples according to genuine constitutional principles of mandatory applicability. The Constitution defines the lands traditionally occupied by indigenous peoples as “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” (Art. 231, para. 1). Such lands are intended “for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein” (Art. 231, para. 2).

Indigenous reservations belong to the Union (Art. 20, XI of the Constitution) and indigenous communities are granted with permanent possession and exclusive usufruct rights over the lands and of the riches of the soil, the rivers and the lakes existing therein. The reservations are inalienable and indisposable and not subject to the statute of limitations (Art. 231, para. 4). The Constitution also acknowledges indigenous people as part of the Brazilian culture and as Brazilian peoples: “the State shall protect

the expressions of popular, Indian and Afro-Brazilian cultures, as well as those of other groups participating in the national civilization process” (Art. 215, para. 1).

THE JUDGMENT BY FEDERAL SUPREME COURT

In August 2008, the STF started with the final judgment of the case. The reporter, Justice Carlos Ayres Britto, presented the first vote to the judgment which considered the demarcation process lawful. It confirmed the demarcation Decree was legal and dismissed the alleged nullity of the administrative process claimed by the private rice producers.

Justice Ayres Britto casted his vote on the demarcation matter by endorsing the right of indigenous peoples to the entire territory of Raposa Serra do Sol, which has been occupied during the last 150 years without witnessing any conflict among the different tribes. He acknowledged the findings of the anthropological assessment confirming that an economic, social and cultural miscegenation were found among the different tribes, which makes it difficult to establish the area effectively occupied and used individually by each of the communities. It concluded that the geographical characteristics of the reservation that encompasses large portions of infertile land, do not allow for a restrictive demarcation. In his vote, Justice Ayres Britto declared void all land titles issued by the National Institute of Agrarian Reform in 1979 and 1985 on behalf of the Union which, in turn, assigned them to private rice producers. Such deeds were found to be assigned to the Union without any consultation with FUNAI. Justice Ayres Britto also declared private property rights over Guanabara farm invalid as the alleged owner had no legal

grounds to rely upon. He stated the territory has been ancestrally occupied since time immemorial by the indigenous communities, and has been peacefully possessed since the approval of the 1988 Constitution. The rice producers started the exploration of the area in 1992, after the promulgation of the Constitution, and do not have any vested rights over the land as it had been acquired through a violent act of land grabbing. By taking such land, the farmers subtracted from the communities a wide expanse of fertile land indispensable for their economic, social and cultural survival. According to Art. 231, para. 6 of the Constitution, “acts with a view to occupation, domain and possession of the [indigenous] lands or to the exploitation of the natural resources of the soil, rivers and lakes existing therein, are null and void, producing no legal effects except in case of relevant public interest of the Union as provided by a supplementary law, and such nullity and voidness shall not create a right to indemnity or to sue the Union, except in what concerns improvements derived from occupation in good faith, in the manner prescribed by law.”

After presenting his vote, Justice Marco Aurelio Mello requested the suspension of the judgment until December 2008, when it was resumed to process the votes of eight Justices. They all ultimately voted in favor of the demarcation of the reservation in a contiguous area. The last three Justices to vote expressed their positions in March 2009: Justice Carlos Menezes Direito, although favorable to the demarcation of the reservation Raposa Serra do Sol as a continuous area, proposed a series of conditions to be taken into account in future demarcations of indigenous territories. Some of them are already sponsored by the Constitution and others aim to restrict the use of the lands and its natural resources by allowing the Union the freedom to exploit such

resources without engaging in prior and meaningful consultation with the communities.

“Too much land for a few Indians” was the main argument contained in the final last vote cast by Justice Marco Aurelio Garcia. He endorsed the view that indigenous peoples must be integrated to society to become part of the national majority and questioned whether the existence of only 19,000 Indians in the area justifies the contiguous demarcation. In his vote, he interpreted the Constitution in a very narrow manner, and disregarded the distinctive identity, tradition and values which entitle the indigenous communities to be granted with special guarantees by the Constitution as a response to their vulnerable situation. He also did not recognise the special importance of their relationship with the land and the natural resources for the reproduction of their cultures and spiritual values. Justice Aurelio Garcia argued that they were entitled to be granted the lands they actually occupied when the 1988 Constitution was adopted and thus had not recognised the legal existence of a time immemorial possession attained by the indigenous peoples as a result of the original occupation of the territory. According to his view, the Constitution did not aim to remedy the gross violations that were practiced against indigenous communities – deaths, confiscation of their lands and natural resources, slavery – as it would have to be implemented at the cost of those who did not experience such practices. He also argued that at the backstage of the demarcation process rests, in his opinion, the interests of non-governmental organisations that insight the Indians in the Amazon region to struggle for the division of the national territory so as to undermine our national

sovereignty. Justice Marco Aurelio Garcia’s vote considered the demarcation process null and void.

The final judgment confirmed the demarcation of Raposa Serra do Sol as a contiguous area and ordered the withdrawal of all non-indigenous people – the rice farmers were given a deadline to leave the area by 1 May. The withdrawal operation was coordinated by the Federal Police and by the stipulated deadline they had left the area peacefully. The farmers continued the struggle to get the amount of compensation they claim they are due from FUNAI. The final judgment adopted the 19 conditions suggested by Justice Carlos Menezes Direito, which bound the exercise of the indigenous’ rights over the demarcated area of Raposa Serra do Sol and framed future land demarcations:

- 1 The usufruct of the rivers, lakes and the reaches of the soil existent in the indigenous land can be upheld when there is a competing public interest of the Union (Art. 231, para. 6 of the Constitution).
- 2 The usufruct enjoyed by the indigenous peoples does not encompass the exploitation of water sources and potential energy, which requires the authorisation of the National Congress.
- 3 The usufruct enjoyed by the indigenous peoples does not encompass the exploitation of mineral resources and mining, which requires the authorisation of the National Congress.
- 4 The usufruct enjoyed by the indigenous peoples does not encompass mineral prospecting or digging, which are obtainable at permission.

- 5 The usufruct enjoyed by the indigenous peoples is conditioned to the interests of the National Defense Policy. The installation of military bases and units, the expansion of the road system, the exploitation of energy sources and the protection of strategic riches will be implemented regardless of consultation with indigenous communities or with FUNAI.
- 6 The action of the Army Force of the Federal Police within the indigenous reservation, in the scope of its attribution, is guaranteed regardless of engaging in consultations with the involved communities and FUNAI.
- 7 The usufruct enjoyed by the indigenous peoples does not consist of an impediment to the installation, by the Federal Union, of public equipment, communication networks, roads and transportation routes, and the construction necessary to support the provision of public services.
- 8 The usufruct enjoyed by the indigenous peoples in an area that overlaps with environmental reservations is restricted to the purpose of their ingress, transit and permanence, as well as for hunting, fishing and vegetable extraction, all according to the period, season and conditions stipulated by the administrator of the conservation unit, which will be under the responsibility of the Institute Chico Mendes of Biodiversity Conservation.
- 9 The Institute Chico Mendes of Biodiversity Conservation will respond for the administration of the conservation unit, even when it overlaps with indigenous lands, with the participation of the affected indigenous communities, in consultative grounds only.

- 10 The transit of non-indigenous visitors and researchers into the area will be admitted according to the timetable and conditions established by the administrator.
- 11 Ingress, transit and the permanence of non-indigenous peoples in the rest of the indigenous area shall be permitted subject to the conditions established by FUNAI.
- 12 The transit, ingress and permanence of non-indigenous peoples cannot be subject to any charges or payments of any nature to the indigenous communities.
- 13 The charge of taxes or payments of any nature cannot be imposed upon the use of roads, public equipment, energy transmission, or any other installations open to public use, whether they have been expressly excluded or not from the indigenous areas.
- 14 Indigenous lands cannot be subject to leasing or any other juridical contract that restricts the full exercise of the direct possession enjoyed by the community.
- 15 Fishing, hunting, farming and the collection of fruits are forbidden to outsiders.
- 16 Indigenous goods, such as the lands, the exclusive usufruct of the natural riches and the utilities existent in the occupied lands, as well as the indigenous peoples' incomes, are exempt of any taxes and payment of any contribution, according to Art. 49, XVI and Art. 231, para. 3 of the Constitution.
- 17 The enlargement of an indigenous reservation already demarcated is forbidden.

- 18 Indigenous rights over the territory are indisposable, and the lands are inalienable and unavailable for transfer.
- 19 The participation of all governmental levels of the Federation is assured in the demarcation process.

THE CONSTRAINTS IMPOSED BY STF ON INDIGENOUS RIGHTS AND ILO CONVENTION NO. 169

Although the judgment adopted by STF abides by the concept of land enshrined in International Labor Convention No. 169 concerning indigenous and tribal peoples, many of the conditions imposed by the vote of Justice Menezes Direito violate the rights enshrined in that Convention. For instance, the concept of land provided for by the Convention embraces the whole territory used by indigenous peoples, including forests, rivers, mountains and sea, the surface as well as the sub-surface.

Additionally, items 5, 6, 8, 9, 10 and 11 of the abovementioned decision violate the right to self-determination, which provides for self-management and the right of indigenous peoples to decide their own priorities. This includes the management and control of their lives and their own economic, social and cultural development. In case the adoption of such restrictions has the aim to safeguard the persons, institutions, property, labour, cultures and environment of the peoples concerned, they cannot be contrary to their freely-expressed wishes (Art. 4.2 of ILO Convention No. 169).

The fundamental right to consultation, enshrined in the Convention (Art. 6.1 of ILO

Convention No. 169) will be violated should items 2, 3, 5, 6, 7, 9, 10, 11 and 12 are implemented. The right to consultation must be exercised whenever any measure which may have a direct effect on indigenous peoples is being planned or implemented. Such measures can include any public policies affecting indigenous peoples, such as those related to the exploitation or use of natural resources, including water, present in their lands. Although the Convention does not give indigenous peoples the right to veto, they shall be consulted in order to reach an agreement with the proponent of any project' through their prior and informed consent. The Convention also specifies that no measures should be taken against the wishes of indigenous peoples and that the consultation must be specific to the circumstances and the special characteristics of the group or community concerned (Art. 6.2 of ILO Convention No. 169). The aim of the Convention is to "offer the Indians the opportunity to participate in decision-making processes and to influence their outcome. It provides the space for indigenous peoples to negotiate to protect their rights." The constraints described in items 2 and 3 do not allow for the communities to be heard before the authorisation for mining exploitation is issued by the National Congress, or for their right to participate in the results of mining activities, as set forth by the Constitution in Art. 231, para. 3.

With regards to their right to development, this guarantee consist of "their right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and well-being and the lands they occupy or otherwise use, and to exercise the control, to the extent possible, over their own economic, social and cultural development"

(Art. 7.1 of ILO Convention No. 169). The right to development encompasses their right to “participate in the formulation, implementation and evaluation of plans and regional development which may affect them directly” (Id). The implementation of development-based projects without consultation, as described in item 5 of the judgment, violates ILO Convention No. 169 by denying the following rights to the indigenous peoples: the right to have impact assessment studies undertaken before any planned development project is implemented; the right to decide the kind of development they want; the right to participate in all steps of relevant plans at any level; and the right to control their own economic, social and cultural development.

Item 13 of the judgment can also affect negatively the improvement of the conditions of life and work of the peoples concerned. It violates

Art. 15.1 of ILO Convention No. 169 which states that “the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.” The rights of indigenous peoples to the natural resources of their territories include, inter alia, “the right to benefit in the profits made from any exploitation and use of natural resources and the right to be compensated by the government for any damages caused by such activities.”

Furthermore, the admission of the ingress, transit and the permanence of non-indigenous peoples in the indigenous area without their prior consultation, as foreseen in item 11, can damage their customs and way of life. Art. 17.3 of ILO Convention No. 169 states that “persons not belonging to these peoples

shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.” Even if the rules for such ingress, transit and permanence of outsiders in the indigenous reservation have to observe the conditions established by FUNAI, such conditions must be discussed with the peoples concerned.

Finally, the whole list of constraints imposed by this judgment shall be subject to consultation with the concerned population, according to Art. 6.1. of ILO Convention No. 169: “... governments shall consult the peoples concerned through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”

CASE NOTES

Abahlali baseMjondolo Movement of South Africa and Another v. Premier of the Province of KwaZulu-Natal and Others

The Abahlali baseMjondolo Movement, which represents thousands of persons residing in informal settlements, challenged the Kwa-Zulu Natal Elimination and Prevention of Re-emergence of Slums Act. The Movement claimed that the legislature of Kwa-Zulu Natal lacked the authority to adopt the Slums Act since it dealt with land tenure issues reserved to national-level authority. They also contended that the Act contravened the right to adequate housing enshrined in the Constitution. Section 16 of the Slums Act required municipalities

to resort to eviction in situations where the landowner or person in charge of the land failed to do so within a given time period.

While finding that that Kwa-Zulu Natal legislature did have the authority to adopt the Slums Act as it dealt primarily with housing conditions rather than land tenure, the Constitutional Court found that the Slums Act was unconstitutional as it mandated evictions. Such compulsory resort to eviction violated the right to adequate housing guaranteed by Article 26

of the Constitution on account of it (1) precluding meaningful engagement, or participation, of those facing eviction in the decisions by municipalities that affect their housing rights; (2) violating the principle of eviction as a last resort; and (3) undermining the security of tenure of those living in informal settlements by allowing eviction while circumventing the procedural safeguards of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act (PIE Act No. 19 of 1998).

Case Note by Bret Thiele

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CASES TO WATCH

Z.F. VERSUS CORPORATE TOWN Kladno AND THE CZECH REPUBLIC – ACTION FOR PERSONALITY RIGHTS VIOLATED BY ETHNIC DISCRIMINATION AND UNEQUAL ACCESS TO ADEQUATE HOUSING

Filed with the Regional Court in Prague, this case involves racial discrimination in access to housing by a Romani family of six in the City of Kladno. The Plaintiffs were rejected from renting municipal housing from 1996 to 2003. After having her last child in 2003, the lead Plaintiff was temporarily housed in housing that she managed to rent from a private landlord. This housing was inadequate and unacceptable for permanent living. She eventually was able to move into an ethnically “mixed” neighbourhood after the intervention of the Social Welfare Department. In 2007, however, she was forced to move to segregated housing known as Masokombinát housing that consisted of flats in a renovated slaughterhouse located outside the city limits and underserved by public transportation. This segregated housing is four times as expensive as her previous housing. The flats are in very bad conditions (damp, mouldy, with low temperatures from autumn until spring). The locality is excluded from the social

and economic life of the city and all tenants living in Masokombinát are stigmatized in the eyes of the other Kladno citizens. The case seeks not only remedies for the Plaintiffs, including moving to an integrated neighbourhood, but also an end of municipal policies of segregating Roma in the Masokombinát housing. COHRE has intervened as amicus curiae arguing that such segregation violates, inter alia, Article 5(e)(iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (right to housing without discrimination) as well as Article 26 of the International Covenant on Civil and Political Rights (equal protection of the law). COHRE also makes arguments under the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Economic, Social and Cultural Rights and sets up the possibility to appeal any adverse decision to a number of international fora.

Case to watch Bret Thiele and Kateřina Hrubá

UPCOMING EVENTS

Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights will next meet in May 2010. States Parties to the International Covenant on Economic, Social and Cultural Rights up for periodic review include Afghanistan, Algeria, Colombo, Mauritius and Kazakhstan. States Parties up for review by the Pre-Sessional Working Group, at which the List of Issues will be prepared, are Mali, Republic of Moldova, the Russian Federation, Sri Lanka, Turkey and Yemen.

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