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The land rights of indigenous and traditional peoples in Brazil and Australia*

Direitos territoriais de populações indígenas e tradicionais no Brasil e na Austrália

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Abstract

The global community accepts that the conservation of biological diversity depends upon the oral knowledge developed by traditional communities over generations ("traditional knowledge"). The maintenance of this knowledge depends upon traditional people's capacity to carry out cultural practices on traditional lands. Brazil and Australia use different legal mechanisms to facilitate this goal. This article examines those mechanisms to identify how each may learn, adapt and improve from the other. Key findings include the potential to strengthen land rights in Australia through the constitutional recognition of existing statutory and common law regimes, and the capacity to halt the forced relocation of some traditional peoples in Brazil through the use of joint management arrangements on conservation lands. The collection of findings suggest that Brazil and Australia have much to contribute in the development of an adaptable land rights model that advances both cultural and biodiversity objectives.

Keywords: Biological diversity. Traditional populations. Traditional knowledge. Indigenous. Land rights.

Resumo

A conservação da diversidade biológica depende, segundo grande parte da comunidade científica, dos conhecimentos desenvolvidos, ao longo de sucessivas gerações, pelas comunidades tradicionais. A manutenção desses conhecimentos, por sua vez, está diretamente relacionada à capacidade dessas comunidades de continuar a desenvolver, nas áreas por elas tradicionalmente ocupadas, práticas culturais ancestrais que os transmitam e revivifiquem continuamente. Para tanto, Brasil e Austrália utilizam diferentes mecanismos. Desse modo, o objetivo desse artigo consiste em identificar e examinar tais mecanismos, a fim de que cada experiência possa ser adaptada, aprimorada e utilizada pelo outro. Os principais achados incluem o potencial de se fortalecer direitos territoriais na Austrália, por meio do reconhecimento constitucional de direitos já positivados ou declarados pela *Common Law*, assim como, no Brasil, a capacidade de se evitar a transferência compulsória de grupos tradicionais não-indígenas quando da criação de unidades de conservação de proteção integral, a partir da adoção de instrumentos de gestão

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compartilhada de áreas protegidas. As principais conclusões sugerem que os dois países tem muito a contribuir com o desenvolvimento de um modelo adaptativo de direitos territoriais que avance na proteção do sócio e da biodiversidade.

Palavras-chave: Diversidade biológica. Populações tradicionais. Populações indígenas. Conhecimentos tradicionais. Direitos territoriais.

1. Introduction

Article 8(j) of the Convention on Biological Diversity (CBD) encourages contracting parties to "respect, preserve and maintain the knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity"[1]. This provision recognizes the longstanding contribution of traditional knowledge to biodiversity conservation. Traditional knowledge is also more than a simple commodity; its maintenance and development is a cultural human right and indispensable to the survival of Indigenous and local cultures[2].

Peoples living traditional lifestyles require access to land if they are to maintain and develop their biodiversity knowledge. Unlike many industrialized societies, traditional populations are oral cultures who do not write their knowledge down. They hold it in stories, songs, ceremonies and art; they transmit it verbally to younger people in cultural practices like hunting, harvesting and land management; and they develop it through observation and experiential learning ("learning by doing"). Indigenous and local peoples require access to land to carry out many of these practices.

Indigenous, tribal and other local populations with long connections to land view territoriality very differently from those raised in capitalist, industrial and urban societies. For traditional communities, their homelands are the base of their cosmology, culture and lore. Land is not private property, but a collective good over which all members of the group are eternal stewards.[3] Disparate perceptions of land are just one of the challenges traditional peoples face in securing land rights within colonial legal systems.

For instance, a key challenge affecting the recognition of land rights in Brazil is the release of conservation lands to traditional owners. The contest arises from within the part of the environmental movement that presumes human beings and biodiversity cannot live together. It manifests in the creation of restricted protected areas where the government transfers traditional populations living inside the area elsewhere, even if those people have sustained and conserved the area for centuries. A key challenge affecting the recognition of land rights in Australia is the competition between colonial land grants and traditional land claims, especially when it involves productive lands. These two challenges have caused particular delays in the recognition of traditional land rights in Brazil and Australia. This paper explores those contexts in more detail.

2. Traditional populations in Brazil

The 15th to 18th centuries were a time of European empire building, primarily through the annexation of Indigenous people's lands. The Portuguese colonized Brazil in 1500. During the 300 years of Portuguese rule, the Portuguese exploited many of the countries natural resources including Brazil wood, land, gold and diamonds. Slaves, especially those brought from Africa, comprised most of the work force.

Today in Brazil, there are two types of traditional populations: Indigenous and non-Indigenous. Although they are very different from each other, they have some common characteristics: both populations comprise hundreds of different communities spread all over the country and both have developed knowledge essential for the conservation of biodiversity.[4] This section explores the land rights of Indigenous and non-Indigenous traditional peoples in Brazil.

1 *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 19 December 1993).

2 MOREIRA, Eliane Cristina Pinto. Acesso e uso dos conhecimentos tradicionais no Brasil: o caso Ver-o-Peso. In: SOARES, Inês Virgínia Prado; CUREAU, Sandra (Org.). *Bens culturais e direitos humanos*. São Paulo: SESC, 2015. See also: LITTLE, Paul. *Territórios sociais e povos tradicionais no Brasil*: por uma antropologia da territorialidade. Brasília: Universidade de Brasília, 2002. (Série Antropologia 322).

3 GUANAES, Sandra; LIMA, Solange Almeida; PORTILHO, Wagner Gomes. Quilombos e usos sustentáveis. In: DIEGUES, Antônio Carlos; VIANA, Virgílio (Org.). *Comunidades tradicionais e manejo dos recursos naturais na Mata Atlântica*. 2. ed. São Paulo: HUCITEC, 2004.

4 RAMOS, André de Carvalho. *Teoria geral dos direitos humanos na ordem internacional*. Rio de Janeiro: Renovar, 2005.

Article 3 of the *Indigenous Act 1973* defines an Indigenous person as "any person with pre-Columbian origin who identifies himself as belonging to an ethnic group whose cultural characteristics distinguish it from the national society".[5] Indigenous populations that inhabited Brazil before the arrival of the Portuguese did not know writing, and no colonial report from the time identifies how many Indigenous societies there were. Estimates suggest a population of between three and five million people that spoke about 1300 different languages.[6] Many of those societies were extinguished during the colonization process through war, slavery and disease. By the end of the sixteenth century, the Indigenous population was little more than two million people.[7] By 2010, there were 246 Indigenous societies and 896917 Indigenous individuals speaking 150 different languages. Around 37% of these peoples lived in cities and the remainder in rural areas, of which just over 50% lived on lands designated as "Indigenous".[8]

It is clear that the Indigenous history in Brazil is one of depopulation. Prior to colonization, the Portuguese treated Indigenous peoples as their business partners in the "pau-brasil" trade ("brazil wood", a tree species that contains red dye). Those relations changed drastically upon the establishment of the colony and nomination of the first General Government. Needing a labor force to drive their enterprises, the new settlers set about capturing and exploiting many Indigenous peoples as slaves. Many factors contributed to the failure of the Indigenous slavery model, including the following:

- Indigenous peoples were used to doing only what was needed for their subsistence, such as foraging, fishing and hunting;
- Indigenous peoples were not resistant to European diseases;
- The missionaries that wanted to catechize Indigenous peoples opposed their enslavement; and
- The industry of trading black slaves from Africa was more profitable.[9]

Hence, the law prohibited Indigenous slavery from 1570. Despite the prohibition, landowners that could not afford African slaves continued for a long time to capture Indigenous peoples for slavery.

Other factors contributed to the collapse of the Indigenous population, such as war, famine, social disruption and the escape of Indigenous peoples to new regions where the natural resources were not well known.[10] Also contributing to the depopulation phenomenon was the Missions Regime, starting in 1686 and ending in 1759 with the expulsion of the Jesuit missionaries. The mission policy of confining large populations of Indigenous peoples to religious "villages" favored the spread of epidemics, which killed thousands of inhabitants. Those who survived were often sent to fight hostile tribes.[11] These are just some of the reasons why most of the Indigenous groups that inhabited Brazil when the Europeans arrived do not exist anymore.[12]

For many centuries, there was no official policy towards Indigenous peoples. The prevailing view was that at some point they would just disappear. In 1910, a public opinion movement led to the creation of the Indigenous Protection Service (Serviço de Proteção ao Índio, SPI), an official agency in charge of caring for Indigenous affairs. The National Indigenous Foundation (Fundação Nacional do Índio, FUNAI) replaced the SPI in 1967. FUNAI remains the government-appointed guardian of Brazil's Indigenous people.[13] The establishment of protection agencies reflected the

5 Free translation from the authors. The original text: "todo indivíduo de origem e ascendência pré-colombiana que se identifica e é identificado como pertencente a um grupo étnico cujas características culturais o distinguem da sociedade nacional".

6 Darcy Ribeiro estimates that the Indigenous population was 5 million people or more when the Portuguese arrived in Brazil. RIBEIRO, Darcy. *O povo brasileiro*: a formação e o sentido do Brasil. 2. ed. São Paulo: Companhia das letras, 1995.

7 INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. [*Homepage*]. Available in: <http://pib.socioambiental.org/pt>. Access on: 19 nov. 2015.

8 INSTITUTO BRASILEIRO DE GEOGRAFIA E ESTATÍSTICA. [*Homepage*]. Available in: <http://www.ibge.gov.br/home/estatistica/populacao/censo2010/default.shtm>. Access on: 19 nov. 2015. The number of Indians living in Indigenous lands was determined in 1998, and was not object of the 2010 census.

9 It is calculated that this industry has cost 160 million gold-pounds for the Brazilian economy in the 300 years of slavery. More than 3 million Africans were introduced and sold in Brazil as slaves during this period. RIBEIRO, Darcy. *O povo brasileiro*: a formação e o sentido do Brasil. 2. ed. São Paulo: Companhia das letras, 1995.

10 CUNHA, Manuela Carneiro da. *Índios no Brasil*: história, direitos e cidadania. São Paulo: Claro Enigma, 2012. (Coleção Agenda Brasileira).

11 CUNHA, Manuela Carneiro da. *Índios no Brasil*: história, direitos e cidadania. São Paulo: Claro Enigma, 2012. (Coleção Agenda Brasileira).

12 RIBEIRO, Darcy. *O povo brasileiro*: a formação e o sentido do Brasil. 2. ed. São Paulo: Companhia das letras, 1995.

13 FUNAI. [*Homepage*]. Available in: <www.funai.gov.br>. Access on: 1 dez. 2015.

emerging view that Indigenous societies would not disappear, that they instead needed to be kept apart from colonial society for their own protection. Despite this emerging view, some governmental employees continued to defend the thesis that Indigenous communities would disappear, not through extermination as previously thought but through their gradual assimilation into colonial society.[14]

In 1952, the federal government embraced the protectionist vision by adopting the Indigenous reservation policy. The reserve movement is attributed to the Villas-Bôas brothers, part of the Roncador-Xingu expedition,[15] together with important personalities like Marshal Rondon. These personalities proposed the creation of the Xingu Indigenous National Park, finally established in 1961 but with limits 10 times smaller than initially proposed.[16] Although mostly well-intentioned people advocated for the creation of Indigenous reserves, some government people used the policy against Indigenous peoples by forcing them of traditional lands that were well suited to agriculture. This secured large tracts of rich agricultural land for others while causing the transfer of different Indigenous groups to small reserves unsuited to farming. Unsurprisingly, many conflicts arose between traditionally hostile groups forced to live together on small areas of non-productive land. These outcomes did not reflect the protectionist view of the Villas-Bôas brothers.[17]

From the 1950s to the 1970s, the two different visions of Indigenous peoples coexisted: the protectionist view of the Villas-Bôas brothers and the governmental assimilation idea. The latter was adopted by the *Indigenous Act 1973* (Estatuto do Índio – Lei nº 6.001) but rejected by the first organized, national Indigenous movement formed in the 1980s. This movement led to the Indigenous victories seen in the new Brazil Constitution, promulgated in 1988.[18] Indeed, the 1988 Constitution abandoned the assimilation theory and reserved a whole chapter to ensuring Indigenous cultural and land rights.

> Article 231 recognizes Indigenous social organizations, costumes, languages and original rights to traditional lands. It requires the Federal Union to demarcate those lands,[19] protect Indigenous peoples and make the whole society respect their assets. The Constitution defines the meaning of Indigenous land as follows:
>
> Any land that has been traditionally occupied by Indigenous peoples, those inhabited by them permanently, those that are used for any productive activity, those indispensable to the preservation of natural resources that are necessary for their wellbeing and those necessary to their physical and cultural reproduction, according to their uses, customs and traditions.[20]

Although the Constitution establishes that those lands belong to the Federal Union, it also determines that they are intended for Indigenous people's permanent possession and that Indigenous peoples have the right to the exclusive use of the soil, lakes and river resources on those lands (articles 20, XI, and 231, paragraph 7). Paragraph 5 of article 231 establishes that Indigenous lands are inalienable and the rights to imprescriptible.

Because Indigenous lands belong to the Federal Union, only the Federal Government can establish them. So far, the Federal Government has demarcated 699 Indigenous lands occupying 115819863 hectares (13.6% of Brazilian land).[21] Most are public lands located in the Amazon region (54%) where few economic activities take place. There are few Indigenous lands in more developed areas, such as the South (10%) and Southeast (6%) regions, because most lands in those regions are in private ownership or the location of cities established long ago.[22] The Centre-West and Northeast Regions sum the other 30%, as shown in Figure 1.

14 CUNHA, Manuela Carneiro da. *Índios no Brasil*: história, direitos e cidadania. São Paulo: Claro Enigma, 2012. (Coleção Agenda Brasileira).

15 This expedition was part of the country internalization process. The idea was to explore areas that had not been occupied until then.

16 INSTITUTO SOCIOAMBIENTAL (ISA). *Almanaque socioambiental Parque indígena do Xingu*: 50 anos. São Paulo: Instituto Socioambiental, 2011.

17 RICARDO, Fany (Org). *Terras indígenas e unidades de conservação da natureza*: o desafio das sobreposições. São Paulo: Instituto Socioambiental, 2004.

18 CUNHA, Manuela Carneiro da. *Índios no Brasil*: história, direitos e cidadania. São Paulo: Claro Enigma, 2012. (Coleção Agenda Brasileira).

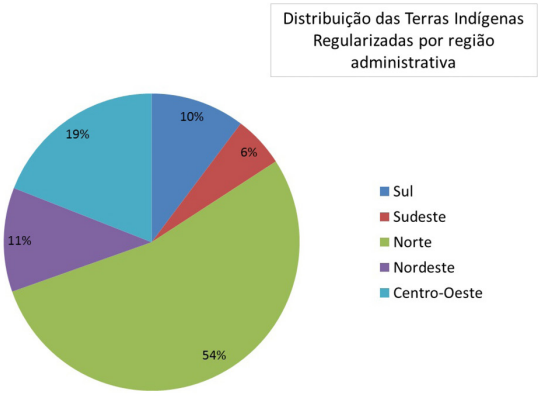
19 The Federal Union in Brazil is similar to the Australian Commonwealth.

20 Free translation from the authors. The original text: "são terras tradicionalmente ocupadas pelos índios as por eles habitadas em caráter permanente, as utilizadas para suas atividades produtivas, as imprescindíveis à preservação dos recursos ambientais necessários a seu bem-estar e as necessárias a sua reprodução física e cultural, segundo seus usos, costumes e tradições".

21 POVOS INDÍGENAS NO BRASIL. *Localização e extensão das TIs*. Available in: <http://pib.socioambiental.org/pt/c/terras-indigenas/demarcacoes/localizacao-e-extensao-das-tis>. Access on: 19 nov. 2015.

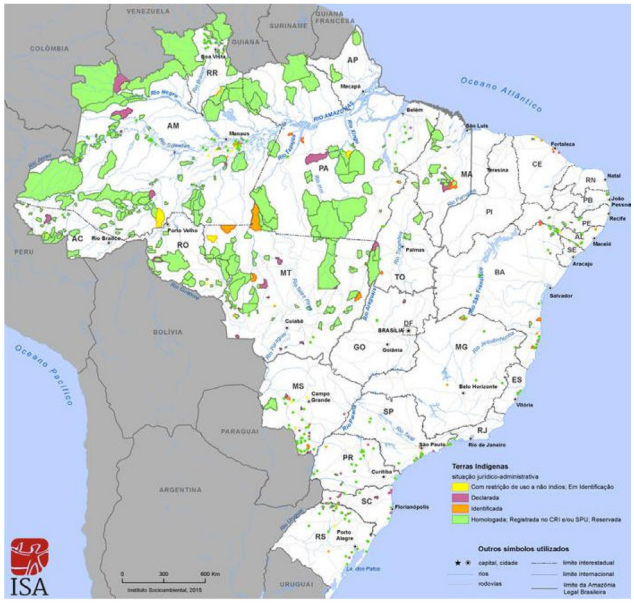
22 The Noongar land claim over the capital city of Perth, AUSTRALIA, suggests it is possible to jointly recognise traditional and private land rights. For an overview see http://<www.abc.net.au/news/2015-06-08/premier-signs-noongar-native-title-settlement/6530434>. Access on: 20 apr. 2016.

Figure 1 shows the distribution of Indigenous Lands through Brazilian Administrative Regions



Fonte: Fundação Nacional do Índio - FUNAI[23]

Figure 2 shows the map with demarcated indigenous lands (green)



Fonte: Instituto Socioambiental - ISA[24]

Although Indigenous lands established by the Federal Union remain classified as public lands, the government cannot allocate them for any other purpose or establish them as full protection conservation units[25] (similar to Category 1 and 2 areas under the International Union for the Conservation of Nature ('IUCN') protected areas system)[26]. The reason is that the law does not permit people to live inside full protection conservation units, even if they are traditional peoples, and Indigenous lands presuppose permanent possession and exclusive rights to use the natural resources present on the surface.

The Constitutional regime gives Indigenous populations a high degree of protection, at least with respect to maintaining possession of their original territories. That does not mean, however, that overlaps do not occur. For example, some conservation units created in the 1930s are located inside Indigenous lands.[27] Indigenous peoples and environmentalists did not consider this a problem until the 1970s when conservationists started to oppose any human presence in conservation units. However, the constitutional protection for Indigenous peoples means that the government must respect Indigenous rights to live on the land and use its natural resources whenever there is an overlap. The Brazil Supreme Court confirmed this fact in the Raposa – Serra do Sol case by upholding the principle of double affectation. This principle allows government to designate land to Indigenous peoples *and* environmental protection[28].

Although Indigenous land rights are somewhat protected, Brazil has other types of non-Indigenous traditional populations with different origins to Indigenous

23 FUNAI. *Terras indígenas*: o que é? Available in: <http://www.funai.gov.br/index.php/nossas-acoes/demarcacao-de-terras-indigenas>. Access on: 21 nov. 2015.

24 POVOS INDÍGENAS NO BRASIL. *Localização e extensão das TIs*. Available in: <https://pib.socioambiental.org/pt/c/terras-indigenas/demarcacoes/localizacao-e-extensao-das-tis>. Access on: 21 nov. 2015.

25 In Brazil, there are 12 types of conservation units that make up a system regulated by Law nº 9.985/00.

26 Category Ia, Strict Nature Reserve: strictly protected areas set aside to protect biodiversity and also possibly geological/geomorphical features, where human visitation, use and impacts are strictly controlled and limited to ensure protection of the conservation values; Category Ib, Wilderness Area: protected areas that are usually large unmodified or slightly modified areas, retaining their natural character and influence without permanent or significant human habitation, which are protected and managed so as to preserve their natural condition; Category II, National Park: protected areas that are large natural or near natural areas set aside to protect large-scale ecological processes, along with the complement of species and ecosystems characteristic of the area, which also provide a foundation for environmentally and culturally compatible, spiritual, scientific, educational, recreational, and visitor opportunities. IUCN. Available in: <http://www.iucn.org/about/work/programmes/gpap_home/gpap_quality/gpap_pacategories/ . Access on: 20 apr. 2016.

27 Araguaia, Monte Pascoal and Pico da Neblina National Parks were created in lands where there were Indigenous groups. RICARDO, Fany (Org). *Terras indígenas e unidades de conservação da natureza*: o desafio das sobreposições. São Paulo: Instituto Socioambiental, 2004.

28 PET 3388. In this case, the Supreme Court decided that Indigenous land can be also affected by a conservation unit, and it will be managed by the Environmental Agency with the participation of FUNAI and the Indigenous community.

peoples. Unfortunately, aside from the Quilombolas, these traditional groups do not have the same level of protection as Indigenous societies.

Quilombolas are the most known non-Indigenous traditional peoples. They comprise descendants from African slaves that started their own communities and developed their own cultures. Article 2 of *Presidential Decree nº 4887 (2003)* defines Quilombola communities as follows: An ethnic-racial group, according to criteria of self-definition, with its own historic trajectory, that has specific relations to the territory and presumed Negro ancestry related to the historic oppression resistance[29].

This definition is much wider than the one used before the Presidential Decree that related Quilombola communities exclusively with fugitive slaves. The Presidential Decree establishes that a Quilombola community might have been formed from a land donation, inheritance or purchase, or just because a landowner tolerated the group's presence[30].

Article 68 of the Brazilian Constitution Transitory Dispositions recognizes the property rights of those Quilombolas occupying their lands at the time of the 1988 Constitution. The Federal Union, States and Municipalities must grant those Quilombolas property titles upon satisfaction of certain conditions. Article 17 of the Presidential Decree nº 4887/03 requires the federal, state or municipality to grant the property title to the community. This collective title cannot be divided and the property registry must contain a clause establishing that it cannot be alienated (sold, donated, exchanged etc). Article 17 also requires the communities to establish legally constituted associations to represent their interests. To date, the Federal Government has certified 2607 Quilombola communities[31]. However, perhaps because of the requirement that the community occupied the lands in 1988, the government has only determined 161 Quilombola lands occupying 752797 hectares (0.088% of Brazil)[32]. These titles benefit 237 communities and 15150 families.

Quilombola lands have a completely different status when compared to Indigenous lands. In addition, Presidential Decree nº 4887 (2003) regulates the procedure for their identification, recognition, delimitation and demarcation, and the issuing of Quilombola property titles. What the two types of land rights have in common is the Constitutional protection that prevents the Federal Government from creating full protection conservation units over any recognized title. This means that the Government cannot demand either group transfer to a different place if any overlap occurs. However, in both cases, it is possible to allocate the land for other environmental purposes as determined by the finding of double affectation in the Raposa-Serra do Sol case.

Very different is the situation for the hundreds of other non-Indigenous traditional communities not specifically addressed in the 1988 Constitution. A shared characteristic of these communities is the nature of their formation. Most arose from economic cycles during the long process of colonization and independence. The fortunes of many rural districts ebbed and flowed with the international market for a local resource; whenever the market for that resource dropped, a new economic cycle was initiated that positioned a different region and resource as economically important. In these cases, many people would flee the formerly prosperous district, leaving it practically abandoned. The families that remained often became isolated and dependent on subsistence skills for their survival[33].

This socio-cultural-environmental adaptation model varies according to the society in issue, but it does share some characteristics with Indigenous societies. The similarities are unsurprising in light of the fact that Indigenous societies were very often the traditional community's only contact. Shared characteristics include the use of wild plants and animals as food and medicine, the adaptation of hunting and fishing skills to suit surrounding environments, and the deepening of

29 Free translation from the authors. The original text: "os grupos étnico-raciais, segundo critérios de auto-atribuição, com trajetória histórica própria, dotados de relações territoriais específicas, com presunção de ancestralidade negra relacionada com a resistência à opressão histórica sofrida".

30 VITORELLI, Edilson. *Estatuto da igualdade racial e comunidades Quilombolas*. Salvador: Juspodivm, 2012.

31 BRASIL. Ministério da Cultura. *Lista das CRQs*. Available in: <http://www.palmares.gov.br/wp-content/uploads/2015/09/C%C3%B3pia-de-Lista-das-CRQs-Certificadas-Portaria-n%C2%B0-84-08-06-2015.pdf>. Access on: 19 nov. 2015.

32 Sometimes, more than one community share the same land. That is the reason why the number of communities is bigger than the number of Quilombos. Available in: <http://www.cpisp.org.br/terras/asp/terras_tabela.aspx>. Access on: 19 nov. 2015. See also: <http://www.cpisp.org.br/acoes/upload/arquivos/Quilombo_Report_Summary_Final_Trad_.pdf>. Access on: 19 nov. 2015. The Brazilian territory has a total of 891196500 hectares.

33 ARRUDA, Rinaldo. "Populações tradicionais" e a proteção dos recursos naturais em unidades de conservação. *Ambiente & Sociedade,* ano 3, n. 5, 2 sem., 1999.

relationships with natural surroundings. Over time, the traditional groups developed their own oral traditions, myths, stories, beliefs and rituals, and a deep knowledge and respect for the environment, its cycles and resources. Also similar to Indigenous peoples was the positioning of the family as the productive unit, with families linked to each other through relationships based upon reciprocity. Some examples of non-Indigenous traditional societies that remain today are the Castanheiros, whose main economic activity is the extraction of Brazil nuts; the Seringueiros, whose main economic activity is the extraction of latex; and Quebradeiras de Coco Babaçu (artisanal nut shell breakers), whose main economic activity is the extraction of the shell of a nut called Babaçu.

These non-Indigenous traditional groups do not have legal rights to the lands they traditionally inhabit. On the contrary, Article 42 of the Federal Law nº 9.985 (2000) establishing the Brazilian National System of Conservation Units demands that the Government move those peoples to a different place whenever they create a full protection conservation unit in that area. In some cases, like in the Atlantic Forest, those peoples who inhabit the area do have some legal rights, primarily the right to collect firewood or wood for construction from the forest without an authorization.[34] In the pursuit of these and other rights, it became necessary to distinguish traditional societies from other societies. The majority of authors[35] and federal legislation[36] assert the following characteristics of traditional societies:

- Self-identification as belonging to a non-Indigenous traditional group
- Identification from the surrounding society as a distinct group
- Sustainable exploitation of natural resources that produce low impacts and contributes to biodiversity conservation
- Dependence on nature and its cycles and elements for cultural and physical survival
- Importance of subsistence activities and reduced capital accumulation
- Territoriality, being the feeling of belonging to a certain territory that is defined by beliefs, myths and practices and kept alive in the collective memory of the group
- Communal stewardship of the land and its resources
- Oral transmission of knowledge, from one generation to the next

A traditional society does not have to embody all these characteristics, but they must demonstrate some of these features if they seek legal recognition.

The land rights of non-Indigenous traditional people remains an issue in Brazil, especially when the government intends to create a conservation unit over lands where they still live that is not compatible with their continued presence. The number of full protection and public domain conservation units created in areas where there are non-Indigenous traditional populations is high. In 2012, according to research done by the federal agency in charge of creating and managing federal conservation units,[37] 29.32% of all full protection and public domain conservation units had traditional inhabitants[38]. This number is likely to be higher when state and local conservation units are counted.

34 Atlantic Forest Act, Law nº 11.428/06.

35 For example POSEY, Darrel Addison. The importance of semi-domesticated species in postcontact Amazonia: effects of the Kayapó indians on the dispersal of flora and fauna. In: HLADÍK, C. M. et al (Ed.). *Tropical forests, people and food*: biocultural interactions and applications to development. Paris: UNESCO; New York: The Parthenon Publishing Group, 1993. (Man & the Biosphere Series; v. 13).; VARELLA, Marcelo; PLATIAU, Ana Flávia (Org.). *Diversidade biológica e conhecimentos tradicionais*. Belo Horizonte: Del Rey, 2004. (Coleção Direito Ambiental, 2); LIMA, André; BENSUSAN, Nurit (Org.) *Quem cala consente*? Subsídios para a proteção aos conhecimentos tradicionais. São Paulo: Instituto Socioambiental, 2003. (Série Documentos do ISA, 8); BENSUSAN, Nurit (Org.). *Seria melhor mandar ladrilhar*? Biodiversidade como, para que, por quê? Brasília: Universidade de Brasília; Instituto Socioambiental, 2000; DIEGUES, Antônio Carlos; ARRUDA, Rinaldo S. V. *Saberes tradicionais e biodiversidade no Brasil*. Brasília: Ministério do Meio Ambiente; São Paulo: USP, 2001; SANTILLI, Juliana. *Socioambientalismo e novos direitos*. São Paulo: Peirópolis, 2005; SOUZA FILHO, Carlos Frederico Marés de. As populações tradicionais e a proteção das florestas. *Revista de direitos difusos*, São Paulo, v. 31, maio/ jun. 2005; LEUZINGER, Márcia Dieguez. *Natureza e cultura*: unidades de conservação de proteção integral e populações tradicionais residentes. Curitiba: Letra da Lei, 2009.

36 Some of those Laws are Law nº 11.428, 2006, Law nº 11.284, 2006, Presidential Decree nº 6040, 2007, Law nº 9.985.

37 Instituto Chico Mendes de Conservação da Biodiversidade, or Chico Mendes' Institute for the Conservation of Biodiversity (ICMBio). ICMBio is the official agency in charge of creating and managing federal conservation units.

38 BRASIL. Ministério Público Federal. Câmara de Coordenação e Revisão, 6. *Territórios de povos e comunidades tradicionais e as unidades de conservação de proteção integral*: alternativas para o asseguramento de direitos socioambientais. Coordenação de Maria Luiza Grabner. Redação de Eliane Simões e Débora Stucchi. Brasília: MPF, 2014.

The situation calls into question the government's role in respecting and achieving the Constitutional cultural rights of all peoples that participated in the national civilization process. [39] Articles 215 and 216 enumerate these rights as pertaining to Brazilian cultural heritage, being assets of material and immaterial nature and including forms of expression and traditional ways of creating, making and living. Cultural rights sit equally alongside the Article 225 obligation on government to protect the environment for present and future generations. On the one hand, creating a full protection conservation unit fulfils the constitutional obligation to protect the environment. On the other, creating a full conservation unit and displacing the traditional peoples that live there violates Articles 215 and 216 by severing traditional people's connections to their cultural heritage through forced relocation from homelands. This represents a clash of fundamental rights: the right of everyone to live in a sustainable environment and the right of traditional societies to maintain and develop their culture and knowledge. The solution to this conflict is unlikely to be simple because the Constitution does not recognize land rights for most traditional populations.

Scholarship offer some possible solutions to this dilemma. In a previous research project, Leuzinger proposed the carrying out of scientific studies prior to the declaration of an area as a full protection conservation unit. Such studies could identify any traditional peoples living inside the perimeter of the proposed unit. If identified, Leuzinger argues that the creation of a full protection conservation unit will only be constitutional if the study demonstrates that the ecosystem cannot support the impact of the traditional population/s. If the scientific study demonstrates that the area can support the subsistence lifestyle of relevant traditional groups, then the government must choose a different conservation category that is compatible with the group/s remaining on the land. The rationale behind this approach is that if the ecosystem is so fragile that it cannot support the impact of traditional everyday activities, the community will collapse eventually. In these cases, displacement will not violate the Constitution. If the ecosystem can sustain traditional activities, displacement of traditional peoples violates the cultural rights provisions in the Constitution.

In cases where the scientific study identifies traditional people/s and finds no ecosystem threat from the continuation of traditional activities, Jose Benatti proposes that the conservation unit's Zoning Plan include permission for identified traditional group/s to remain in designated Multiple Use Zones, regulated according to a management plan.[40] The Brazilian Federal Government Agency for Law Enforcement (Ministério Público Federal) proposes some similar and alternative strategies:

- Adoption of a Traditional Use Plan, similar to the approach suggested by Benatti;
- Creation of historic-cultural anthropological zones where traditional populations could continue to live;
- Management or commitment agreement between the traditional peoples and the conservation agency (ICMBio);
- Review of the boundaries of the conservation unit, with the exclusion of areas occupied by traditional groups;
- Reclassification of the conservation unit to a category that allows traditional inhabitants;
- Double allocation, which means that the area would have two different goals: the conservation of biodiversity and protection of cultural rights[41].

If Federal Law nº 9.985 (2000) establishing the Brazilian National System of Conservation Units is not amended, the solutions presented in items 1 to 3 can only be temporary and the traditional group will have to be transferred to another area sooner or later. The solutions presented in items 4 and 5 require law reform modifying the conservation unit's limits. The double allocation idea, on the other hand, offers a permanent solution recognized as a valid legal instrument by the Supreme Court in the Raposa-Serra do Sol case. Although this case involved a conservation unit inside Indigenous land, it is possible to apply the same reasoning when the conflict involves non-Indigenous traditional populations. Overall, the problem is not simple. The easiest solution appears to be law reform, but until this

39 Brazil Constitution Article 215.

40 BENATTI, José Helder. Unidades de conservação e as populações tradicionais: uma análise jurídica da realidade brasileira. *Novos Cadernos NAEA*, v. 2, n. 2, dez. 1999.

41 BRASIL. Ministério Público Federal. Câmara de Coordenação e Revisão, 6. *Territórios de povos e comunidades tradicionais e as unidades de conservação de proteção integral*: alternativas para o asseguramento de direitos socioambientais. Coordenação de Maria Luiza Grabner. Redação de Eliane Simões e Débora Stucchi. Brasília: MPF, 2014

happens, government must employ other solutions to prevent the disruption of traditional groups and loss of cultural heritage.

The following table shows the different land rights situation in relation to Indigenous and non-Indigenous traditional populations in Brazil.

Type of traditional population	Legislation	Land rights
Indigenous populations	Federal Constitution 1988 (articles 20, XI, and 231(7)); Indigenous Act 1973 (Lei nº 6001/73)	Indigenous land belongs to the Federal Union, but Indigenous communities have permanent possession of those lands and the right to the exclusive use of surface resources
Quilombolas	Federal Constitution 1988 (Transitory Dispositions, article 68)	Collective property titles granted from the Federal Union, States or Municipalities; the land cannot be divided; the property register must contain a clause establishing that it cannot be alienated
Non-indigenous traditional populations	Atlantic Forest Act (Law nº 11.428/06); Conservation Units Act (Law nº 9985/00)	Rights to collect firewood or wood for construction from the forest without an authorization; right to remain in full protection conservation units until they are transferred to another area

3. Indigenous australians

Australia's Indigenous peoples comprise two first nations: the Aboriginal peoples from mainland Australia and Tasmania and the Torres Strait Islander peoples from the islands between Australia and Papua New Guinea. For over 60000 years,[42] hundreds of different Aboriginal and Torres Strait Islander language groups co-existed,[43] with intergroup affairs regulated by complex and diverse legal, social and land stewardship systems.[44] The maintenance, development and adaptation of biodiversity knowledge ensured the land and resources thrived for current and future generations, and that each generation survived the often harsh and unrelenting Australian climate.[45] Access to land is intrinsic to the continued maintenance and development of Aboriginal and Torres Strait Islander biodiversity knowledge, held by the elders and passed to younger people in cultural expressions (e.g. stories, songs and ceremonies) and land-based cultural practices (e.g. the wild harvesting of traditional foods).

Like Brazil, the Europeans colonized Australia. Although at least 50 European ships visited Australian shores between the 15th and 18th centuries,[46] colonization began with the landing of the British Lieutenant, James Cook, in 1770.[47] The King of England had instructed Cook to gain consent from any local inhabitants before taking possession of the land, and if uninhabited, to take possession in the name of the King.[48] Cook observed local inhabitants upon landing, but there is no record of any attempt to gain their consent. Cook's impression of the locals was as "savages", with no recognized sovereign or system of laws and cultivation.[49] According to international law at the time, such land was "terra nullius" (belonging to no one) and could be "settled" by another, with the "settler" becoming the sovereign and "owner" of the land.[50]

42 AUSTRALIAN GOVERNMENT. *Australian Indigenous Cultural Heritage*. Canberra: Commonwealth, 2015. Available in: <http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage>. Access on: 20 apr. 2016.

43 AUSTRALIAN GOVERNMENT. *Australian Indigenous Cultural Heritage*. Canberra: Commonwealth, 2015. Available in: <http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage>. Access on: 20 apr. 2016.

44 AUSTRALIAN MUSEUM. *Family*. Canberra: Australian Museum, 2016. Available in: <http://australianmuseum.net.au/indigenous-australia-family>. Access on: 20 apr. 2016; CENTRAL LAND COUNCIL. *Kinship and Skin Names*. Alice Springs: CLC, 2016. Available in: <http://www.clc.org.au/articles/info/aboriginal-kinship>. Access on: 20 apr. 2016.

45 85% of Australian land is classified as arid or semi-arid. COOPERATIVE RESEARCH CENTRE FOR REMOTE ECONOMIC PARTICIPATION. *Remote Australia*: Facts. Alice Springs: CRC-REP, 2015. Available in: <http://crc-rep.com/about-remote-australia>. Access on: 20 apr. 2016.

46 AUSTRALIAN GOVERNMENT. *Australian Indigenous Cultural Heritage*. Canberra: Commonwealth, 2015. Available in: <http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage>. Access on: 20 apr. 2016.

47 AUSTRALIAN GOVERNMENT. *Australian Indigenous Cultural Heritage*. Canberra: Commonwealth, 2015. Available in: <http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage>. Access on: 20 apr. 2016; PROJECT ENDEAVOUR. *Captain James Cook and his Voyages*. Perth: Curtin University. Available in: <http://john.curtin.edu.au/endeavour/cook.html>. Access on: 20 apr. 2016.

48 AUSTRALIAN MUSEUM. *Family*. Canberra: Australian Museum, 2016. Available in: <http://australianmuseum.net.au/indigenous-australia-family>. Access on: 20 apr. 2016.

49 AUSTRALIAN LAW REFORM COMMISISON. *Aboriginal Customary Laws and Anglo-Australian Law after 1788*. In Recognition of Aboriginal Customary Laws. Canberra: ALRC, 1986.

50 KARLYAWASAM, Kanchana. Native title litigation in Australia: does the judiciary deliver on the principal objectives defined by

In 1786, in an attempt to address the burgeoning prison population in Britain, the King of England declared Australia a penal colony. The first fleet of prisoners and officials arrived in 1788. It marked the beginning of a long period of land dispossession for Aboriginal and Torres Strait Islander peoples. As time went on, the Crown granted more and more land to freed prisoners and settlers. Aboriginal and Torres Strait Islander resistance was immediate.[51] There were some official calls to treat "natives" kindly when taking possession of a land grant,[52] and to recognize the "plain right and sacred rights" of Aboriginal and Torres Strait Islander peoples to their land,[53] but more often land possession resulted in the massacre, murder, sexual assault, infection, starvation and dehydration of Aboriginal and Torres Strait Islander peoples.[54] These physical and associated psychological traumas were fundamental to the death of more than 80% of the Aboriginal and Torres Strait Islander population within the first 150 years of colonization[55].

Despite these threats and obstacles, Aboriginal and Torres Strait Islander resistance to land dispossession continued[56]. Amidst reports of physical resistance is evidence of Aboriginal and Torres Strait Islander peoples claiming land rights through the colonial legal system[57]. For instance, in the early 1820s, colonial officials hoped to quell Aboriginal and Torres Strait Islander resistance to land dispossession by allocating small parcels of land ("reserves") to individuals or small families to cultivate[58]. By 1890, some Aboriginal peoples were using the reserve system to regain control over their traditional lands by claiming reserve land for agricultural purposes ("appealing to the colonial understandings of land use")[59]. Another example of the early assertion of land rights is the 1835 treaty between Aboriginal peoples from southern Australia and a settler with a 600000-acre land grant over the area.[60] Sadly, colonial officials found ways to thwart attempts by Aboriginal and Torres Strait Islander peoples to reclaim their traditional lands or assert any form of prior ownership. For example, the Governor of the colony rejected the 1835 treaty on the basis "the land belonged to no-one prior to the British crown taking possession"[61].

By 1890, many of the earlier agricultural reserves had become places of segregation. Designated colonial "protectors" forced many Aboriginal and Torres Strait Islander peoples to live on the reserves for their "protection".[62] Very often, the reserve land was not the homeland of the Aboriginal and Torres Strait Islander person. Considering the inseverable connection between Aboriginal and Torres Strait Islander peoples

Mabo? Asia-Pacific Journal on Human Rights and the Law, v. 1&2, p. 3-27, 2013. AUSTRALIAN LAW REFORM COMMISISON. *Aboriginal Customary Laws and Anglo-Australian Law after 1788*. In Recognition of Aboriginal Customary Laws. Canberra: ALRC, 1986.

51 CENTRAL LAND COUNCIL. *History of the Land Rights Act*. Alice Springs: CLC, 2015. Available in: <http://www.clc.org.au/articles/info/history-of-the-land-rights-act/>. Access on: 20 apr. 2016.

52 AUSTRALIAN MUSEUM. *Indigenous Australian Timeline 1500-1900*. Canberra: Australian Museum, 2015. Available in: <http://australianmuseum.net.au/Indigenous-australia-timeline-1500-to-1900>. Access on: 20 apr. 2016.

53 AUSTRALIAN MUSEUM. *Indigenous Australian Timeline 1500-1900*. Canberra: Australian Museum, 2015. Available in: <http://australianmuseum.net.au/Indigenous-australia-timeline-1500-to-1900>. Access on: 20 apr. 2016.

54 BALLYN, Sue. *The British Invasion of Australia*. Convicts: Exile and Dislocation. In Lives in Migration: Rupture and Continuity. Catalonia: University of Barcelona, 2011. p. 17; AUSTRALIAN LAW REFORM COMMISISON. *Aboriginal Customary Laws and Anglo-Australian Law after 1788*. In Recognition of Aboriginal Customary Laws. Canberra: ALRC, 1986; HARRIS, John. Hiding the bodies: the myth of the humane colonisation of Aboriginal Australia. *Aboriginal History,* v. 27, p. 79-104, 2003.

55 HARRIS, John. Hiding the bodies: the myth of the humane colonisation of Aboriginal Australia. *Aboriginal History,* v. 27, p. 79-104, 2003.

56 CENTRAL LAND COUNCIL. History of the Land Rights Act. Alice Springs: CLC, 2015. Available in: <http://www.clc.org.au/articles/info/history-of-the-land-rights-act/>. Access on: 20 Apr. 2016.

57 GOODALL, Heather. Land in our Own Country: The Aboriginal Land Rights Movement in South-eastern Australia, 1860 to 1914. *Aboriginal History*, v. 14, p. 1-24, 1990.

58 HILL, Ronald Paul. Blackfellas and Whitefellas: Aboriginal Land Rights, the Mabo Decision, and the Meaning of Land. *Human Rights Quarterly,* v. 27, p. 303-322, 1995; GOODALL, Heather. Land in our Own Country: The Aboriginal Land Rights Movement in South-eastern Australia, 1860 to 1914. Aboriginal History (14) (1990) 1-24, 2.

59 GOODALL, Heather. Land in our Own Country: The Aboriginal Land Rights Movement in South-eastern Australia, 1860 to 1914. *Aboriginal History*, v. 14, p. 1-24, 1990.

60 PIERLUIGI, Claudio. Aboriginal Land Rights History: Western Australia. *Aboriginal Law Bulletin,* v. 56, 1991; BALLYN, Sue. *The British Invasion of Australia*. Convicts: Exile and Dislocation. In: Lives in Migration: Rupture and Continuity. Catalonia: University of Barcelona, 2011. p. 16-29, 17-18; HILL, Ronald Paul. Blackfellas and Whitefellas: Aboriginal Land Rights, the Mabo Decision, and the Meaning of Land. *Human Rights Quarterly,* v. 27, p. 303-322, 1995.

61 AUSTRALIAN GOVERNMENT. *European discovery and the colonisation of Australia*. Canberra: Commonwealth, 2015. Available in: <http://www.australia.gov.au/about-australia/australian-story/european-discovery-and-colonisation>. Access on: 16 Apr. 2016.

62 GOODALL, Heather. Land in our Own Country: The Aboriginal Land Rights Movement in South-eastern Australia, 1860 to 1914. *Aboriginal History*, v. 14, p. 1-24, 1990.

and their homelands, the physiological trauma of severing this connection was intense. Many protectors also forcefully removed children from the reserves who did not look Indigenous, with the aim of breeding out the Indigenous race.[63] As funding to the protectors dwindled and British citizens arrived in the colony demanding land, the protectors began to sell reserve land[64], a lot of which Aboriginal and Torres Strait Islander peoples had transformed into rich agricultural land. These policies continued well into the mid-to-late 1900s[65], with the racist view of Aboriginal and Torres Strait Islander peoples reflected in their complete lack of recognition in the Australian Constitution 1901[66]. Still, Aboriginal and Torres Strait Islander peoples refused to accept defeat[67],

Between 1960 and today, Aboriginal and Torres Strait Islander peoples have made some inroads into the colonial land tenure system through petitions and prolonged, peaceful protests[68]. An early legislative response was allowing traditional landowners[69] and their families to forage over certain public lands without needing a permit[70]. Some jurisdictions also allow Aboriginal and Torres Strait Islander peoples to participate in land-use decision making when development is likely to affect sites or objects of cultural significance[71]. Today, the nature and scope of these rights varies greatly between jurisdictions, from rights to be consulted[72] to rights to control development on sacred sites[73].

Key legislative advances regarding land rights include the establishment of a fund for Aboriginal and Torres Strait Islander peoples to purchase land[74] and the enactment of Aboriginal and Torres Strait Islander land rights legislation in most jurisdictions[75]. The statutory land rights regimes vary between jurisdictions; most only allow claims over unclaimed public land; some require the immediate leaseback of land to the government for use as a national park; some require claimants to have a traditional connection to the land claimed; others require no traditional connection[76]. Title restrictions may include limitations on selling or mortgaging the land, and requirements that an incorporated body or trust manage the title on behalf of the traditional owner collective[77]. The requirement that land be unclaimed means that a lot of the land available for claim is in remote areas and of "low commercial value"[78].

There have also been several judicial responses to the land claims of Aboriginal and Torres Strait Islander peoples[79]. The foundational case is *Mabo v Commonwealth (No 2)* (1992). Counsel for Eddie Mabo did not dispute the acquisition of colonial sovereignty after the annexation of the islands to the northern Australian state of Queensland in 1879. They instead argued that the Miriam people of the Murray Islands in the Torres Strait continued to own and possess their lands and surrounding waters "in accordance with the law, customs, traditions and practices of the Miriam people"[80],

63 PIERLUIGI, Claudio. Aboriginal Land Rights History: Western Australia. *Aboriginal Law Bulletin,* v. 56, 1991.

64 GOODALL, Heather. Land in our Own Country: The Aboriginal Land Rights Movement in South-eastern Australia, 1860 to 1914. *Aboriginal History*, v. 14, p. 1-24, 1990.

65 BALLYN, Sue. *The British Invasion of Australia*. Convicts: Exile and Dislocation. In Lives in Migration: Rupture and Continuity. Catalonia: University of Barcelona, 2011. p. 17-18.

66 GOODALL, Heather. Land in our Own Country: The Aboriginal Land Rights Movement in South-eastern Australia, 1860 to 1914. *Aboriginal History*, v. 14, p. 1-24, 1990.

67 See GOODALL, Heather. Land in our Own Country: The Aboriginal Land Rights Movement in South-eastern Australia, 1860 to 1914. *Aboriginal History*, v. 14, p. 1-24, 1990.

68 AIATSIS. *Land rights*. Canberra: AIATSIS, 2015. Available in: http://aiatsis.gov.au/explore/articles/land-rights. Access on: 10 Apr. 2016; CENTRAL LAND COUNCIL. *History of the Land Rights Act*. Alice Springs: CLC, 2015. Available in: <http://www.clc.org.au/articles/info/history-of-the-land-rights-act/>. Access on: 20 Apr. 2016.

69 Aboriginal and Torres Strait Islander peoples with "primary spiritual responsibility" for the relevant land.

70 See e.g. *National Parks and Wildlife Act 1974* (NSW) s 87B.

71 See e.g. *Aboriginal Cultural Heritage Act 2003* (Qld).

72 See e.g. *National Parks and Wildlife Regulation 2009* (NSW) Part 8A.

73 See e.g. *Northern Territory Aboriginal Sacred Sites Act 1989* (NT).

74 INDIGENOUS LAND CORPORATION. About us. Adelaide: ILC, 2015. Available in: <http://www.ilc.gov.au/Home/About-Us>. Access on: 17 Apr. 2016.

75 See e.g. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Lands Trust Act 2013* (SA); *Aboriginal Land Rights Act 1983* (NSW).

76 See generally WENSING, Ed. Dealings in native title and statutory Aboriginal land rights lands in Australia: what land tenure reform is needed?. In: SANDERS, Will (Ed.). *Engaging Indigenous Economy*. Canberra: ANU, 2016.p. 215-217.

77 WENSING, Ed. Dealings in native title and statutory Aboriginal land rights lands in Australia: what land tenure reform is needed?. In: SANDERS, Will (Ed.). *Engaging Indigenous Economy*. Canberra: ANU, 2016. p. 215-217; MADDISON, Sarah. *Black politics*: inside the complexity of Aboriginal political culture. Brisbane: Griffin Press, 2009.

78 MADDISON, Sarah. *Black politics*: inside the complexity of Aboriginal political culture. Brisbane: Griffin Press, 2009. p. 6.

79 See e.g. *Milirrpum v Nabalco Pty Ltd.* (1971) 17 FLR 141; *Coe v Commonwealth* (1993) 118 ALR 193; *Mabo v Queensland* [No 2] (1992) 175 CLR 1; see generally KARLYAWASAM, Kanchana. Native title litigation in Australia: does the judiciary deliver on the principal objectives defined by *Mabo? Asia-Pacific Journal on Human Rights and the Law*, v. 1&2, 2013. p. 3-27.

80 KENNA, Jonathan. *The Statement of Claim*. Canberra: National

and that these rights had not been extinguished by any legislative or executive act of the Queensland government[81]. In agreeing, the High Court rejected the legal fiction that Australia belonged to no one at the time of colonization. They found the Australian common law capable of recognizing traditional law and custom as a source of property rights and interests, and that the government could not extinguish native title "without the payment of compensation or damages to the traditional titleholders"[82].

Like the statutory land rights scheme, the common law native title regime recognizes collective ownership of land. Also similar to the statutory scheme was the finding that because native title rights and interests derived from tradition, they could not be alienated or assigned.[83] Regarding the scope of native title rights, the Court enunciated them as a "bundle of rights": "Title" is…the abstract bundle of rights associated with… possession. Significantly, it is also used to describe the group of rights which result from possession but which survive its loss…[84]

The Australian government quickly followed the Mabo case with legislation[85], partially to quell the propaganda campaign that Aboriginal and Torres Strait Islander peoples could claim suburban backyards. Section 223 of the *Native Title Act 1993* defines native title rights and interests as "communal, group or individual rights and interests" possessed under traditional law and custom and held by Aboriginal and Torres Strait Islander peoples with a continued connection to the lands. The criterion that traditional owners must demonstrate a continued connection with the land is particularly difficult to establish in a colonized country[86]. Further, the 1993 legislation validated many past acts of dispossession, including the grant of freehold titles. That is, any grant of freehold extinguishes native title.

Subsequent High Court cases brought by native title claimants have sought to define the limits of native title rights and interests. For instance, in *Wik v Queensland* (1996)[87], the High Court revisited the extinguishment doctrine and found that native title could co-exist with other rights and interests in land because native title was a bundle of rights that could be "extinguished one by one"[88]. If there is any inconsistency between the rights of the native titleholders and other rights, the rights of the native titleholders must yield. "If there is no conflict, the rights of each co-exist"[89]. The Australian government quickly responded with amendments to the Native Title Act. Argubaly, the amendments "resulted in the reduction of only Indigenous peoples' rights"[90]. On a more positive note, in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33, the High Court rejected the prior assumption that native title rights and interests did not include commercial rights and interests[91]. The Court unanimously found that legislation requiring people to obtain a fishing license did not extinguish native title rights to fish for any purpose (commercial or non-commercial).

Today, native title claims are determined by the Federal Court, either by a judicial determination or by a consent determination following an agreement between people holding rights and interests in the relevant land.[92] Determinations may extend to exclusive native title rights, where the holders can exclude others from the land, or non-exclusive rights that co-exist with other rights and interests. The Native Title Act vests native titleholders, and people who have registered a native title claim yet to be determined, with the right to negotia-

Film and Sound Archive of Australia, 2015. Available in: <http://www.nfsa.gov.au/digitallearning/mabo/info/theStatementOfClaim.htm>. Access on: 16 apr. 2016.

81 ABS. *The Mabo Case and the Native Title Act*. Canberra: ABS, 2012. Available in: <http://www.abs.gov.au/Ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article21995>. Access on: 20 Apr. 2016.

82 *Mabo v Queensland* [No 2] (1992) 175 CLR 1.

83 AIATSIS. *Overturning the Doctrine of Terra Nullius*: The Mabo Case. Canberra: AIATSIS, 2000. p.3-4.

84 *Mabo v Queensland* [No 2] (1992) 175 CLR 1, 631-632.

85 *Native Title Act 1993* (Cth).

86 AIATSIS. *Overturning the Doctrine of Terra Nullius*: The Mabo Case. Canberra: AIASTSI, 2000. p. 3-4.

87 Wik Peoples v Queensland (1996) 187 CLR 1.

88 Wik Peoples v Queensland (1996) 187 CLR 1.

89 AIATSIS. *Wik Peoples v Queensland*: case summary. Canberra: AIATSIS, 1997. Available in: http://aiatsis.gov.au/publications/products/case-summary-wik-peoples-v-queensland. Access on: 17 apr. 2016.

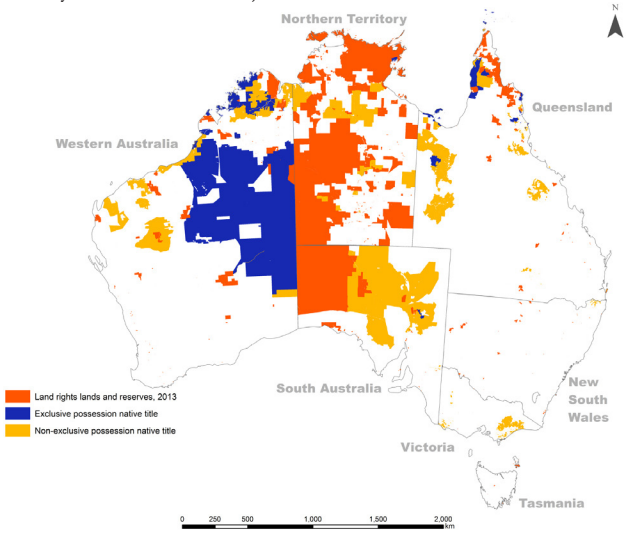
90 AIATSIS. *Wik*: Coexistence, pastoral leases, mining, native title and the ten point plan. Canberra: AIATSIS, 2008. Available in: <http://aiatsis.gov.au/sites/default/files/products/research_outputs_statistics_and_summaries/wik-coexistance-pastrol-leases-mining-nati-vetitle-ten-point-plan.pdf>. Access on: 20 apr. 2016.

91 See AUSTRALIAN LAW REFORM COMMISSION**.** *The Nature and Content of Native Title*. In Connection to Country: Review of the Native Title Act 1993. Canberra: ALRC, 2015.

92 See AUSTRALIAN LAW REFORM COMMISSION. *Promoting Claims Resolution*. In Review of the Native Title Act 1993. Canberra: ALRC, 2014.

te mining leases on their lands[93]. If native titleholders or claimants refuse to agree to mineral exploration, the mining company can petition the National Native Title Tribunal to meditate or determine the matter[94]. As of 2009, the Tribunal had determined only one case in favour of native titleholders[95]. This may compel native title groups to negotiate mining agreements on their lands even when they do not want to.

Figure 3 represents the extent of statutory land rights and native title determinations in Australia (it does not represent native title claims yet to be determined)



Fonte: Land rights portfolio in 2013 © Jon Altman and Francis Markham, ANU

Statutory and native title rights underpin several other legal regimes regulating Aboriginal and Torres Strait Islander access to land. For instance, most Australian states and territories have co-management regimes that enable statutory or exclusive possession native titleholders to negotiate the co-management of national reserve land[96]. Generally, participation in the regimes require Aboriginal and Torres Strait Islander landowners to lease their land to the government for 99 years for use as a national or state park in exchange for financial support to maintain the land[97]. The government and traditional owners then manage the land jointly, with management arrangements regulated by legislation, lease agreements, management plans and the constitution of the board of directors. Uluru and Kakadu National Parks are examples of these arrangements (see **Figure 4**)[98].

Indigenous Land Use Agreements (ILUAs) are a private law mechanism used to modify or determine Aboriginal and Torres Strait Islander land rights.[99] Mining on native title land provides an example of how ILUAs may modify land rights. Generally, the mining company negotiates an ILUA that requires the native titleholders or claimants to permit mineral exploration in exchange for a share of mining royalties[100]. The Indigenous Protected Areas program (IPA) provides an example of the use of ILUAs to determine land rights and expand the national reserve system. This occurs when the Australian Government agrees to settle a land claim if the claimants agree to manage the land as a protected area[101]. Alternatively, existing Aboriginal and Torres Strait Islander landowners may voluntarily donate land to the national reserve system in exchange for time-limited government financial support to carry out land management work "to conserve the lands ecological and cultural value" in line with agreed international standards and a Plan of Management[102]. Indigenous Protected Areas (IPAs) comprise over 40 per cent of the national reserve system (**Figure 4**)[103], with "60 per cent…managed by government-funded Indigenous ranger groups"[104] . However, the IPA program is not a statutory program, making all funds discretionary and subject to current policy.

Figure 4

93 Native Title Act 1993 (Cth) ss 25-44.

94 Native Title Act 1993 (Cth) ss 25-44.

95 Western Desert Lands Aboriginal Corporation/Western Australia/Holocene Pty Ltd [2009] NNTTA 49.

96 BAUMAN, Toni; HAYNES, Chris; LAUDER, Gabrielle. *Pathways to the co-management of protected areas and native title in Australia.* Canberra: AIATSIS. 2013. p. 10.

97 See e.g. *National Parks and Wildlife Conservation Act (NSW)* Part 4A.

98 BAUMAN, Toni; HAYNES, Chris; LAUDER, Gabrielle. *Pathways to the co-management of protected areas and native title in Australia.* Canberra: AIATSIS. 2013. p.14-17.

99 *Native Title Act 1993* (Cth) Division 3.

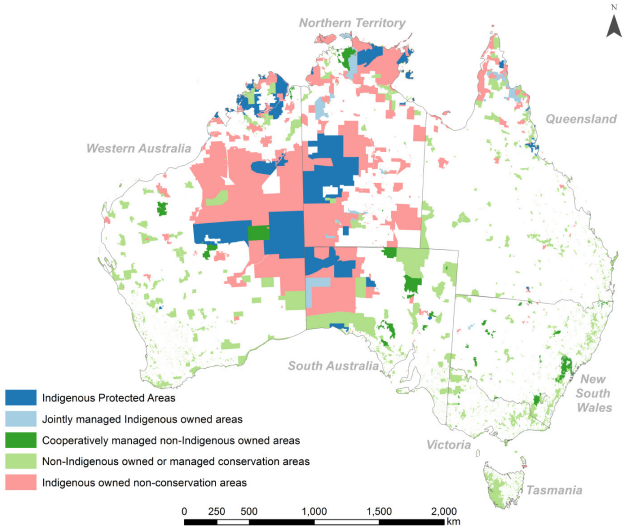
100 *Native Title Act 1993* (Cth) Division 3.

101 BAUMAN, Toni; HAYNES, Chris; LAUDER, Gabrielle. *Pathways to the co-management of protected areas and native title in Australia.* Canberra: AIATSIS. 2013. p. 14-17.

102 BAUMAN, Toni; HAYNES, Chris; LAUDER, Gabrielle. *Pathways to the co-management of protected areas and native title in Australia.* Canberra: AIATSIS. 2013. p. 14-17.

103 AUSTRALIAN GOVERNMENT. *Australia's Indigenous Protected Areas.* Canberra: Commonwealth, 2016.

104 AUSTRALIAN GOVERNMENT. *Australia's Indigenous Protected Areas.* Canberra: Commonwealth, 2016.



Fonte: Joint management and Indigenous Protected Areas estate in 2013 © Jon Altman and Francis Markham, ANU

There is no single, comprehensive map of the different types of land rights held by Aboriginal and Torres Strait Islander peoples in Australia. Such a map may be difficult to develop because of the overlap of different rights on the same piece of land. Recent estimates suggest that Aboriginal and Torres Strait Islander peoples control access to just over 30% of land, most of which is in remote areas[105]. The following table provides a simplified summary of Aboriginal and Torres Strait Islander land rights.

Type of land right:	**Source**	**Land rights**
Standard freehold	Property law (common law and legislation)	Rights to own, possess, mortgage, lease and negotiate access to property
Statutory land rights	Various land rights legislations	Unfettered or conditional freehold rights, depending on jurisdiction; may or may not require traditional connection to land; some statutory landowners have rights to participate in land use decisions
Statutory rights to hunt and gather	National park, flora and fauna legislation	Traditional owner and family rights to forage for non-commercial purposes on some public lands
Native title rights	Common law, codified in native title legislation; rights sourced in common law and tradition	Bundle of rights extinguishable by inconsistent legal rights; rights must be managed by corporation or trust; registered native title claimants and holders have right to negotiate mining leases; some registered claimants and holders have rights to participate in land use decisions
Contractual rights	Indigenous Land Use Agreement or other agreement	Rights determined by agreement; may require the relinquishing of freehold rights in exchange for financial support to manage land according to agreement
Statutory joint management arrangements	Legislation is different jurisdictions	Provides for the co-management of land as a protected area; may require leaseback of freehold land in exchange for funding; must be managed in accordance with a management plan

4. Comparison between land rights in Brazil and in Australia

Brazil and Australia are both constitutional federations with state and federal divisions, but their legal and political structures are different. Before establishing a comparison of legal rights between Brazil and Australia, it is necessary to highlight some key differences.

First, Brazil is a civil law system. This means that legislation is the only way to create legal rights (although judicial precedent can play an important role in giving effect to those rights and ensuring their correct interpretation). Conversely, Australia is a common law system that allows the federal and state legislatures to pass statutes and the federal and state courts to make rules through case law and statutory interpretation[106].

Second, the Brazilian federation arose from the segregation of a unitary country. This led to the Union (Commonwealth) keeping many more legislative and executive competences than those granted to the states and municipalities. This includes the power to legislate with respect to Indigenous lands. The Australian federation arose from aggregation, with the states retaining

105 See generally STEERING COMMITTEE FOR THE REVIEW OF GOVERNMENT SERVICE PROVISION. *Overcoming Indigenous Disadvantage*: Key Indicators. 2011. p. 56; NATIONAL NATIVE TITLE TRIBUNAL. **Registered Indigenous Land Use Agreements.** Canberra: NNTT, 2016; NATIONAL NATIVE TITLE TRIBUNAL. *Determination of Native Title*. Canberra: NNTT, 2016.

106 STATE LIBRARY OF NSW. *Australian Legal System*. Sydney: SLNSW, 2006.

all the lawmaking powers not delegated to the Commonwealth in section 51 of the Constitution. One such power concerns land. This explains the diversity of land rights between jurisdictions in Australia.

Notwithstanding the differences, there are many similarities between the two countries:

a. Both were colonized by Europeans who systematically depopulated and dispossessed the Indigenous populations that inhabited the territories

b. Both have legal instruments granting land to Indigenous peoples

c. Both have recognised few Indigenous lands in developed areas

d. Both have protected area systems that provide for the co-existence of Indigenous rights and environmental goals

In some ways, Brazil is more advanced in the recognition of Indigenous land rights than Australia. For instance, the Brazil Constitution recognises Indigenous people's rights to possess their traditional lands. The Australian Constitution contains no such protection. In fact, Australia affords no Constitutional protection to Indigenous peoples in any regard. On the contrary, section 25 allows state governments to ban people from voting based on their race. This provision led to the exclusion of Aboriginal and Torres Strait Islander peoples from voting until the 1960s[107]. Section 51(xxvi) grants the federal government the power to make special laws with respect to the people of any race[108]. The Australian High Court has determined that this "race" power allows the federal government to grant or take away rights[109]. To date, the federal government has only used the power to make laws regarding Aboriginal and Torres Strait Islander peoples[110].

The *Northern Territory National Emergency Response Act 2007* provides an example of the exercise of the race power and its effect on land rights in Australia. In 2007, the federal government ordered the army to invade many Aboriginal and Torres Strait Islander communities in northern Australia in response to reports of child sexual abuse[111]. Subsequent "intervention" legislation suspended the operation of the *Racial Discrimination Act 1975* on the basis emergency action was necessary to "protect Aboriginal children and vulnerable adults living in the affected communities"[112]. One such emergency action was the curtailment of statutory land rights held by some Aboriginal and Torres Strait Islander peoples. Prior to the intervention, statutory landowners in the Northern Territory could freely decide whether to lease their land to others. The *Northern Territory National Emergency Response Act 2007* allowed the federal government to compulsorily acquire these lease options on the rationale that compulsory acquisition was necessary to "stabilize the communities such that they are safe places for the kids"[113]. There is some suspicion that the intervention had more to do with controlling land than child welfare, as three months before the intervention the traditional owners had rejected an AUD$60 million offer from the government to relinquish control "of leasing arrangements"[114].

Constitutional recognition of Aboriginal and Torres Strait Islander peoples has been on the national agenda for a long time, but to no avail. Past processes include the Expert Panel on Constitutional Recognition of Indigenous Australians, the Act of Recognition Review Panel and the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples[115]. On 7 December 2015, the Prime Minister and Leader of the Opposition appointed a Referendum Council to progress the recognition of Aboriginal and Torres Strait Islander peoples in Australia's Constitu-

107 AUSTRALIAN GOVERNMENT. *The 1967 referendum*: Fact sheet 150. Canberra: Commonwealth, 2016.

108 Australian Constitution section 51(xxvi).

109 CASTAN, Melissa. *Explainer*: what Indigenous constitutional recognition means. Canberra: The Conversation, 2014.

110 CASTAN, Melissa. *Explainer*: what Indigenous constitutional recognition means. Canberra: The Conversation, 2014.

111 BEACROFT, Laura; POOLE, Melanie. *Overview of Northern Territory Emergency Response*. Canberra: CAEPR, 2008. Available in: <http://caepr.anu.edu.au/sites/default/files/Seminars/presentations/Beacroft_NTER.pdf>. Access on: 20 Apr. 2016.

112 GULSON, Kalervo; PARKES, Robert. From the Barrel of the Gun: Policy Incursions, Land, and Aboriginal Peoples in Australia. *Environment and Planning*, v. 42, p. 300-313, 2010.

113 GULSON, Kalervo; PARKES, Robert. From the Barrel of the Gun: Policy Incursions, Land, and Aboriginal Peoples in Australia. *Environment and Planning*, v. 42, p. 300-313, 2010.

114 GULSON, Kalervo; PARKES, Robert. From the Barrel of the Gun: Policy Incursions, Land, and Aboriginal Peoples in Australia. *Environment and Planning*, v. 42, p. 300-313, 2010.

115 AUSTRALIAN GOVERNMENT. *Constitutional recognition*. Canberra: Commonwealth, 2016. Available in: <https://www.dpmc.gov.au/indigenous-affairs/constitutional-recognition>. Access on: 20 Apr. 2016.

tion[116]. The Council comprises sixteen Indigenous and non-Indigenous members. A key focus of the Council is on the drafting of a constitutional preamble recognizing Aboriginal and Torres Strait Islander peoples as Australia's first peoples, and the drafting a referendum proposal to remove the race power from the Constitution[117].

One idea that the Referendum Council may draw from Brazil is the constitutional protection of Indigenous rights to lands. Any such proposal must be mindful of the need for proposed Constitutional changes to pass a referendum. This is notoriously hard to achieve, with only eight off 44 proposed amendments passing in the last 200 years[118]. First, an absolute majority in both Houses of Parliament must pass the proposed amendment; second, the proposal must be approved by a "double majority"', being a national majority of voters *and* a majority of voters in a majority of states (i.e. at least four out of six states)[119]. Negative reactions to Aboriginal and Torres Strait Islander land claims and the extent of private land ownership does not bode well for the passing of constitutional amendments conferring rights on Aboriginal and Torres Strait Islander peoples to possess any traditional land they have ever occupied, inhabited, used or conserved, similar to those conferred on Indigenous peoples by the Brazil Constitution. However, it might be possible to constitutionalize the native title and statutory lands rights regimes. It might also be possible to entrench the Indigenous Protected Areas regime, currently at the mercy of federal government discretion. This would help move the successful IPA program beyond changeable policy and create the first environmental protection in the Australian Constitution.

In other ways, Brazil has not advanced beyond Australia in the recognition of traditional land rights. For instance, Aboriginal and Torres Strait Islander peoples have the legal capacity to claim ownership of Australian land not previously designated for another purpose. Aboriginal and Torres Strait Islander peoples who hold native title, or who have registered a claim for native title, have the legal right to negotiate mining on lands they own or claim. Although these legal capacities are limited to some Aboriginal and Torres Strait Islander peoples and more susceptible to change because they are not entrenched in the Constitution, the capacity to own land and negotiate the extraction of sub-surface minerals exceeds the constitutional rights of Brazil's Indigenous peoples to possess land and surface resources. In Brazil, the Union retains ownership of Indigenous lands, with most Indigenous peoples having the right to possession and the use surface resources.

Another way in which Australia land rights exceed those in the Brazilian system concerns the treatment of Brazil's non-Indigenous traditional peoples. Aside from the recognition of land rights for some Quilombolas, the Brazil Constitution does not protect the land rights of non-Indigenous traditional peoples. This lack of constitutional protection allows the federal government to enact laws that demand the forced relocation of non-Indigenous traditional peoples upon the creation of a full protection conservation unit on their homelands. In contrast, the Australian system offers the possibility of joint management arrangements for protected area inhabited by traditional populations, even for IUCN I and II category areas such as national parks.

Australia uses various mechanisms to effect joint management arrangements and permit the permanence or use of protected areas by traditional populations. These include statutory co-management regimes, government leaseback agreements, Indigenous Land Use Agreements (ILUAs) and memorandums of understanding. That is not to say the arrangements are perfect; they may require Aboriginal and Torres Strait Islander peoples to relinquish legal claims to land or submit unfettered freehold land to the rules and prohibitions of the national reserve system. Common constraints include use restrictions that limit the exercise of commercial and non-commercial practices. Nevertheless, joint management offers a participatory power greater than that granted to non-Indigenous traditional populations in Brazil. The Australian system also demonstrates a possible way forward for Brazil's non-Indigenous traditional peoples that reconciles the conflict between environmental and cultural rights.

116 AUSTRALIAN GOVERNMENT. *Constitutional recognition*. Canberra: Commonwealth, 2016. Available in: <https://www.dpmc.gov.au/indigenous-affairs/constitutional-recognition>. Access on: 20 Apr. 2016.

117 AUSTRALIAN HUMAN RIGHTS COMMISSION. *About Constitutional recognition*. Available in: <https://www.humanrights.gov.au/publications/about-constitutional-recognition>. Access on: 20 Apr. 2016.

118 AUSTRALIAN HUMAN RIGHTS COMMISSION. *About Constitutional recognition*. Canberra: AHRC. Available in: <http://www.aec.gov.au/elections/referendums/types.htm>. Access on: 20 Apr. 2016.

119 Australian Constitution section 128.

Perhaps the best system to protect the constitutional environmental rights of Brazil citizens and cultural rights of non-Indigenous traditional populations is a combination of the Australian and Brazilian systems. This might include the use of joint management agreements to permit the permanence of traditional populations inside protected areas, where scientific study supports the continuation of traditional activities, or at least the use of those lands for traditional purposes. This approach would support traditional populations to carry out the cultural practices essential for the maintenance and development of their biodiversity knowledge, recognized by the international community as essential to biodiversity conservation.

This approach fits within popular socio-environmentalist philosophy that highlights the positive impact traditional populations have on biological diversity and conservation[120]. Socio-environmentalist scholars share many stories of where biodiversity has benefited from traditional practices and knowledge. For example, Balée tells that the story of the Kayapós, an Indigenous Brazilian nation that live in balance with nature. The Kayapós practice a subsistence economy and use natural energy technologies such as solar, fire and human force. As they manage the environment, they manipulate organic and inorganic components to create an environmental diversity that did not exist in the pristine conditions prior to humans.[121] Many similar stories regarding non-Indigenous traditional peoples suggest Brazil stands to benefit greatly from considering a joint management approach to biodiversity-rich homelands.

5. Final considerations

This paper highlighted some key similarities and differences between the traditional land rights systems in Brazil and Australia. While each system demonstrates some progress towards land rights recognition, there is still a lot to be done to expedite the aspiration expressed in the Convention on Biological Diversity regarding the maintenance of traditional people's knowledge.[122] This aspiration, intrinsic to the conservation of biological diversity, depends upon traditional people's access to land.

The constitutional protection of Indigenous people's rights to possess and use their traditional lands in Brazil far exceeds the land rights afforded to Australia's Aboriginal and Torres Strait Islander peoples. In Australia, Aboriginal and Torres Strait Islander peoples may submit a legal claim for land, but there are strict limitations on the land that can be claimed and the rights that can be granted. Priority is always accorded to private colonial interests over traditional land claims. The situation is made more insecure by the capacity of Australian parliaments and courts to further limit the lands and rights available for claim at any time, a noticeable trend in native title legislation.

A similar lack of constitutional protection for the land rights of Brazil's non-Indigenous traditional peoples allows for the forced relocation of these peoples to other areas upon the declaration of their land as a full protection conservation unit. This reflects a tension between environmental protection and cultural rights. The paper argues that the removal of traditional populations on environmental protection grounds is currently based on philosophical beliefs rather than scientific evidence. In many cases, scientific study may demonstrate that there is no conflict between biodiversity conservation

120 See BALÉE, William L. Footprints of the forest – Ka'apor ethnobotany: the historical ecology of plant utilization by an Amazonian people. New York: Columbia University Press, 1994; REED, Richard. Guarani production. In:_____. Forest dwellers, forest protectors: Indigenous models for international development. Boston: Allyn and Bacon, 1997. p. 49-75; POSEY, Darrel Addison. The importance of semi-domesticated species in postcontact Amazonia: effects of the Kayapó indians on the dispersal of flora and fauna. In: HLADÍK, C. M. et al (Ed.). Tropical forests, people and food: biocultural interactions and applications to development. Paris: UNESCO; New York: The Parthenon Publishing Group, 1993. (Man & the Biosphere Series; v. 13).; COLCHESTER, Marcus. *Salvaging nature*: Indigenous peoples, protected areas and biodiversity conservation. United Nations Research Institute for Social Development, Diane Publishing Co., 1994; DESCOLA, Philippe. Diversité biologique, diversité culturelle. In: MONOD, Jean-Claude; RAZON, Jean-Patrick, (Resp.). *Nature Sauvage, nature sauvée*? Ecologie et peuples autochtones. Ethnies Documents 24-25, Printemps, 1999; GÓMEZ-POMPA, Arturo; KAUS, Andrea. Taming the wilderness mith. *Bioscience*, v. 42, n. 4, p. 271-279, Abr. 1992; BENSUSAN, Nurit (Org.). *Seria melhor mandar ladrilhar*? Biodiversidade como, para que, por quê? Brasília: Universidade de Brasília, Instituto Socioambiental, 2000; DIEGUES, Antônio Carlos; ARRUDA, Rinaldo S. V. *Saberes tradicionais e biodiversidade no Brasil*. Brasília: Ministério do Meio Ambiente; São Paulo: USP, 2001; SANTILLI, Juliana. *Socioambientalismo e novos direitos*. São Paulo: Peirópolis, 2005; SOUZA FILHO, Carlos Frederico Marés de. As populações tradicionais e a proteção das florestas. *Revista de direitos difusos*, São Paulo, v. 31, maio/ jun. 2005.

121 BALÉE, William L. *Footprints of the forest – Ka'apor ethnobotany*: the historical ecology of plant utilization by an Amazonian people. New York: Columbia University Press, 1994. p. 116.

122 See also International Covenant on Economic, Social and Cultural Rights 1966 and United Nations Declaration on the Rights of Indigenous Peoples 2007.

and the continued possession and use of the land by the traditional population. In these cases, an adaptation of the joint management models used to facilitate biodiversity conservation and Indigenous land rights in Australia can provide a legal mechanism to enable the co-existence of traditional peoples and conservation units in Brazil.

In all countries and for all traditional peoples, access to lands helps safeguard the knowledge and practices essential for biodiversity conservation. Future biodiversity conservation depends upon learning from the past; from peoples who have accumulated knowledge of the land and its resources, and sustained those resources over generations. Developing more efficient systems to secure traditional people's access to lands, whatever and wherever they are, is the only way to do it.

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