Integrity and consistency of court decisions in Ronald Dworkin's framework as a way of tackling the problem involving conflict between fundamental indigenous rights and the legal certainty of landowners

Jaqueline Mielke Silva
Doutora e Mestre em Direito pela Universidade do Vale do Rio dos Sinos. Especialista em Direito Processual Civil pela Pontifícia Universidade Católica do Rio Grande do Sul. Professora do Curso de Pós-graduação stricto sensu da Faculdade IMED e da Faculdade INEDI - CESUCA e de outras instituições de ensino superior. Professora na Escola Superior da Magistratura do Rio Grande do Sul – AJURIS, Escola Superior da Magistratura Federal – ESMAFE, Fundação Escola Superior do Ministério Público – FMP, Escola Superior da Magistratura do Trabalho – FEMARGS. Advogada. E-mail: <jaqueline@mielkelucena.com.br>.

Abstract

The 1988 Federal Constitution contains several provisions protecting Native Brazilians and expressly acknowledges their right to be different. The enforcement of constitutional provisions regarding the protection of areas occupied by indigenous communities must be considered along with other constitutional guarantees and principles, especially property rights and legal certainty. Ronald Dworkin's theory of rights is one of the possibilities for tackling this problem.
Keywords: Native Brazilians. Property. Legal certainty.

1 Initial considerations

Indigenous issues, despite being contemplated in various provisions of the Federal Constitution, are one of the themes that present the greatest controversy. This paper aims to address the subject of lands traditionally occupied by indigenous peoples using Ronald Dworkin's Theory of Rights.

In accordance with article 231 of the Constitution, the custody of lands traditionally occupied by indigenous peoples is the consecrated duty of the State, thus it is the Union's responsibility to demarcate and protect these. This legal provision considers null and void acts that aim at the occupation, control and possession of these areas, without any right to indemnity for occupants, owners or possessors, with an exception only for compensation awarded for improvements made in good faith.

The isolated interpretation of this legal provision, without considering other guarantees and constitutional principles, has the effect of disregarding the rights of any third parties that have legitimate ownership over areas that are under their dominion, and often that have been for over a century.

In this context, the proposal of this essay is to provide a brief reflection on this apparent conflict of constitutional norms and values, springing from Ronald Dworkin's theory regarding the need for coherence and integrity in judicial decisions. This is one way of dealing with the problems involving the conflict between Native Brazilians and landowners.

DOI: 10.18256/2238-0604/revistadedireito.v12n1p20-30

2 Protection of indigenous culture and rights in the Federal Constitution of 1988

The historical dimension surrounding the indigenous question is broader than that which defines the Brazilian or even the American issue. It is a concrete representation of an intersection that occurs in a clash between two types of civilization, forming an incompatible pair. As Brazil grows, the indigenous population shrinks. Regardless of the historical period—colonial, monarchy, republic, dictatorship or democracy—native Brazilians have suffered from discrimination: pressures on their lands, neglect of their health and their education, disrespect, injustice and persecution, coming from all of the nation's quadrants (GOMES, 2012, p. 16).

The 1988 Federal Constitution, in Articles 231[1] and 232[2], in order to "compensate" for all the atrocities committed against native Brazilians, recognized fundamental rights specific to this population. These legal provisions have been acclaimed by many indigenous leaders, among them Márcio Pereira Gomes (2012, p. 111) who considers "indigenous lands as arising from an 'original' right, which means that it precedes the arrival of the Portuguese." Darcy Ribeiro (2010, p. 91), addressing this issue, believes that "fortunately, their constitutional rights to own the land on which they live and which are indispensable to their survival have been recognized." However, he adds that "sinister voices rise up wanting to repeal the demarcation of those lands" (RIBEIRO, 2010, p. 91).

The recognition of indigenous rights by the Constitution is an important innovation. The lands traditionally occupied by native Brazilians have become assets of the Union and it is the Union's responsibility to demarcate, protect and respect all their possessions. They are considered inhabited on a permanent basis those lands used for production, as well as those essential to the preservation of environmental resources and to their well-being.

The lands that natives have in their possession are regarded as permanent possessions, as well as the use of their mineral wealth, as long as their occupation, control and possesstion do not involve illegal acts. It is the responsibility of the National Congress to authorize usage of water and mineral resources on indigenous lands and native Brazilians must approve and also share in earnings, as determined in Section 3 of art. 231 of the Federal Constitution.

On the other hand, the Federal Constitution recognizes the right to difference and no longer propagates the incapacity of the native people who thereby needed protection (art. 232 of the Constitution). In the new system, indigenous capacity is recognized so that native people may take legal action to defend their rights, without needing intermediation. We have shifted from a constitutional paradigm of "protective" indigenous custody to one of protection of indigenous interests, which is completely different (BARBIERI, 2008, p. 105).

1 Art. 231. The rights of native Brazilians to their social organization, customs, languages, traditions and original rights to their lands they traditionally occupy are recognized, the Union being responsible to demarcate, protect and ensure respect for all of their goods § 1°. Lands traditionally occupied by Native Brazilians are those inhabited on a permanent basis, utilized in productive activities, essential to the preservation of environmental resources necessary for their well-being and needed for their physical and cultural reproduction, according to their uses, customs and traditions § 2°. Lands traditionally occupied by Native Brazilians are ordained for their permanent possession, giving them the exclusive right to the wealth of soils, rivers and lakes on those lands § 3°. The use of water resources, including its use for energy resources or research and of mineral resources on indigenous lands may only be carried out with the authorization of the National Congress, upon a hearing with participation of the affected communities, ensuring their participation in the results of this use, by law. § 4°. The lands considered in this article are inalienable and unavailable, and the rights to them are inviolable. § 5°. The removal of indigenous groups from their lands is forbidden, except ad referendum of the National Congress, in case of catastrophe or epidemic putting the population at risk, or in the sovereign interest of the Nation, pursuant deliberation of the National Congress, guaranteeing, under any circumstances, the immediate return upon cessation of said risk. § 6°. Acts aimed toward the occupation, control or possession of the lands referred to in this article, or exploiting natural resources of the soil, rivers or lakes on them, are null and void, with no legal effect, except for those acts in the public interest of the Union, according to complementary law, not generating nullity or voided rights to indemnization or to actions against the Union, except by law, with regard to improvements made in good faith during occupation § 7°. The provisions in art. 174, §§ 3 and 4 do not apply to indigenous lands.

2 Art. 232. Native Brazilians, their communities and organizations are legitimate parties apt to seek defense of their rights and interests before a court of law, whereby the Federal Public Ministry shall intervene at each act of the judicial process.

This change and the progress made in the Federal Constitution of 1988 mark a new beginning. In terms of indigenous issues, there has been an aim to put an end to outdated and hypocritical paradigms, such as that of integration, to seek recognition of diversities, and interaction among diverse peoples without breaking down cultural and identity traditions.

According to Antônio Carlos Wolkmer (2003, p. 88),

> the Constitution has elevated the rights already protected in the Native People's Statute (Estatuto do Indio), to a constitutional level, and this constitutionalization highlights the social organization, customs, languages, beliefs and traditions of indigenous people and has put an end to the evolutionist conception of assimilation, as though indigenous populations were transitory realities.

Thus, the Federal Constitution overcame the notions of ex-president Geisel, who did not understand why native Brazilians persisted in maintaining their indigenous customs. In reference to this issue, the anthropologist Darcy Ribeiro (2010, p. 76-77) reports that Geisel said:

> Why do these Indians insist on being Indians? My father and mother were German. I spoke only German until the age of 12 and today I am Brazilian. These Indians insist stubbornly on being Indians, probably because they are induced by missonaries and protection service workers.

For this reason, he concluded that he would imperially declare that all unacculturated indigenous tribes should cease being indigenous and become common Brazilian communities. This compulsory emancipation would entail the loss of indigenous lands, the loss of any right for compensation, and therefore, their decimation (RIBEIRO, 2010, p. 77).

2.1 The principle of human dignity and recognition of indigenous rights based on this principle

The issue of human dignity is an issue of insertion within a Democratic State of Law, which is the foundation of our constitutional system and our organization as a Federative State, pledged to ensure the exercise of social and individual rights, with freedom, safety, well-being, development, and justice as supreme values of a fraternal, pluralist and unprejudiced society.

The notion of a fundamental right (and of a fundamental guarantee) together with the physical conditions to ensure a life of dignity was first dealt with dogmatically in Germany, where it obtained legal and judicial recognition. In the doctrine, Otto Bachof (1987, p. 32) was one of the first jurists to sustain that a subjective law could positively guarantee the minimum resources for a dignified existence. According to him, the principle of human dignity does not only proclaim a guarantee of freedom, but also a minimum of social security, since without the material resources needed for a dignified existence, human dignity itself would be sacrificed. For this reason, the right to life and bodily integrity can not be conceived merely as a ban on destruction of existence—as a right to defense—but also as an active stance to ensure life.

Evidently, the guarantee of a dignified existence entails more than a guarantee of mere physical survival, rather it reaches beyond the threshold of absolute poverty. A life without alternatives does not fulfill the conditions of human dignity, which cannot be reduced to mere existence. Human dignity is not dependent on any specific circumstance, since everyone--including the worst criminals—are equal in dignity, in that they are recognized as people, regardless of their behavior being less than dignified. This is the meaning of article 1 of the Universal Declaration of the UNITED NATIONS (1948), according to which "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood". This precept universalized the basic premises of Immanuel Kant (SARLET, 2002, p. 44).

Dignity, as a moral and spiritual value, would be a bare minimum of the values that should be respected by society, giving the human being the right to self-determination and freedom to conduct his or her own life, and it should be protected by the law and its norms, as a recognition of the very essence and the condition of being human.

The Portuguese Constitutionalist José Carlos Vieira de Andrade (1987, p. 102), maintains that the principle of human dignity is the basis of all constitutionally enshrined fundamental rights, admitting, however, that there may be differing degrees to which the diverse rights are bound to that principle, such that there are rights that are first-degree explicitations of the principle and others that derive from it.

Indigenous law is fundamentally grounded in the principle of human dignity (BARBIERI, 2008, p. 110). As human beings, it is evident that Indians have the right to a dignified life on equal terms with other races. The indigenous culture, with its particular customs and rich diversity, must be respected.

It is not an overstatement to affirm that since the occupation of America by Europeans, most thinkers have held a terrible conception about the nature and the human condition of the Indian, qualifying them as inferior beings, indolent, dirty, cannibals, perhaps as a way to legitimize the exploitation of the indigenous populations by settlers (COLAÇO, 2000, p. 88). Still, there have been some conscientious spirits, pioneers of indigenous human rights, who denounced the oppression and social injustices, which culminated in the constitutional protection of the right to indigenous communities.

3 The milestone in the recognition of indigenous rights to lands occupied by others

In 2009, the Supreme Court ruled on the paradigmatic case denominated "Raposa Serra do Sol", establishing nineteen conditions for the preservation of indigenous lands. In addition, the Supreme Court, edited Precedent 650, *verbis*: "The items I and XI of art. 20 of the Constitution do not cover the lands of extinct villages, even when occupied by Indians in the remote past." The date of the 1988 Federal Constitution, "would be the legal time at which an indigenous group would need to be occupying a certain area for it to be considered 'traditionally occupied'" (GOMES, 2012, p. 111).

The Supreme Court also clarified the proper use of the notion of "immemorial possession," exercised by indigenous peoples, which was accomplished through instructive to vote by Min. The Nelson Jobim, given during the trial of RE 21998 3-3[3].

The same Minister, when laying out the grounds for his vote, points out that Article 231, Sec. 1 of the Constitution, upon recognizing the right of indigenous peoples, imposes the requirement of permanence—"lands traditionally occupied by Indians are those on which they live on a permanent basis [...]" and points out that "there is a necessary judicial factor: the Indians must be in possession of the area".

In the ruling of Supreme Court Civil Suit 1,383 of August 2010, regarding the Indian Reservation Cachoeirinha, in Mato Grosso do Sul, by the Full Bench of the Federal Supreme Court, an injunction issued by Justice Marco Aurélio was approved, which awarded maintainenance of ownership of an indigenous area by the property owner whose proptery titles dated back to 1892.

In the same direction, the Supreme Court ruled in Writ of Mandamus case n. 28,555 in January 2010, to suspend the effects of the Presidential Decree of December 21, 2009, which approved the demarcation of the Indigenous Land called Arroyo-Kora, in relation to the property called Fazenda Polegar, in Mato Grosso do Sul State. Among other allegations, the plaintiffs contend that under the jurisprudence of the Supreme Court, the traditional indigenous lands would effectively be only those inhabited by indigenous groups at the time of the promulgation of the 1988[4] Constitution.

The understanding that Article 20, sections I and XI, do not cover land that was only inhabited by native Brazilians in ancient times is present in the trials of RE 335887[5]

3 In the vote, it was determined: As for the request of advance protection, the circumstances of the indigenous lands to be demarcated shall be taken into consideration, in accordance to provisions in article 231 of the tution, as those lands occupied at the time of the promulgation of the aforementioned, that is, in 1988. In the case at hand, possession by private parties since 1892 can be verified, the property title dating back to December 20 of 1912. The judicial circumstances given in the Carta of 1988 must be preserved and indigenous occupation dating back to before the respective titles was confirmed by the indigenous community Terena da Terra Indígena Cachoeirinha by way of historical documentation.

4 At that time, Minister Gilmar Mendes affirmed: the arguments regarding violation of due legal process and a full defense are plausible. In addition, the documentation of pages 41-83 attest that the real estate registry dates to the year 1924, long before the date of October 5, 1988, fixed as a cutoff date of occupation by the jurisprudence of this Court, in the well-known case of Raposa Serra do Sol, as explicated in excerpts of the presentation of the ruling PET nº 3388, Rel. Min. Carlo Britto, DJ 25.9.2009.

5 Usucaption. Indigenous villages. Article 20, I and XI, of the Constituion—The Plenary of this Court, by ruling on the extraordinary appeal 219.983, confirms the understanding that items I and XI of article 20 of the present Constitution do not cover lands, such as those in the case at hand, that only in time immemorial were occupied by Native Brazilians. The ruling does not deviate from this orientation. In addition, in there being no interest on the part of the Union in the act, the allegation of offense

and RE 219.983[6].

It would not be irrational to consider that any other reasoning would lead us to conclude that all of Brazil belongs to the Native Brazilians, who were the first occupants of the entire extension of land in the country.

However, the anthropologist, Mercian Pereira Gomes, disagrees that the promulgation date of the Federal Constitution of 1988 should be established as the cutoff date for the occupation of indigenous lands, stating that

> with this symbolic date, which is anthropologically random and arbitrary, several demarcation processes have been challenged in regional courts because of the impossibility of proving that a particular indigenous group had been inhabiting a certain area at that date (GOMES, 2012, p. 111).

Despite understanding that indigenous rights should be protected, we disagree with this understanding, because paragraph 6 of art. 231 of the Constitution can evidently not be interpreted in isolation, but rather concurrently with the provision of Sec. 1 of the same provision and other rights protected by the Constitution, such as acquired--rights and those rights derived from it (e.g., legal certainty, confidence, objective good faith).

3.1 The conflict between the fundamental rights of Native Brazilians and third-party ownership rights: the urgent need to preserve legal certainty and good faith

Evidently, all Brazilians have a "debt" to indigenous peoples, who have been decimated and segregated. In addition, the right to difference of these peoples should be preserved, as an expression of the fundamental right to human dignity. Nevertheless, we understand that this "debt" should be paid by all Brazilians, and not by a small portion of rural producers, often very small-scale producers who also live in extreme poverty. Removing these people from their land also means sacrificing fundamental rights. It is important to remember that the fundamental right to human dignity includes all Brazilians, not just Native Brazilians.

To make matters worse for landowners, pursuant Sec. 6 of art. 231 of the Federal Constitution, they do not have the right to be indemnified with respect to the value of the land, but only for improvements made during occupation in good faith. If this paragraph were interpreted without the Constitution of 1988 cutoff date, the owners of land that one day belonged to native Brazilians would not be entitled to any amount by way of compensation, except for any improvements that had been made to the area. In other words, the "debt" of the Brazilian society would be paid by only a few land owners, when it should be paid by the whole collective.

In our opinion, the question should be resolved by the Union as follows: either grant land to the indigenous populations, different from those originally occupied by indigenous communities, or compensate the landowners for the areas that will be demarcated as indigenous due to indigenous possession in the remote past. What cannot be consented is that individuals will have no right to compensation for land acquired in good faith because that land was once possessed by native Brazilians (these acquisitions prior to the 1988 Federal Constitution).

Besides articles 231 and 232, there are other rights provided for in the Federal Constitution, of equal hierarchy, and that must also be preserved, e.g., the right to property, provided for in art. 5, item XXII, as well as acquired-rights, perfect legal act and res judicata, protected under item XXXVI of this provision.

These two constitutional postulates, together with articles 231 and 232 of the Constitution, imply the need for such a conclusion, in that it is the duty of the legal system to recognize the effective need for protection of private property titles over areas of land that were in ancient times occupied by indigenous communities, especially when these real estate acquisitions involved equivocations on the part of the State.

A different interpretation would be clearly unconstitutional, in violation of article 5, section XXXVI, which contemplates acquired-rights and also the fundamental right of property, as provided

of article 109 of the Magna Carta is hampered. Extraordinary appeal is not granted. (RE 335887, Rel. Min. Moreira Alves, Primeira Turma, 12.03.2002).

6 GOODS OF THE UNION – LANDS – INDIGENOUS VILLAGES – ARTICLE 20, ITEMS I AND XI, OF THE CONSTITUTION – SCOPE. The guiding rules regarding possession of the items I and XI of article 20 of the Federal Constituion of 1988 do not cover lands occupied in the remote past by indigenous tribes. (RE 219983, Rel. Min. Marco Aurélio. Tribunal Pleno, 17.09.1999).

for in section XXII, both of the Constitution. Thus, legal certainty, the principle of objective good faith and perfect legal act would also be violated.

Not recognizing the acquired rights of individuals bearing legitimate titles of property would mean compromising the achievement of the ideal of legal certainty of the entire system: no State action can be trusted as it will always be subject to review by the State itself. Even worse: the State recognises rights, creating consolidated legal situations, then withdraws them subsequently, not granting the property owners even the right to be indemnified for the value of their respective areas. It should also be noted that there have been judicial decisions, which improperly used the Raposa Serra do Sol case and only recognized the right to compensation for improvements made to the property, that is, without the value of the land itself being indemnified. The insecurity arising from these rulings is evident and applies not only to owners, but also to the entire Brazilian population, since Brazil was entirely inhabited by native Brazilians originally.

Acquired-rights and perfect legal act are constitutional guarantees engraved in article 5, section XXXVI of the Constitution. This provision consecrates the principle of legal certainty in the Federal Constitution, which together with the principle of trust, are constituent elements of the rule of law, serving as a basis for the safe, autonomous and responsible conduct of relations in society. These principles make up the formal and material conformation of legislative and administrative acts practiced by public entities.

The Portuguese Constitutionalist J. J. Garcia Canotilho (1996, p. 372) states that the idea of legal certainty is connected with two material principles: "the principle of the determinability of law, expressed in the requirement of clear and dense laws and the principle of the protection of trust, which entails the establishment of stable laws, or at least laws whose legal effects can be predicted and calculated by citizens. Paul de Barros Carvalho (2002, p. 95) also teaches along similar lines, *verbis*:

> The principle of legal certainty is a result of systemic factors, directed toward the implantation of a specific value, which is to coordinate the flow of inter-human interactions in order to propagate within the social community the sense of predictability as to the legal consequences of the conduct. This sense reassures citizens, making space for the planning of future actions, whose legal effects are known, being that the citizens can trust the way in which the application of laws will be carried out.

Therefore, the principle of the rule of law, densified by the principles of legal certainty and legal trust, imply a subjective-legal guaranteeable dimension, assuring trust in the permanence of citizens' legal situations.

From this follows the idea of a *measure of confidence* in the action of public entities within the active laws and of protection of citizens in case of legal changes that are necessary to the development of State activity (CANOTILHO, 1996, p. 375). In the case of concessions of private properties, by means of numerous State acts which guaranteed the right of ownership of these areas that had been in the past occupied by indigenous communities, it would be forbidden for the public administration to invalidate them, as this would cause irreparable damage to the land owners, and affront legal certainty and good faith.

Celso Antonio Bandeira de Mello (2004, p. 109), also follows this same line of reasoning, citing the canons of loyalty and good faith, which require that the Administration proceed in relation to its citizens with honesty, being forbidden to act shrewdly, with malice, in such a way as to confuse, hinder or minimize the exercise of rights by citizens.

Once the right to property is incorporated into the patrimony of an individual, it is based on laws and constitutional acts, thus it is not possible to consider vice, illegality or unconstitutionality of such acts performed over several decades. It is therefore not possible to imagine the repeal of acts performed on the basis of a decree issued by the public administration itself.

It is based upon the arguments exposed thus far, that is, in the face of acquired-rights, perfect legal act and legal certainty, all linked to good faith, that the long-standing legitimate ownership of lands, including areas of land that were occupied by native Brazilians in the distant past, must be respected. In this sense, Mary Sylvia Zanella Di Pietro (2005, p. 85) claims that:

> Legal certainty is closely related to the notion of respect of good faith. If the Administration adopted a particular interpretation as correct and applied it to concrete cases, it cannot then come to annul previous acts, under the pretext that they were made based on an erroneous interpre-

> tation. If the citizen had a given right recognized based on an interpretation adopted uniformly by the entire administration, it is clear that their good-faith must be respected. If the law must respect the acquired right, perfect legal act and res judicata, out of respect for the principle of legal certainty, it is not acceptable that the citizen should have their rights susceptible to variations in legal interpretations over time.

It is concluded, therefore, that it is not possible for the Public Administration to revert its acts at any time, given the stabilization of these acts, in total respect for the constitutionally guaranteed legal certainty.

3.2 The integrity and coherence of judicial decisions as an alternative in the solution of conflicts between native Brazilians and landowners

Considering the decision issued by the Supreme Court in the Raposa Serra do Sol case, the relevance of the coherence and integrity of judicial decisions can clearly be seen. In hypotheses such as this one, in the face of fundamental principles and guarantees at stake.

Initially, it can be said that weighing results is a method of developing the law, and the principle of proportionality arises precisely from the rationalisation of concrete solutions to the conflict of rights and assets. For Robert Alexy (2011, p. 600), "the second order present in the law of balancing is the importance of satisfaction of another principle". On the other hand, Lênio Luiz Streck (2012, p. 536), claims that "proportionality must be present, in principle (and we can see the ambiguity of the expression), in all *applicatio*.

Evidently, proportionality should also be applied to the indigenous question. In the case of private properties intended for indigenous demarcation, which are endorsed by legitimate titles showing possession prior to the 1988 Federal Constitution, the application of this principle is clearly identified in so far as the Act of the public administration affronts other fundamental rights laid down in the Constitution. Many of the people who purchased lands where demarcation is intended, had no way of knowing at the time of purchase, that they were once occupied by native Brazilians. These people simply relied on the registry process. This situation clearly calls for an integrated, not isolated, interpretation of the constitution.

There is, however, another way to approach proportionality of legal applications than that proposed by Robert Alexy (weighing in order to solve conflicts between principles that, depending on how they are conceived, would justify opposing solutions). The American author Ronald Dworkin, springing from different premises than those proposed by Robert Alexy (suffice it to say that Dworkin does not believe in the existence of an actual conflict between principles), provides an alternative way of confronting legal controversies using a hermeneutical point of view (or interpretavist). In the work of Dworkin, the principle of proportionality is approached as the requirement that the judicial decision, necessarily generated by principles, maintain coherence with the integrity of the law.

We will briefly review his reasoning, seeking to strengthen our arguments in favor of an interpretevist proposal that could harmonize, rather than distancing or choosing one over another, the constitutional principles that appear as potentially influential to solve the indigenous question in this text.

The first target of Dworkian theory is Herbert Hart's legal positivism[7]. In the commended formulation of the English legal philosopher, the law is a complex *system of rules*, whose normative source is, ultimately, social recognition. There are rules that define the way other rules are created, as well as establishing the competence for dictating them (second-degree rules); and there are rules of conduct that establish obligations, duties, etc. In this system, the judge would be the agent responsible for resolving legal controversies involved in the application of rules recognized by the community. To solve cases not contemplated by the rules or simply doubtful (where the actual application itself is questioned), the judge would have a certain margin of leeway, admitted by the system. In other words, the Law is a phenomenon constituted by language and the rules are con-

7 According to Dworkin, the Hartian positivist model is unable to account for the complexity of Law. The most developed positivist tradition holds the thesis of judicial discretion. When there is no norm that is exactly applicable, the judge should decide using his discretion. The Law cannot offer a response to every case that arises. As seen previously, Hartain positivism sustains that in difficult cases there is not a correct response before the judge's decision, which is a markedly discretionary one. Dworkin attacks the theory of the discretionary function of the judge with his right answer thesis. *Los derechos en serio*, p. 150.

ceived as having an open texture, to be contemplated and filled by judicial discretion.

Following this formulation, difficult cases, such as the indigenous issue, would be solved, ultimately, by judicial discretion. That is to say, where available rules are insufficient or inconclusive, it is up to the judge to exercise his or her discretionary power (a form of interstitial legislative power) to reach a solution. There is not, strictly speaking, a correct answer previously established to solve difficult cases. This is the function, the power, of the judge.

Dworkin (1995, p. 150), however, sustains that even difficult cases have a correct answer. He claims that the legal material, composed of rules, guidelines and principles is sufficient to provide a right answer to problems presented, and that there is no justification to defer to the legislative power of judges. For Dworkin (1995, p. 150), judicial discretion is not a suitable concept because the judge is not authorized to even dictate norms, much less to dictate them retroactively. Ultimately, this would be antidemocratic. The judge must be expected to seek criteria and construct theories to justify his or her decision, which must be consistent with the theory.

Dworkin's jurisprudential analysis leads him to find certain cases that were not solved by arguments with authority derived from the rules themselves. Indeed, he finds decisions that actually circumvented the hypothesis in the application of unquestionably established rules. In the well-known case of *Riggs v. Palmer*, for example, the rules of succession were circumvented in order to avoid an injustice (it was recognized in the case that if no one may avail themselves of their own depravity, the assassin of a grandfather should not benefit from the inheritance left by the grandfather). In other words, the rules were ceded in the face of a principle, a moral argument.

Pointing out the correctness of decisions such as this one, Dworkin claims that in difficult cases such as that one, judges should argue based in legal principles, rather than by exercising discretionary power (which is an approach that does not consider the correctness or incorrectness of decisions).

Nevertheless, as there is not a pre-established hierarchy among principles, it is possible that this may lead to differing decisions. Dworkin (1995, p. 150) claims that the principles are dynamic and change quickly and that any intent to canonize them is destined to fail. Therefore, the application of principles is not automatic, but requires theoretically-grounded legal foundation. Principles, however, different from rules, possess the dimension of weight or importance, and must be dimensioned in an interpretivist fashion, on a case-by-case basis.

One of the keys to the success of Dworkin's work (1995, p. 15) is related to its concern with the concept of certainty in the Law. His theory is original in its focus on legal analysis from the perspective of difficult cases and the uncertainty that they produce. Difficult cases present problems that the theory must solve (theory=reduction of incertainty). The judge applies the Law upon utilizing the theory as a criterion to solve social conflicts Theory does not only describe, but constitutes the Law. Thus, Dworkin's theory is a pragmatic one, or more precisely, a normative one: its objective is to prescribe criteria for making correct decisions.

The framework that Dworkin utilizes to explain the theory of rights is centered on the analysis of judicial controversies. It can be summarized as follows:

- in every judicial process there is a judge responsible for resolving the conflict;
- there is a right that should win the conflict and the judge should ponder who should win;
- this right will always be existent, even if there is not an immediately applicable law existent;
- in difficult cases, the judge should give the win to one party, based on grounding principles;
- social objectives are subordinated to rights and the principles that ground them;
- the judge, upon grounding his or her decision in a pre-existent principle, is not making up a right or applying a law retroactively: he or she is limited to guaranteeing the right.

Dworkin (1995, p. 150) understands that the role of the courts in controversial cases is not to create new rights, but to discover the Law that has been thus far hidden. This discovery is carried out by means of the principles and rules.

Every judicial decision whose argument is based on principles will meet an individual right; however, if it is based on policies, it will meet a collective objective, in terms of the general well-being of the community. According to Dworkin (1995, p. 150), legal decisions should be based in princi-

ples, since the judicial and legislative powers will not be confused: legislative programs can be reasonable and correctly justified by policies.

The theory of rights distinguishes, objectively, between social objectives and individual rights. Individual rights consist of individualized political objectives, while social objectives consist of non-individualized political objectives.

On the other hand, the theory of rights descriptively considers the structure of the institution of *adjudication*, as well as providing a political justification for this structure. That is, from that distinction between principles and policies, arises a description of how judges decide cases and a prescription of how they should decide. The thesis of rights consists of a judicial technique, which aims to reduce the occurrence of fallacious decisions, which ultimately are consecrated institutionally due to being considered of legal quality (CHUEIRI, 1995, p. 165).

Therefore, it is possible to think of legal rights, even in difficult cases, respecting both the legislation and precedents. Thus, from the perspective of Dworkin (1995, p. 102), the legal rule does not constitute an impediment to the fulfillment of individual rights, but rather an ingredient that is added to it.

Due to being a social phenomenon, Law should be analyzed through argumentative practice. The interpretative option in detriment to dominant semantic theories, especially positivism, seeks to understand the argumentative nature of legal practice in order to unveil the meaning of law as a symbolic dimension of fairness and justice (CHUEIRI, 1995, p. 103). In the chain of law process (continuity of Law), Law is an exercise of constructive interpretation where the purposes and intentions of the interpreter are taken into account, albeit arising from the intentions of the author.

This is where two interpretation keys come into play: coherence and integrity. In their interpretative / constructive task, judges should take seriously the responsibility of being consistent—and not just with their own decisions, but with integrity of the Law.

For Dworkin, interpretation is a matter of responsibility and value. Thus, the interpreter (judge) should consider a particular practice (the Law) in order to identify its purpose; then, the judge must take responsibility in promoting this value.

Furthermore, for Dworkin, the law is a collective enterprise whose primary function is the legitimatization of the exercise of coercive governmental power. This is its value. Moreover, as previously mentioned in light of an analysis of the theory of rights, any gesture from the State (government) can only be considered legitimate when exercised in accordance with the individual rights of members of the political community. Among such rights, we can highlight the right to equal consideration and respect (whose foundation dates back from Dworkin to the Kantian philosophy). In this way, the government has the duty of treating citizens fairly, hence the requirement to act consistently—consistent with the principles whose legitimacy is recognized by the political community, which consists of rights holders. Remember: principles, as seen previously, are arguments in favor of rights.

Thus, in what way can this interpretive approach shine a light on the indigenous issue dealt with in this research?

Let us consider: a democratic state is formed around rights. A government that does not respect such rights loses the moral authority to claim legitimate use of collective force. Particularly, as mentioned, the government must treat people under their rule with equal interests. This is a requirement for human dignity.

In sum, it is not possible to preserve the rights of some while eliminating the rights of others. The rights effectively recognized by the political community must be guaranteed—especially by the judicial system. Thus, any interpretation aimed at the resolution of a legal dispute must seek to construct a solution that balances the rights of those involved. This is different from seeing a competition, or rivalry, between different rights.

A solution for the conflict between the interests of people who built their lives on disputed lands and those of indigenous peoples does not require the arbitration of a winner in a dispute, as though it were a game, but rather an integration and harmonization of the rights of those involved. This is not about advocating a compromise or seeking a middle ground, it is about inalienable rights that do not admit any forms of compromise. This is the key point: there are rights on both sides. It is up to the interpreter to construct the best way of recognizing and preserving them. Thus, only in such a way will it be possible to ensure equal interests, which is the foundation of a democratic community.

4 Final considerations

The reflection expounded in this text invites the reader to debate regarding the best form of carrying out the constitutional command of state custody over indigenous areas. In this way, we offer the following conclusions:

a. According to Precedent no. 650 of the Supreme Court, the constitutional custody of the areas occupied by indigenous communities does not cover the land of extinct villages, even if occupied by the indigenous people in the remote past.
b. The protection of the areas occupied by indigenous communities cannot be enacted with total disregard to the constitutional guarantees of property rights and legal certainty.
c. The legal relations of public law involving the state-owned entity and individuals is guided by the principle of good faith in order to provide legal certainty as to the purposes of administrative actions and avoid surprises for citizens.
d. The conflict of constitutional values can be solved in a satisfactory way with the use of the principle of proportionality, which in addition to optimizing legal solutions, acts as a pragmatic hermeneutic tool for weighing legitimate values, rationalizing the use of the constitutional text.
e. An interpretation based in consistency and integrity is also one of the alternatives for the solution of conflicts between indigenous people and landowners.

References

ALEXY, Robert. *Teoria dos Direitos Fundamentais.* Trad. Virgílio Afonso da Silva. São Paulo: Malheiros Editores, 2011.

ANDRADE, José Carlos Vieira de. *Os direitos fundamentais na Constituição Portuguesa de 1976*. Coimbra: Almedina, 1987.

BACHOFF, Otto. *Jueces e Constitución.* Trad. Rodrigo Bercovitz Rodríguez-Cano. Madrid: Editorial Civitas, 1987.

BARBIERI, Sâmia Roges Jordy. *Os direitos constitucionais dos índios e o direito à diferença, face ao princípio da dignidade da pessoa humana.* Coimbra: Almedina, 2008.

BRASIL. *Constituição Federal de 1988.* Diário Oficial da União. Poder Legislativo. 05 out. 1988, Seção 1, p. 1.

BRASIL. Supremo Tribunal Federal. Súmula nº 650. Os incisos I e XI do art. 20 da CF não alcançam terras de aldeamentos já extintos, ainad que ocupadas por indígenas em passado remoto. In <http://www.stf.jus.br/portal/cms/verTexto.asp?servico=jurisprudenciaSumula& pagina=sumula_601_700>. *DJ* 09 out. 2003.

CANOTILHO, J. J. Gomes. *Direito Constitucional.* Coimbra: Livraria Almedina, 1996.

CARVALHO, Paulo de Barros. *Curso de Direito Tributário.* São Paulo: Saraiva, 2002.

CHUEIRI, Vera Karam de. *Filosofia do Direito e modernidade*: Dworkin e a possibilidade de um discurso instituinte de direitos. Curitiba: JM, 1995.

COLAÇO, Thaís Luzia. *Incapacidade Indígena.* Curitiba: Juruá, 2000.

CUNHA, Manuela Carneiro da. **Índios** *no Brasil – História, Direitos e Cidadania.* São Paulo: Claro Enigma, 2012.

DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo.* São Paulo: Atlas, 2005.

DWORKIN, Ronald. *El imperio de la justicia*: de la teoria general del derecho, de las decisiones e interpretaciones de los jueces y de la integridad política y legal como clave de la teoría e práctica. 2. ed. Traduzido por Claudia Ferrari. Barcelona: Gedisa, 1992.

DWORKIN, Ronald. *Law's empire*. Londres: Fontana Press, 1986.

DWORKIN, Ronald. *Los derechos en serio.* Traduzido por Marta Guastavino. Barcelona: Ariel Derecho, 1995.

DWORKIN, Ronald. *Taking Rights Seriously.* Estados Unidos da América: Harvard University, 1997.

GOMES, Mércio Pereira. *Os* **índios** *e o Brasil – Passado, presente e futuro.* São Paulo: Contexto, 2012.

MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo.* 17. ed., São Paulo: Malheiros, 2004

PEÑALVA, Ernesto Pedraz. *Constitución, jurisdicción y proceso.* Madrid: Akal/Iure, 1990.

RIBEIRO, Darcy. *Falando dos* **índios.** Brasília: Editora UNB, 2010.

SARLET, Ingo Wolfgang. In: *Revista de Direito do Consumidor*, n. 61, p. 60-125. "Direitos fundamentais sociais, mínimo existencial e direito privado".

SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais.* Porto Alegre: Livraria do Advogado, 2012.

SARLET, Ingo Wolfgang. *Dignidade da Pessoa Humana e Direitos Fundamentais.* Porto Alegre: Livraria do Advogado, 2002.

STRECK, Lênio Luiz. *Verdade e Consenso.* 4. ed., São Paulo: Editora Saraiva, 2012.

WOLKMER, Antônio Carlos. *Os novos Direitos no Brasil: Natureza e perspectivas: uma visão básica das novas conflituosidades jurídicas.* São Paulo: Saraiva, 2003.

L'integrità e la coerenza delle decisioni giudiziali secondo la concezione di Ronald Dworkin come possibilità per affrontare i problemi, compreso il conflitto tra i diritti fondamentali indigeni e la sicurezza giuridica dei proprietari di terra

Riassunto

La Costituzione Federale del 1988 ha tutelato, con diversi dispositivi legali, la protezione degli indios, con l'esplicito riconoscimento al diritto alla differenza. L'attuazione della determinazione costituzionale, di protezione delle aree occupate da comunità indigene, deve essere interpretata in maniera integrata con altre garanzie e principi previsti nella Costituzione Federale, in particolare con il diritto e la sicurezza giuridica. La tesi di diritti di Ronald Dworkin si presenta come una delle possibilità per affrontare questo problema.

Parole Chiave: Indios. Proprietà. Sicurezza pubblica.

Submissão: 07/01/2016
Aprovaçao: 04/05/2016