# THE COMMON PROPERTY AND THE COMMUNITY FOREST MANAGEMENT IN THE BRAZILIAN AMAZON FOREST[1]

José Heder Benatti[2]

**ABSTRACT –** This paper is a preliminary legal reflection on the role of common property in the Brazilian Amazon. It suggests the integration of two distinct normative scopes of the society, the legal right and consuetudinary law, with the objective to argue that the legal instruments of the Brazilian society can be used to protect the cultural and natural patrimony.

**KEY WORDS:** property, common property, resource management, Amazon.

## INTRODUCTION

In the last years, the discussion over importance of the traditional populations on forests management and protection of the renewable natural resources has been intensified. Under an optimistic point of view, this social group has the legal right to explore the forest, specifically Amazon, as well as it accomplishes an outstanding role of rational use of forest resources.

This way, the studies aim for elements that can serve as a "model" of a rational, or at least, to detach reference elements for long-term managements and, this way, subsidizing the public politics. When legitimating the permanence of traditional populations in their areas of use and management it is also trying to solve the problem of conflicts for the ownership of the land and this way, strengthening both women and men's fixation to the filed. Another expected goal is the economical, because the once access to the property and the exclusive use of several existent forest resources in the rural property is granted, there is possibility of an economic alternative for such social groups.

Now we have different forms of legitimating the ownership process of traditional population. We can enumerate the extractive reserve (RESEX), the reserve of the projects of agricultural extraction's establishment (PAE), the projects of maintainable development (PDS) and this year the project of forest establishment was created (PAF).[3] Besides those juridical illustrations, the areas occupied by the traditional populations in national forests are insured for their use. Below, we present a table of each juridical category of recognition of possession among traditional populations in Brazil.

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[1] The discussion that we present in this paper is part of the research that we coordinated, among 2000 and 2003, in the Project "Impact of Public Politics on Community Management of Natural resources", of the Ministry of Science and Technology, Subprogram of Science and Technology. SPC&T, which was part of the Pilot Program to the Protection of Brazil's Tropical Forests. PPG7.

[2] Lawyer, Law professor at the Universidade Federal do Pará (Federal University of the Pará) -UFPA, PhD in Social and environmental Sciences by the Núcleo de Altos Estudos Amazônicos (Nucleus of High Amazonian Studies) - NAEA/UFPA, researcher associated to NAEA/UFPA and coordinator of research of the Instituto de Pesquisa Ambiental da Amazônia- (Amazon Institute for Environmental Research) - IPAM. Email: benatti@amazon.com.br or jbenatti@ufpa.br

[3] The National Forest is a protected area of ownership and public domains, and the private areas included in its limits should be dispossessed in agreement with what disposes the law. It is admitted the permanence of traditional populations that inhabit ever since its creation, in accordance with the determination and regulation and in the Management planning of the unit (Article 17 of the Law 9.985, of July 18, 2000).

| Juridical Category | Definition |
|---|---|
| Extractive Reserve (RESEX) | It is an area used by traditional extractive people, whose subsistence is based on extraction, as a complement, in the subsistence farming and in raising small animals and it has as basic objectives to protect means of life and the culture of those populations and to assure the maintainable use of natural resources of this unit. The extractive reserve is of public domain and its use is granted to the traditional extractive populations (art. 18 of the Law 9.985, of July, 18, 2000)<br>Agrarian creation and stabilization is responsibility of the state or federal environmental organ. |
| Reserve of maintainable development (RMD) | It is a natural area that shelters traditional populations, whose existence is based on maintainable systems of exploitation of the natural resources, developed along several generations and adapted to the local ecological conditions and that works as a fundamental part related to nature's protection and related to the maintenance of biological diversity.<br>The RMD is of public domain; however, private areas in its boundaries shall be, if so, dispossessed, according to what the law disposes (art. 20 Law 9.985, of July, 18th, 2000).<br>Agrarian creation and agrarian regulation is a responsibility of the state (or federal) environmental organ. |
| Quilombola Property | It is considered remainders of Quilombola communities, ethnic-racial groups (according to an attribution criteria of their own) with own historical path endowed with specific territorial relationship, with a presumption of black ancestral related to the resistance of the suffered historical oppression. The characterization of the quilombolas communities' remainders will be attested by definition of their own community. A Quilombola property is land taken by remainders of Quilombola community and which is used in order to guarantee their physical, social, economical and cultural reproduction (Ordinance 4.887, of November, 20th, 2003).<br>Agrarian creation and agrarian stabilization is a responsibility of Federal Land Organ – National Institute of Colonization and Agrarian Reform (INCRA) |
| Project of Agri-extractive Establishment (PAE) | It is an area that the exploration of areas endowed with extractive wealth, through activities economically viable and ecologically maintainable, to be executed by the populations that occupy or come to occupy the mentioned areas (Administrative rule/INCRA/n.º 627, of July 30, 1987).<br>The creation and the agrarian stabilization is a responsibility of the organ of federal land. National Institute of Colonization and Land reform (INCRA). |
| Project of Maintainable Development (PDS)[4] | It is a modality of an establishment project, of socioeconomic-environmental interest, destined to the populations that already develop or that are disposed to develop activities of low environmental impact, depending on the aptitude of the area (Administrative rule/INCRA/n.º 477, of November 4, 1999).<br>The creation and the agrarian stabilization is a responsibility of the organ |

[4] The basic difference between the project of Agric/extractive Establisments and the Project of Maintainable Development (PDS) is that the first one will be specific for traditional populations; there is no establishment of people from other places. However, in PDS it happens the establishment of families, in areas of ecological interest, that want to work in an ecologically maintainable way. The administration of the area of PDS will happen in an integrated way, contemplating the participation of the association of the establishment, of a local environmental organ and of a no-government organization, that with INCRA will promote the administration of that area (BENATTI, 2003a:212).

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|---|---|
| | of federal land. National Institute of Colonization and Land reform (INCRA). |
| Project of Forest Establishment (PAF) | The forest establishments are based, above all, on extraction of wood, of eatable and combustible oils, in the cultivation of fruit pulps and medicinal herbs. They also foresee the management of wild animals and of mineral resources. In the areas in which great part of the forest was already dropped, there will be reforestation, subsistence planting and creation of small animals. The area needs to have enough wood for the retreat from 20 to 30 cubic meters for hectare, to be close of the markets, to assist the timber demand and has to possess infrastructure so that the production can have easy drainage and agile commercialization.<br>The creation and the agrarian stabilization is a responsibility of the organ of federal land. National Institute of Colonization and Land reform (INCRA). |

To have an idea of the dimension that the collective property is gaining in the Amazon forest, we will present a table containing each one of the access categories to the land with its correspondent extension.[5]

| *Category* | *Existent Áreas Federal and State* | *Number of benefited families* | *Extension in Hectares* |
|---|---|---|---|
| RESEX Federal | 21 | 33.915 | 3, 377.671 |
| RESEX Estadual | 07 | --- | 973, 398. |
| RDS | 03 | --- | 4, 280.814 |
| PAE | 15 | 2.672 | 1, 057.814 |
| Quilombos in Pará | 10 | 1.365 | 330, 957 |
| **T o t a l** | **56** | | **10, 020.654** |

Source: Instituto Nacional de Colonização e Reforma Agrária – INCRA/PA (2000); Ricardo & Capobianco (1999), Benatti (2003a).

An aspect scarcely studied is the juridical profile of the common property[6], which more and more has a territorial, social, environmental and juridical expression, important in Amazon landscape. In fact, the prominence that the collective property is gaining is not limited only to Brazil; in several Latin American and European countries such phenomenon is repeated.[7]

In Europe, the current collective properties represent the survival of the community appropriation of natural resources before the creation of the modern states, in spite of the several attempts of its elimination since the century XVIII. After the Bourgeois Revolution, the land reform in occupied lands in a collective way was wanted, in order to fraction and to privatize the patrimony, which was initially indivisible.

With the consolidation of the modern state and the monist vision of the rights, the collective property represented an "anomaly" before the new structure of individual property, which

[5] Because of a lack of data, we are not computing in this report the areas taken by the traditional populations in national and state forests, once the Law 9.985/00 allows the permanence of traditional populations that inhabit such category of the conservation unit of maintainable use, since its, as we exposed previously.

[6] In order to accomplish the goals of this paper, we will use "collective" and "common property" as synonymous.

[7] In Portugal there are the *"wastelands"*, in Spain, the *"biens comunales"*, in France the *"biens communaux"* subject to a specific regime, and in Italy the *"beni"* or *"demani civici"*, were quoted as some European examples (Nabais 1999).

made possible its division and alienation. It was also in discussion the hegemony of the rights for an official and unique/unitary juridical vision.

In Latin America, this picture was not different; in several moments the great owners tried to stop the application of laws, which would recognize the rights of the community appropriation of the natural resources. The historic differential lays in the fact that the collective property will be structured after the political and social organization and colonial social.[8]

Therefore, the current discussion about the common property and the community management and its relative peculiarity before the effective Law System, besides represents a new configuration of the property's juridical regime, alternative to the individual property, expresses pluralist values that come to recognize and to guarantee the social formation and that can compete for man's development (Martin 1990:12).

The consolidation of a pluralist point of view of the right seeks for overcoming the limit imposed by the official right, because the predominant understanding is that there is identification between right and State. It is considered as juridical what the State elaborates; the remaining is a "pseudo" right or an inferior right. However, the juridical possesses a much wider and much more complex dimension than the limited Positivist conception tries to impose, for that is the reason why we work with the principle of plurality of Law System, since inside the territory of the country, the juridical dimension doesn't coincide, in fact, with the juridical production of the State (Rossi: 1997).

On the other hand, when we refer to common property, it doesn't mean that only a "unique model" of collective property exists. In fact, we are treating in a generic way the multiple appropriation forms and collective management of natural resources, as it can be seen in the first table that describes different forms of recognition of the possession of the traditional populations. Like this, we don't intend to analyze the intrinsic characteristics of each one of them. We won't study the peculiarities of each appropriate area, through different segments of designated farmers of traditional populations, such as seringueiros[9], remainders of quilombos, ribeirinhos, fishermen, inhabitants of the seaside etc. In spite of the importance of such exam, for the objectives of this work we will present only the common elements of the collective properties.

For Blaikie and Brookfield (1987:186) the common property (common property resource) possesses three characteristics: a) There's the individual use of certain natural resources, but there's no individual ownership; b) when using a certain resource, the user acquires rights over that good, but nothing impedes that some users can be entitled of use; c) the collective usufruct gives use right only to the members of that group, excluding others that are not members of this community.

Under the juridical aspect, we can understand the common property as being originated from a primary system. It is a "primary juridical arrangement, because here it is considered a community that lives under certain values and they preserve them, values which are peculiar ones, preserved along generations, value that deserves our respect and our understanding." (Rossi 1997 : 271)

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[8] With that, we are also affirming that the common property is different from the indigenous property, and the last one is previous to the appearance of the State, subject that we will discuss about in another topic.

[9] Men who extract natural rubber from forest trees. Such trees are named "Seringueiras"

In a few words, the legitimating of the common property is in the capacity of the social group to appropriate certain resources and in the course of time, they are building use rules and management of the forests resources that are respected by the community's members. Its possession is primary because they occupied the area with the intention of being an owner, master of that "territory", without authorization of a third part.

This way, when we refer to the community property, it is not only about the land but it involves the management rules of the natural resources developed by the traditional populations, their institutional and social arrangements, because the dissolution of this consuetudinary juridical outline and of its local institutional base can lead the social group to desegregation that got appropriated of that field, as well as the degradation of the natural resources. Like this, unlike Hardin affirmed, the "tragedy of the common" ones is, in fact, the tragedy of the resources of open accesses" (Bromley & Cernea 1991)

## 1. The relevance of the common property in the contemporaneity:

Several factors are contributing so that collective property is in evidence in the national and international scenery. The Portuguese jurist, José C. Nabais (1999), detaches two aspects: the economical and social/environmental.

The first one is linked to the fact, in the course of time, the common property lost importance and meaning in the capitalist mobilization. The collective areas are no longer seen as important spaces to be incorporated to the free market of individual property. Another point to be detached/ brought out is the "growing loss of importance and meaning of the primary sector, and, designedly, of the agrarian and forest activity for which it was tried to mobilize the collective domains." (NABAIS, 1999:12). That phenomenon came to worsen with the rural exodus, the massive exodus of the rural/country populations, straightly to urban centers and it ended up leaving abandoned as much the individual properties as reduced the demographic pressure on the common areas.

Linked to the social/environmental aspect, we have the revitalization of the collective properties, which passed to be seen, inside of the public politics developed in the territorial system as an important space to stop a growing desertification of the land and the exodus of the rural populations. Another positive point was that the collective areas gained pulse with the defense of the environment, the cultural heritage protection, the concern with the preservation of the natural resources and with the ecological biodiversity that would be elements capable to provide a worthier life to the future generations and the right of enjoying the same natural wealth (Nabais 1999:13).

In Brazil, those elements are also present, actually in differentiated proportions. In the peculiar case of Amazon, the respect to the rights of the rural communities to the land will gain force of the seringueiros and of the quilombolas. The first one legitimated by a growing environmental concern; the second, based to a right that their ancestral ones acquired. And these two claims considered backrest starting from 1988, may it be linked to the Brazilian cultural heritage (art. 216)[10], to an ecologically balanced environment (art. 225)[11] or the

[10] Art. 216 - The Brazilian cultural heritage consists of the assets of material and immaterial nature, taken individually or as a wole, which bear reference to the identity, action and memory of the various groups that form the Brazilian society, therein included:

specific warranty of the right to the land (art. 68 of the Action of the Transitory Constitutional Dispositions)[12].

## 2. The community forms of appropriation of the renewable natural resources.

The ownership and management of the natural resources implicate in control, in other words, it is only possible to handle what is possessed, partially or totally. In the case of the common property, control happens when the social group, somehow, stops some power in a certain area. Such domain is legitimated by the possession, that we denominate agrarian/ecological ownership in the case of the traditional populations (BENATTI, 2003a). The collective form of possession of natural resources and the presence of practices of family work, based on agrarian extraction, are characteristics of the agrarian/ecological ownership. The delimitation of the farmers' rights on areas that are used for cultivation and families homes, while other land portions are reserved for common use, happen inside a special logic, in which, there is no need that those areas (use common and family) are adjacent and permanent. Not even their labor and home activities are confined in fixed portions. Besides, the distribution of those cleared, houses and the area of common use, based on a certain space division of the area, happens according to a consensus of the group and not in isolated actions.

Inside of such reality, there are two modalities of possession: the community's, which is of collective use, in which the use system of the land is manifested; and the one about family possession, leaning on the unit of family work (that can be understood as private).

The collective ownership can be understood as being the one which is explored by work of more than a family, or of the community, with the intention to develop extractive, religious, cultural, education or recreational activities, such as the church, the soccer field, the flour houses, the community headquarters, the school, the port etc. Meanwhile the family ownership would be that one, explored by an individual's work or of a family, the eventual help of a third person, originated from agric/forest activity or of the extractive activities.

The system of common use in the Brazilian structure has always been marginalized, so much, that there isn't a concept of areas of common use, juridically consolidated, in spite of those areas are considered "vital for the survival of a group of family units" that use them (Almeida 1989:185).

The difficulty in defining areas of common use, also known as common lands, is in the fact that the control of the basic resources is not exercised freely and individually for a family or for a domestic group of rural workers, and the norms that regulate such social relationship go

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I – form of expression;
II – ways of creating, making and living;
III – scientific, artistic and technological creations;
IV - works, objects, documents, constructions and other spaces destined to the cultural events;
V - urban compexes and sites of historical, natural, artistic, archeological, paleontology, ecological and scientific values.

[11] Art. 225 – All have the right to an ecologically balanced enviroment, wich is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.

[12] Art. 68 - Final ownership shall be recongnized for the remaining members of the ancient runaway slave communities who are occupying their lands and the State shall grant them the respective title deeds.

further than the juridical norms codified by the State. In reality, those areas are regulated by a group of notions that has the objective to mediate the relationships with the land and other natural resources.

An area of common use is "a good, subjected to the individual appropriation in permanent character. In these spaces they combine the private property notion and of possession of common use, where a solidarity degree and social cohesion can be found, formed from norms of consensual character that guarantee the maintenance of these spaces" (Almeida 1989:183). They are areas whose resources are open, inalienable and indivisible.

The access to the land for the exercise of activities strictly familiar, in portions of the common use area, is only allowed by the residents' group to built houses, clears or extractive activities, but not only to get appropriate of the area of common use in itself.

Therefore, areas of common use are the rivers, lakes, paths (real roads), beaches, cabins/ravines and forests administered by the group of the area inhabitants, where the collective usufruct grows. They are open areas, they are not of private domain and nor they are available to the individual appropriation, but those "open spaces" are linked to the market, because their products are sold and traded in the neighbored communities.

The agric/ecological ownership is materialized as ecological and social space, different and interlinked, in three groups: houses, country and forest.

**House:** We understand as a house, the family physical space that is used as home, where the domestic activities also take place, including surrounding areas, that are the vegetable garden, the ranch (place where the permanent cultures grow and the fruitful trees are planted) and the spaces destined to the preparation of the flour (flour house) and to the creation/raising of domestic animals of small load. In some cases, the flour house carries/plays out more the role of social space, because more than a family and as a meeting place uses it.

**Country:** It is the family physical space where the agricultural productive activities grow and, most of the time they are for subsistence and that stands out of the extractive production. The preparation of the country field is made through the method of knocking down and burning up the whole vegetation, in a continuous way, that can be the forest or in old capoeira. That space is considered the family's appropriation, because it is related to the product of the work, as it is the case of the house, of the country and of the capoeira. They are identified spaces with a certain family, result of their work.

**Forest**: Physical space where the wild trees can be found, the forest, and the fauna. In the forest they grow the extractive activities, as the collection of fruits, chestnuts, lianas, wood and the latex exploration. In the forest, the subsistence hunt is practiced. In the forests, we find the used natural areas (or capoeira) that are spaces annually opened in the forests to sow or to plant for a year or two. Afterwards, those areas are left in rest during a period that is so long enough, that the forest invades them again, making possible the recovery of the nutrients of the soil. Eventually, in the capoeira, there are some products that can be still picked. In most of the cases, it is the cassava.

In that group of propositions, the differences were presented with the patterns of the Brazilian state right, even questioning the traditional model of establishment of standardized agricultural lots, without consideration of the specificity and diversity of the Amazon forest

natural way, and proposing the collective use of the land. We still highlight that the junction between the agrarian subject and the agric/ecological subject proposes new criteria the land's possession, centered in the maintainable use of the natural resources.

Consequently, there's a differentiated reading of habitual home effective culture, improvement and rural module.

Such occupied areas (by those segments of farmers) are the spaces where the houses and countries are located, besides the spaces used for hunt, fishing and the activities of vegetal extraction. Therefore, the notions of taken areas correspond to the lands used to guarantee the way of those farmers' life reproduction.

Another form of possession found in the Amazon forest meadow is the possession of lakes and of pasture areas as common space, and each riverside dweller possesses (squatter) a portion of land in the sandbank where the subsistence farming develops as well as home.[13] This way, the portion of land is the area is the area adapted individually and the lake and the natural pasture accomplishes the role of common area.

If in the Anthropology, the social reproduction of the traditional populations can be treated as field, under the point of view of the right, good part of the populations can be compared to squatler category. Squatter is the land occupant without the consent of a third person, may it be in public, or occupied areas, consequently, and who doesn't possess legal title that guarantees the domain of the area.

In the Brazilian juridical construction there is a direct relationship between leaseholder's definition and the agrarian ownership. In fact, these are their characteristic elements. Like this, the leaseholder is the one who practices the agrarian possession. Agrarian possession is understood as the real phenomenon, visible and tangible, that shelters social and economical interests. It has as necessary requirements as the effective culture, the habitual home and it turns the land productive for the peasant's work of their family.

However, the agrarian possession is more related to the occupation of the land in a rural module way, in other words, the occupied area leads to the formation of a quadrilateral, of continuous and closed areas, used by a family. This model, or the understanding of the use of the rural space, is not the most appropriate to express the modalities of possession and use of the natural resources practiced by the traditional populations in the Brazilian Amazon forest, for that we thought appropriated to denominate the possession of these populations of agric/ecologic possession.

As for the agric/ecologic ownership aspect and its juridical implications, according to the article 96 of the Brazilian Civil Code, the improvements can be classified in three species; in other words, the code defines which are the activities that are considered as possession:

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[13] In areas of meadow of municipal district of Santarém, state of Pará, in the sandbanks the fields of land of each family are demarcated. As we go to the bottoms of the rural property, in the direction of the fields and lakes, the use of these turns out to be of collective use. Even though there is a notion of width based on the tested areas of the land and on the boundary with the neighbors, the fields and lakes that are in the prolongation of the partitions of the property are not considered private spaces, but collective. Usually, there is no dividing fence in the fields and the native pastures are used in a common way by the cattle, which are identified according to each family of ribeirinhos (MacGrath *et* al. 1994).

a) **Voluptuaries**: The ones that are considered of mere delight or entertain, that don't increase the habitual use of the thing, although they can represent a more pleasant content;
b) **Useful ones**: the ones that increase or they facilitate the use of the property;
c) **Necessary ones:** the ones that aim to conserve the thing or to avoid that it deteriorates, and the ones that elapse the execution of norms for the conservation of the natural resources.

Therefore, useful and necessary improvements are the annual and temporary cultures, the perennial cultures, the pastures, the constructions and the equipments, the ironworks and any human activity that requests work aiming at the conservation of the nature.

The constructions can be residential, or no. It made of wood, walls, straw and other materials. Other improvements can exist in the property, such as a fence, well, highway etc. In the same way, the church, the soccer field, the flour houses, the community's headquarters, the school and the port are considered improvements in the community area.

The seringa path or way, chestnut and copaiba are also considered improvements, because they mean improvements from human action. Those highways don't derive from creations of the natures; they are narrow trails in the forest accomplished by the traditional populations, with the mark of facilitating the community's work and displacement. Each "road" has an "owner"; the other members in the community recognize a family that is responsible for its maintenance and this ownership right

It is not different the understanding of the Supreme Court of Justice, before the Constitution of 1988, named Federal Court of Resource (TFR), when it is affirmed that:

> *Administrative Expropriation: INCRA*. 'Highways' of seringueiros: compensated improvements before the peculiar circumstances of the case". The open trails in the dense forest through where the seringueiro walks on his daily work in search of the latex-producing trees, result of man's own work, who is forced to maintain them in constant fight against the bush, which tends to occupy the whole space that's offered: for that, they are included in the concept of compensated improvements, if they are open before the filing of a suit of the expropriated (TFR, Civil Appeal nº 66.112, Acre [3196755], August, 31, 1981, D.J. October, 1st, 1981).

Therefore, any perspective of resolution of the agrarian subject of the riverside dweller, ruber tapper and remainders of quilombos, should take into account the form of possession of those social groups. So, it's urgent like a systemization that seeks for the perception of the Amazon forest reality is looked for, with genesis in categories that have enough content to express the real demands that here are executed.

## 3. Juridical distinction between indigenous ownership and agric/ecologic ownership

It is important not to confuse the meaning of agric/ecologic ownership and the native because they are two different juridical institutes that will provide the basis for the creation of the collective property and the native, respectively. It is not for they possess some common elements that they are synonymous.

In the field of the Social Sciences, the understanding of the existent distinction among "traditional population", "native", "indigenous" and "tribal" still isn't consensual. It reminds

us of the anthropologist Diegues (1994:72) who says that the confusion doesn't happen only in the concepts, but even on expressions in several languages. Trying to look for a wider definition on the main elements that compose the definition of "native people" (indigenous), the Operational Directive 4.20 of 1991 of the World Bank, enumerate the following characteristics of this category (apud DIEGUES, 1994:73).

**a)** Intense connection with ancestral territories;
**b)** Self-identification and identification, through the others, as different cultural groups;
**c)** Own language – often not the National language;
**d)** Presence of traditional social and political institutions;
**e)** Production systems mainly faced to the subsistence.

Another difference used amongst the indigenous groups and the farmers is the cultural autonomy. While the indigenous culture is seen as autonomous in relation to the non-indigenous social groups, the farmer culture is understood as a local expression of a wider civilization. That autonomy is also extended to the relationship with the market, because the native people, in general, don't possess economical connection with the same, but the traditional populations depend on, someway, the market to sell surplus (agricultural or extractive) and to acquire certain goods of first need.

In our opinion, to figure out the difficulty in defining traditional population is related to the concept and not to the identification of what is tradition population. Identification wasn't a problem when the demarcation of the areas taken by that farmer segment, but the theory definition still is controversial, so far. The "easiness" of identifying a group as traditional population happens because one of the criteria to establish the identity, their ay of life, is recognizing himself as belonging to a private social group, in other words, his/her cultural and ethnic identity (Diegues 1994; Lima 1999).

Self recognition is the criterion used by the agrarian organs: The National Institute of Colonization and Land Reform (INCRA) and the Institute of Lands of the State of Pará (ITERPA) – to begin the administrative process of regulation of the lands of quilombos, in other words, the stage that begins the process goes with the presentation by the communities of the request of an administrative process' instauration (Andrade & Treccani, 2000).

The several existent definitions on the category are pertinent because they present elements that characterize this social group, the relationship with the nature and the use of the renewable resources and the little involvement degree with the market and the involving society. One of the "open" definitions is introduced by anthropologists Maunela Cunha and Mauro Almeida (1999), when they affirm that: are traditional populations those ones that accept the implications of the legal definition that it demands, the maintainable use of the natural resources as practices, transmitted by the tradition, whether through new practices.

The National Center of the Sustained Development of the Traditional Populations – CNPT, Organ of the federal government subordinated to Brazilian Institute of Environment – IBAMA, responsible for the creation and administration of Extractive Reserves defines traditional populations as "all the communities, that traditionally and culturally have their subsistence based on the extractive activities of renewable natural goods, a flexible concept to assist the diversity of existent communities in Brazil" (Murrieta & Rueda 1995:53).[14]

[14] The Law 9.985, of July 18, 2000, in its second art., paragraph XV, defined traditional populations, but it was vetoed. The vetoed paragraph described what traditional populations are: "human groups culturally

Under the juridical point of view, the lands, traditionally occupied by Indians, have as constitutional and legal basis, the *indigenato*, juridical institute recognized by almost all the Brazilian Constitutions and consecrated in the current Charter with a chapter (arts. 231 and 232). Its origin comes from the Colonial Permit of April, 1st of 1680, in which the Portuguese Crown – when granting the Brazilian lands to private owners – affirmed that if in those lands, there were "*aldeamentos*", in other words, indigenous ownership, they should be reserved to the Indians, because these are primary and natural masters of these lands. Therefore, the origin of the indigenous land is linked to the existence of the indigenous ownership, which, for consequence, takes the appearance of public property, because the indigenous area is considered as a good of the Union (art. 20, interruption XI of the Federal Constitution)

The reason that takes the Public Power to recognize the right of the indigenous communities to their land is the fact that they traditionally occupy that area. Besides, the indigenous communities need to guarantee "their productive activities, the indispensable ones to the preservation of the necessary environmental resources to their well-being and the necessary ones to their physical and cultural reproduction, according to their customs ands usages" (Art. 231 § 1 of the Federal Constitution).

The indigenous communities are entitled of exclusive usufruct of the natural wealth under their lands, using them for their sustenance and preservation of their cultural identity. The land accomplishes an important role for the ethnic identity of the group.

So, the juridical institute of the *indigenato* is not mere occupation warranty regulated by the civil law, it is not the ownership as simple power in fact over the thing, it is not configured with the possessor's permanent home, with intention to implant and to maintain the effective culture. That institute is the warranty of the land as the "habitat" of the indigenous groups, where the indigenous communities have the necessary space to physical and cultural reproduction, according to their customs and usages.

Therefore, for the Law, the main distinction element amongst the indigenous property and the common one is the social beneficiary subject, in other words, if it is an indigenous group or a community of traditional populations. It is a pre-Colombian group of a certain segment of farmers, because the subject of the titling is not necessarily a differentiating element because indigenous land will always be a public property, of exclusive usufruct of the indigenous group, while the common property can be of private domain (e.g.: the case of the quilombos) or public (as, for instance, the extractive reserves). So, it is the social subject that will define the property type and its repercussions under the titling and autonomy in the forest management.

Another distinction element is that in the indigenous property there is no individual appropriation of the soil or of part of the natural resources, while in the community property

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differentiated, living for, at least three generations, in a certain ecosystem, historically reproducing their way of life, in narrow dependence with the natural environment way for their subsistence and using the natural resources in a maintainable way." However, when we analyze paragraphs 18 and 20 of the foregoing law, we will find some elements that can guide us towards a definition of traditional population, when the norm affirms, respectively, that the extractive population traditionally bases their subsistence on the extractive activities and, as a complement, in the subsistence agriculture and in the creation of animals of small load; and, that the traditional populations have their existence "in natural maintainable systems of exploitation of resources, developed along generations and adapted to the local ecological conditions and that play a fundamental part in the protection of the nature and in the maintenance of the biological diversity."

there is compatibility between family possession and common use. For this reason, it would not be incorrect to compare the indigenous property to the common property. What is common between indigenous land and the collective property is that both possess, as one of their legitimating elements, the concern with the protection of nature. The indigenous communities need the land in order to have conditions of guaranteeing the physical and cultural preservation; the traditional populations of an area that guarantees their mean of life, their subsistence sources and home places.

## 4. Juridical aspects of the common property: the subject of the titling

What we intend to discuss now is the titling of the common property, in other words, who is the title holder of the domain: the local communities that explored the land and the natural resources, the public power or it is about an atypical institute with another titling.

Before we begin the discussion on the titling, it will be necessary to do an explanation about the relationship between property and domain, in order to facilitate the understanding about the theme and the property's title-holder' definition. Such debate is important because it straightly is linked to the discussion on management, administration and administration of the rural property that we will analyze soon later.

One of the conceptual difficulties is the historical definition of property, the subject is to know if the same appears from the humanity's origins and in the course of time it gains new outlines, being perfected; or, if in each period (classic, medieval and modern) we had types of different properties, to every historical moment we had a rupture with the previous ones, in a dialectics overcoming. The first hypothesis works with the continuity conception and improvement, without conceptual ruptures. In the second hypothesis the understanding that we have is that the concept is not built in a lineal way, in a continuous improvement report, but in a rupture and conceptual overcoming. The subject to be answered if it is conceptually correct to affirm that it is about property or properties.

In our point of view, under the juridical methodology the property has a monoculture conditioning, because it is expressed in the relationship of exclusive powers and rules given to a certain subject by a juridical system, since it is about a relationship institution between the man and the things. On the other hand, when we speak about property, we're talking about several institutes that they were built in a plurality of properties, when each one has its structural foundation based on the historical reality and conditioned by social, environmental and economical factors.[15]

The first aspect that we have to enhance is that the property, under the juridical point of view, is every power over the thing; however, it is not a generic notion, but very specific, conditioned historically, what takes the property to manifest to each historical period through the appropriation of goods and of the juridical relationships on them, consequently, marked by a conceptual discontinuity. That discontinuity is characterized in the solutions found by each society in a certain historical moment, in other words, in the models conditioned by social, economical and environmental aspects. For this reason, it is not inconvenient to speak of property, as a general phenomenon (that is every power over the thing), that it has always

[15] When we refer to social facts, we are also including the legal aspect and political aspect, when we think it is convenient to detach one or another element. The economical aspect, which is also a social phenomenon, is enumerated because an extended part of the studies has been giving a singular importance to it.

been present in human history, and on the other hand, in every historical moment we had a type of peculiar property, that characterizes the manifestation of different properties in different times (Grossi 1992).

Therefore, the discontinuity didn't lead to the lack of characterization of the property, to the point we corroborate that we can only call property, the modern property, because if we affirmed so, we would be concluding that the property consolidated in a continuous process of accumulation of historical experiences, and starting from the summations of certain characteristics, or elements, that the property appeared, that it would be a historical and juridical mistaken affirmative.

The key of the understanding about the existence of different properties - because we affirmed that in general, the property is every power over a good, it is exactly in the degree of power, in other words, of the dominium. It is the "gradation" of the dominium that will characterize the minimum or maximum content of the property, and the phenomenon of the discontinuance is in the options that each society "makes" to model the intensity of the power on the thing, which takes the historical differentiation (Grossi 1992: 92).

So, the different historical expressions of the property are the understanding of the different minimum or maximum contents of the property. In the Middle Age we had the property divided among the direct domain (that was in the hands of the master of the lands) and useful domain (that was the vassal's property), which leaded to a division and, consequently, the admission of the legitimacy in more than a proprietor that had powers over the same thing, although in this case, the powers were different and unequal the powers over the good; while in the modern period, of culture predominantly individualist, that is the case of the bourgeois society, the dominium is an exclusiveness of just a subject, the proprietor.

What characterizes the minimum content for dominium, so that we have dominium is exactly the existence of a power over the thing, an autonomous and immediate power on the *res corporalis*, not mattering if such power is relative or absolute; the essential is that when we have that power, we have the faculty or possibility of getting appropriate of the thing or part of it. So, "*propiedad es solamente el diálogo sin intermediarios entre los dos universos supremos, sujeto y objeto, individualizados en sua corporalidad que permite su enganche con la naturaleza primordial..."*(Grossi 1992:95).

Finally, we would like to detach the subject's subject that gets appropriated of the thing. Here subject has to be understood as the individual physics or juridical person, as well as social or family group, which in these last two cases could qualify the property as collective, as it could also be a condominium property.[16]

In this debate we cannot confuse the object, in other words, the property (that can also be denominated as farm, ranch, rural property, in other words the thing in itself), which is the object of the right, with the juridical institute. One thing is the good and another is the recognition to the right of property. Therefore, the Brazilian Constitution recognizes that all are entitled of acquiring property, but the Public Power will regulate the way of acquiring and its administration.

[16] We will discuss soon the distinction between common and condominium property.

Therefore, in Brazil the titling of the common property is linked to its own origin, if it is a public property or private.[17] In the first case the use and management of the natural resources belong exclusively to the local communities, but with administration shared among the local community and to public power. We can mention, as examples, the extractive reserves and the reserves of maintainable development, and in these two situations, law determines that the lands of these conservation units are of public domain, with the use granted to the traditional extractive populations and that will be managed by deliberative councils, composed by representatives of the traditional populations, of the responsible public agency for its administration and organizations of the civil association (arts. 18 and 20 and their paragraphs, of the Law 9.985/00, respectively).[18]

In the case of the remainders of the communities of the quilombos the titling belongs to them (quilombolas) whether it is for their use or joy, with full domain, which guarantees to them a self-administration and self-management. The Federal Constitution, in art. 68 of the Action of the Transitory Constitutional Dispositions, assures to the quilombolas communities not only the ownership or management of the areas that they are occupying, but also the land's absolute titling.

## 5. Management natural resources in the community property

Once the subject of the titling is defined, some reflections on the forest management will be presented.

A point that we intend to highlight is about the focus of our analysis. While the legislation looks for to regulate the activity, in other words, agriculture, livestock, extractive activities and forest management, we intend to demonstrate that the regulation should happen starting from the basic conditions of farmer's production process: agriculture and forest management as a productive and interdependent unit. In other words, much more important than to regulate the management and the agrarian activity as tight elements, the public power needs to look for an integration among them in the inspection process, as well as in licensing and control.

In fact, when that methodological distinction is done, we are also accomplishing a critic to the form, which the agrarian farmer activity is regulated, whether it is in the family or community structure. We need to understand that there is a substantial unit among the norms of the Agrarian and Environmental Law around the fundamental principles of the interdependence between renewable natural resources and the agrarian activity (Israel 1982).

So, when we treat of the renewable natural resources, we will analyze the regulation of the forest management, as guiding principles of the social function of the land's property, the rational, appropriate use of the rural property and the appropriate use of the available natural resources and preservation of the environment (Article 186 of the Federal Constitution).

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[17] We are not referring to the historical origin, but to the recognition and the contemporary official creation. The historical origin of the current ways of collective property deserves a longer study, because it is linked to the Brazilian colonization and, certainty, it doesn't lead to a single basis. Each Brazilian area must have molded in different ways the collective properties, possessing like this their local and historical peculiarities.

[18] In order to accomplish the goals of this paper, we won't discuss if the public collective properties are goods of the private domain of the State or of domain of the State, and what are their repercussions for the definition of the legal regime, for we would have to do an analysis about the public properties, the historical evolution, their classification, legal nature, and the affectation of the public property that would enlarge considerably the number of pages in the text.

The purpose of the agrarian activity is exactly to give a certain destination to the land, "turning it into a trade, when there is already the profit intention, as removing such character from it, with the mere intention to feed or the satisfaction of other needs, protecting it to a conservationist urgency, as attempting to it in a scientific interest." (Sodero 1978:406). The destination can be for agriculture, livestock, and extractive activities, forest or mixed.
The understanding that the agrarian activity is the result of the human action on the nature, with the profit intention and to supply human needs, ends up being a very restricted concept for the current conjuncture. It is necessary to enlarge the conception that the property is based on the tripod: land/man/production, for we should incorporate the new elements introduced by the Federal Constitution of 1988.[19] Based on the constitutional commandments, we can affirm that the guidelines are land, woman or man, production and environmental protection and the agrarian activity would be defined not only as any rural exploration, but as that one which is not noxious to the nature besides conditioning the productive process (Benatti 2003b).

When the public power regulates the use and the reutilization of the soil, of the water, of the forest and of the fauna, it is also defining the powers and duties of the private properties. Therefore, it is ruling the agrarian activity, at the same time that it looks for protecting the nature. In other words, the juridical outline searches to define which are the ways that the society can use and disposal of the rural property.

Therefore, when we have the family and community rural property as object, we need to overcome the classic division which stipulates that the norms of Agrarian law should treat of the agrarian stabilization and of the agricultural development, while the environmental norms shall protect of the natural resources.

Now we have to look for a balance between the traditional functions of the agrarian activity and the preservation of nature. In this aspect, it is necessary to develop an administration of the natural resources in the rural property with the intention to avoid an exploration, which ends up in exhausting these resources because the land cannot be understood as the territorial expression of the individual's sovereignty anymore (Miguel 1992:28), but it is also conditioned to the social and environmental interests.

The fact is that the agrarian activity doesn't just produce material goods but also immaterial goods; not only alimentary products but also non-alimentary products; not only commercial productions but also non-commercial productions. Agriculture has to converge the private interest (that is the production of foods) to general interest (the environmental protection), overcoming, this way, the productive logic that divested the agricultural activity of its function of environmental preservation that was associated to it (Hervieu 1997). So, the overcoming will happen when we are capable to elaborate a legislation that doesn't compartmentalize the agrarian activities in the family field, but when it sees them as elements of a wider process, that it is the administration agric/ environmental of the rural property.

Inside of this debate the subject of the power is situated (rights and duties); that the private owner or the community has on their land field, because the use of the existent natural resources in its area is free, but until the point of not putting in risk the humanity's interests, or as commonly the juridical area calls: the diffuse interests.

[19] In the Federal Constitution of 1988, it is foreseen that the property should accomplish its social function, and the ecological function is also included, as it prescribes the paragraphs 5th, XXIII; 170, III; 186 and 225, caput.

In our point of view a considerable part of these limitation points is in the lack of a more integrated vision between forest management and agriculture. We cannot forget that the renewable natural resources (water, soil, air, vegetation, fauna) interact amongst themselves in a systemic way, and any alteration over anyone of those factors will have an immediate repercussion on all these resources.

When the agricultural or cattle activity is introduced, those activities, besides altering the natural space will also interact with the environment and only a systemic analysis of the space is what can evaluate which measures will be necessary to be taken in order to soften the environmental impact.

Under the juridical point of view, the critic that we presented requests the revision in the current way that the Public Power regulates the procedures of maintainable forest management and of conversion of use of the soil for the property.

We have to look for an integrated administration of the different activities that can be developed in the rural property, whether it is forest or agricultural management. This way, the administration of the natural resources has to be understood "as a particularity of the environmental administration[20], especially worries about the group of principles, strategies and guidelines of certain actions and considered by the socioeconomic agents, publics and private, that interact in the process of use of the natural resources, guaranteeing sustainability for them" (Bezerra & Munhoz 2000:18).

The administration would serialize the group of actions of administrative nature that would be taken to maintain the natural resources available in a maintainable way. In our case (which is peculiar) we are analyzing the space of the collective property, but the administration can be thought for spaces or unit of larger planning.[21]

The fundamental point to be considered in the administration is that we think that the maintainable exploration of the renewable natural resources, in the family rural property, needs to have the maintenance of the forest and of the goods and services available in it.

That presupposition is an important reference to check how much the deforestation is maintainable in the property, how much is the alternative use of the land, in substitution to the forest covering, is acceptable?

This way, when looking for an agric/environmental administration of the property, the Public Power is stimulating maintainable alternatives of use of the land and guiding the implantation of the agric/forest systems in the common and family properties.[22]

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[20] It is understood as Environmental Administration "the group of principles, strategies and guidelines of actions and procedures to protect the integrity of physical and biotic means, as well as the social groups that depend on them" (Bezerra & Munhoz 2000:18).

[21] A strategy example for administration of the natural resources in therms of larger planning is the Ecological-Economical Zoning – ZEE – for the Amazon forest. In fact, when we think of regulating the use and the occupation of the soil of a macro area we should also take into account the interaction with the microarea, until it can reach the level of a rural property to arrive. Only like this, we can be more successful in the zoning and administration of the natural resources.

[22] Several experiences in the Amazon forest point the advantages for the agric/forest systems. Among them we highlight: improvement of the soil's physical and chemical properties; reduction of ecological risks on the agricultural cultivations; they represent production alternatives for family properties; and they facilitate the recovery of degraded areas (Bezerra & Veiga 2000:106).

### 5.1 Management autonomy in community properties

From presuppositions above described that we will analyze community management and its autonomy.

The discussion of the community management comes in the complex definition of two different normative extents: the effective right in the general system, that are the administrative rules of management elaborated by the State; and, community consuetudinary rights, built in the community's historical relationship and still demanded by the same.

Like this, so that we can have a more exact dimension of the development of the autonomy and of the community management in the community property, we will have to analyze the existent relationship among the norms originally non produced by the State and the State-owned companies, from the presupposition of the existence of a juridical pluralism.

The juridical pluralism can be characterized by the coexistence of several juridical systems in the same geographical space, from different sources. Antonio Carlos Wolker defines juridical pluralism as being the *"multiplicity or normative practices in a same partner-political space, interacted by conflicts or consensus, official or not and its reason of being is in the existential materials or cultural needs*" (1994: XII). It is that multiplicity of conceptions on what is and as it should be the management that need to be integrated in a more dynamic process of administration of the natural resources.

#### 5.1.1 the official conception of management

Now when we think of management, there is a presupposition that it is maintainable, in other words, when using the natural resources, sustainability should be searched and its use should last long, without environmental deterioration and, inside of the scientific and technical limits, with a low impact for the loss of native biodiversity.

The subject is that the management involves manipulation of the ecosystem to favor certain species to be explored or to accommodate other human activities, fact that may bring negative effects on other species that were not "privileged." Inside of this perspective, a planning would soften the possible impacts so that the management becomes the most maintainable possible.

The Act/decree N. º 2.788, of September 28, 1998, that disposes about the exploration of the primitive forests and other forms of arboreal vegetation in the Amazon forest - that modified the Ac/decree N. º 1.282, of October 19, 1994 - presents in its art. 1$^{st}$ the parameters the forest management, when it affirms that:

The exploration of the primitive forests of the Amazon basin (art. 15 of the Law in the 4.771, of September 15, 1965 - Forest Code), and of other species of natural arboreal vegetation, will only be allowed under the form of maintainable forest management of multiple use, that shall obey the principles of conservation of natural resources, of preservation of the forests' structure and of their functions, of maintenance of a biological diversity, of socioeconomic development of the area/regions and to the other technical foundations established in this Ordinance/act.

It is defined as maintainable forest management of multiple uses, the administration of the forest for obtaining economical and social benefits, respecting the mechanisms of sustentation of the ecosystem (object of the management) (§ 2nd, of the art. 1st).

The same Ordinance created the modality of community management when it established that the exploration of wild cultures, made in a communal way, through association or cooperative, could be accomplished by a single plan of maintainable forest management, that agglutinates individual fields, respecting the maximum limit of five hundred hectares, according to criteria and parameters to be determined by IBAMA.

In spite of the Ordinance to refer to community management and to describe the organization of the associative rural property, it is believed that such management can also be used in the common property.[23]

Like this, the rules that present the principles that should orientate the procedures of the management are presented, the entire subject is in the interpretation and application of the legal devices as another normative reference the common law of the traditional populations. The premises that strengthen the community management are based on theories that the local populations are more interested in the maintainable use of the natural resources than the State or the administrators; that the local communities are more conscious of the complexity of the processes and ecological practices, for the traditional populations built their culture and knowledge throughout several generations, through the manipulation of plants, animals and management techniques, what makes them receivers of an important knowledge to define the rules of the maintainable management.

### 5.1.2. The communal conception of management

Inside of this context that the consuetudinary right of communal management is inserted, in other words, the management norms, which were historically built by the community.[24]

According to the Brazilian legislation, the habit is subsidiary source of right, which means that: another law can only revoke the law, once it is the main source of the right. Two decisive factors guarantee the obligatory effectiveness of the usual norm: the lingering use and the conviction that the observance of the usual norm corresponds to a juridical need (Alves 1996). Therefore, it is the social need that it determines the formation of the habit.

Analyzing the custom and usage, the tradition of the traditional populations when managing the natural resources for several generations, it can be concluded that they are fit inside of what legal doctrine understands as consuetudinary law.

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[23] It is understood as an associative rural property, or condominium, the property that conjugates the individualized portion with a condominium space. In the condominium part, it happens the management of the natural renewable resources, that can be the area destined for the legal reserve.

[24] When we say that the community management is not limited to the forest management, it also includes other forms of management of the natural renewable resources as, for instance, the management of a lake. Like this, the community management would be the generic denomination of all the uses that are developed in common areas, no matter if the managed areas are collective properties or if they only have the ownership. The convergent points of these collective experiences are in the fact that it involves the community in the management. It occurs the dependence in the natural exploitation of resources found in the appropriate area by the group and they participate in the benefits originating from of the use of such resources (Amaral 1999).

In the extent of the effective norms the habit is also assured as source of right. The Constitution in article 216 affirms that:

It is constituted as Brazilian cultural heritage the goods of material and immaterial nature, taken individually or together, reference bearers to the identity, to the action, to the memory of the different groups (makers) of the Brazilian society, in which are included:
II. Ways of creating, of doing and of living...

The Law 9.985/00 regulates the art. 225, § 1st, paragraphs I, II and VII of the Brazilian Constitution and it institutes the National System of Units of Conservation of the Nature, in several of their legal devices it guarantees the area used by the traditional populations in order to protect the life means and the culture of those populations (arts. 18, 20 and 42, § 2nd).

Like this, since the consuetudinary law is not against *lege* it has full validity in common property. In other words, it is not sustained the habit that can lead to extinction the fauna or the flora, or practices of deforestation in areas of permanent preservation of the rural property.

### 5.1.3. The degree of autonomy of traditional populations

We can divide the autonomy in two levels: one that refers to full freedom of elaborating the norms, which can be represented by the illustration of a "self-government"; the other one with a relative freedom, for the decisions should have as mark the juridical norms of the State that ends up to establish the limit of the decisions and in this case it is treated more like a free will inside of some state parameters (Laats, 2000).

Picturing this, the traditional populations are in a second level, for in the case of conflict between the State legal system and the consuetudinary, this last one should be subordinated to the state laws (that in the case of management of the natural resources), because in the penal field there is no autonomy, in other words, only law can typify what is crime or misdemeanor.

However, we should also remind that the autonomy degree of administration of the community goods when it's related to the public administration derivates of the titling of common property. The administrative protection, whether it is through actions or administrative procedures, for the control, *a priori* or *a posteriori* of the legality of social actions of the communities depends on the domain that these ones possess over the land and the natural resources that they occupy.

If it is public common property, the community is forced to present a management plan, and the ownership and use of taken areas for the traditional populations will be regulated by contract (arts. 27 and 23 of the Law 9.985/00, respectively). Here there is an obvious administrative protection, although the management plan will be elaborated by the community and approved for the competent environmental organ taking into account the conditions and the necessary means to satisfy their needs, either social and cultural (art. 28, Only paragraph of the Law 9.9850/00).

In the case of the private common property, there isn't the direct administrative protection, the limitations of dispositions of the natural resources for the traditional populations are the same ones for any individual property, in other words, in order to accomplish the forest management or conversion of the use of the soil, it will be necessary to obtain the environmental license of the competent environmental organ.

## 6. Conclusion

Our goal, with this work, was to present some points for juridical reflection on the common property in Brazil, which leads us an interface with other areas of human knowledge and with the reality.

We intended to sketch some points of view in order to join the debate about the role of the collective management (and no to be conclusive), for as we discoursed in the text it will be necessary to deepen many of the presented items, as well as others that were only reminded of the importance of discussing them in another opportunity.

On the other hand, when discoursing on the community property or collective domain we don't want to reinforce the opinion that we need more laws and administrative norms to regulate the use and management of the collective goods.

Actually, our greatest need at this time is to integrate the two different normative extents, the effective right and the consuetudinary, so that the cultural heritage and environmental are insured for the community's use and benefit and for the whole society for several generations.

When it is discussed the globalization so much, the end of the borders, the
Study of the common property gains a special outline, because it is a juridical institute that all this time in spite of the politics and laws that almost annihilated it. Therefore, that social phenomenon deserves at least our respect in the search of understanding the cultural lessons that the community experiences can reveal us in the area of the social and environmental coexistence.

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