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# The Judicialization of Indigenous Territories in Brazil: Judicial Power and the Obstacles to Demarcation

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It is fair to say that the inauguration of Brazil's 1988 Constitution accomplished two things in one go; namely, the consolidation in text of the rights Brazilians had demanded with respect to human dignity and the rule of law, as well as a public commitment to ensure that Brazil never return to the *status quo* in which such rights were disrespected and violated. For the Indigenous peoples of Brazil, the Constitution opens a new chapter of struggle and resistance, because unlike previous constitutions and legislation, it breaks with the tutelary and integrationist logics that treated the condition of being Indigenous as a transitory one in which Indigenous communities were thought to gradually and progressively become part of the so-called "national communion," leaving behind their identities, languages, and traditional ways of life. In addition, the 1988 Constitution introduced a new legal regime with respect to Indigenous lands, recognizing that territory is essential for the identity, belonging, and the existential continuity of Indigenous peoples. The Constitution understands that land serves a basis for productive activities and is vital for the preservation of the environmental resources necessary for Indigenous people's well-being and for their physical and cultural reproduction as well, according to their uses, customs and traditions (CF Art. 231, §1°).

Furthermore, the 1988 Constitution, besides recognizing the original right of Indigenous peoples to traditionally occupied lands, assigns to the Federal Government the duty to demarcate, protect, and ensure respect for all their assets. This is because under law, Indigenous lands are considered a public good consecrated as property of the Union (CF Art. 20, XI), but their exclusive possession and usufruct is attributed to Indigenous peoples (CF Art. 231, §2°). This is their distinctive trait in relation to other public goods and with respect to civilian notions of possession and property.

To implement the constitutional mandate, the Executive Power (in the form of the President and various Ministries) is responsible for taking the initiative to carry out the administrative procedure for the demarcation of Indigenous lands, regulated by Decree No. 1,775/1996. These include the following stages and involve the following administrative bodies: 1) identification and delimitation of territories, which falls to FUNAI, the National Indian Foundation; 2) an appeals process in which states, municipalities, or other interested parties can contest the boundaries of territories; 3) declaration of territorial boundaries, which falls to the Ministry of Justice; 4) physical demarcation of the territory by FUNAI; 5) a land survey to assess improvements implemented by non-Indigenous occupants, conducted by FUNAI and INCRA, the National Institute for Colonization and Agrarian Reform; 6) Approval of demarcation, issued by the President of the Republic; 7) removal of non-Indigenous occupants, with indemnity for improvements deemed in good faith (FUNAI and INCRA); 8) FUNAI registers the Indigenous territory with the Secretary of the Estate of the Union; and 9) if applicable, interdiction by FUNAI of areas for the protection of isolated Indigenous peoples.<sup>2</sup>

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2. For more information on the demarcation of Indigenous lands in Brazil, see: <Demarcação — pt-br (www.gov.br)>.

With respect to Indigenous lands, it is still important to note that Art. 67 of the Transitional Constitutional Provisions Acts (ADCT) of the constitutional text enacted on October 5, 1988, provides that “the Union will complete the demarcation of Indigenous lands within five years of the promulgation of the Constitution”, that is, by October 5, 1993. It is worth mentioning that this period stipulated for the Union does not expire but is merely programmatic in nature.<sup>3</sup> In other words, the right of Indigenous peoples to the demarcation of their lands has not been lost after the stipulated time, not least because the State has not availed itself of its constitutional duty due to its own delay in carrying it out.

The fact is that thirty-four years after they secured constitutional rights, Indigenous peoples still have not managed to enjoy such rights fully. They face multiple obstacles in this, often arising within the areas administered by the public powers themselves, whether these be the Executive and Legislative branches, or the Judiciary. Territorial law is at the center of the endless clashes and discussions that take place and that so often seem to be very far from a solution.

As mentioned above, the procedure for demarcating Indigenous lands to be carried out by the Executive Branch has about nine stages, which in many cases take years to complete. Another aspect to be considered is that the referred procedure merely involves making a declaration to put into effect the Union’s constitutional duty. Clearly, such an administrative act is not a necessary condition for constituting or attributing the territorial right to Indigenous peoples, because, as the constitutional text stipulates, this right is an *original* one (CF Art. 231). However, in recent years, as the record makes clear, delay and/or the failure of the Brazilian State to issue such declarations has caused legal uncertainty for several Indigenous communities. Thus, even though the declaration is not the main element constitutive of Indigenous territorial right, its absence weakens the implementation and enjoyment of this right. Furthermore, this gap left by the Executive Branch ensures that other obstacles will arise. Proposed territories become embattled with the initiatives of other branches of the Union, such as legislative bills that aim to change extant legislation regarding the demarcation of Indigenous lands or regarding the opening of Indigenous lands to different types of exploitation, without the participation and consultation of the affected Indigenous peoples. Further delays are caused by spurious lawsuits that question the legality and constitutionality of Indigenous lands that have already been demarcated, or that aim to paralyze a demarcation procedure already in progress. It so happens that in the process of challenging a territorial demarcation (#2 above), in which third parties can present evidence in order to claim compensation or to demonstrate defects in the ongoing procedure, what has occurred time and time again is the direct intervention of the Judiciary to settle disputes of this nature. It is this phenomenon which we call the judicialization of Indigenous territorial issues in Brazil (Santos, 2020).

This phenomenon deserves attention, for as the demarcation procedure for Indigenous lands moves from the Executive to the Judiciary, this results in the latter having the final say regarding what is or is not traditionally occupied territory for the purposes of demarcation. As a result, the judicialization of Indigenous territorial issues has become one of the factors that most contributes to the delay in completing the demarcation process, given that the granting of injunctions in judicial proceedings tends to paralyze many administrative procedures once underway, in addition to decisions on the merits which may confirm such injunctions and consequently restrict the rights of Indigenous peoples to their traditional territories.

This judicialization of Indigenous territorial matters reveals even more obstacles to the realization of Indigenous rights, since access to the Judiciary around these controversies has been given as if it were a one-way street, in which Indigenous communities or their representative organizations do not enjoy the right to argue their case due to the fact that, in many of these actions, they do not even appear as interested parties or third parties, even though

3. For reference, see (RMS 26212 / DF, Rapporteur: Min. Ricardo Lewandowski, DJE-094, disclosed 05-18-2011 public 05-19-2011), to wit: “Summary: Demarcation of Indigenous Lands. In the event of an allegation nullifying the administrative procedure of demarcation, or an allegation of non-existence. Decree 1775/1996: Constitutionality Recognized by the Federal Supreme Court (STF) – There was no violation of the principles of adversarial and broad defense. [On these grounds] the appeal is rejected. I - This Court understands that the time frame provided for in art. 67 of the ADCT is not one that expires, but that it is a programmatic deadline for completing demarcations of Indigenous lands within a reasonable period. Precedents. II – The administrative process aimed at demarcating Indigenous lands is regulated by specific legislation - Law 6001/1973 and Decree 1775/1996 - whose rules have already been declared constitutional by the Federal Supreme Court. Precedents. III – There is no offense to the principles of the adversary system and full defense, since, as can be seen in the case file, the appellant had the opportunity to manifest itself in the administrative proceeding and present its reasons, which were duly refuted by FUNAI. IV – Appeal dismissed.”

such a right to representation is enshrined in the Constitution (CF Art. 232). This is due to a set of issues that still tend to hamper access to justice for Indigenous peoples, some of which are: economic precarity, one of the main factors that tends to block historically marginalized groups from the justice system; in addition to the social, cultural, and linguistic barriers that, when considered in the context of structural and institutional racism, create barriers to the exercise and defense of rights before the Judiciary.

Although the judicialization of claims involving Indigenous lands is increasing throughout the country and at various levels of Brazil's court system, due to its constitutional nature, the Federal Supreme Court (STF) has been called upon frequently to resolve conflicts concerning this issue. On the one hand, the Supreme Court's action is of the utmost importance in shedding light on the proper constitutional interpretation in cases concerning Indigenous territories. On the other hand, it is important to note that through an abundance of cases over the past twenty years, the STF itself has both recognized and denied fundamental rights neglected by another branch of government, such as the right to land for Indigenous peoples. In addition, the decisions of the Supreme Court may become binding as precedent, whether in the technical/legal or political sense, because such judgments are cited in support of many other judicial decisions and have also been used to justify the creation of legislative proposals in Congress by the Executive branch with the goal of restricting the recognition of Indigenous peoples' territorial rights, insofar as these proposals incorporate criteria or foundational concepts extracted from Supreme Court judgements without any regard for the case's proper context, as was the case with the so-called "Theory of Indigenous Fact" which was used in the case of the Court's finding regarding the Raposa Serra do Sol Indigenous Territory and which became the conceptual basis of the dreaded "time frame limit" legal theory (*marco temporal*).

The "time frame limit" theory would limit the recognition of the territorial right of Indigenous peoples to the date of the promulgation of the Federal Constitution of 1988. Which is to say, for those who defend this approach, that only Indigenous people who were occupying lands on October 5, 1988 in fact enjoy the right to demarcate those lands. It turns out that this criterion is not supported. First, because it was not even applied to resolve the dispute that brought it to light, since in the judgment concerning the constitutionality of the demarcation of the Raposa Serra do Sol Indigenous Territory, the Supreme Court concluded that the fact that the Indigenous people were not occupying that specific place, on the date of the Federal Constitution's adoption *did not* imply the loss of these lands' status as traditionally occupied Indigenous lands. This is because Indigenous communities in the region had suffered expulsion (dispossession) at the hands of rural colonists, and for this reason they were not on their lands on that date, but were still entitled to constitutional protections of demarcation in line with the administrative procedure outlined above. Secondly, the Supreme Court made clear in its finding that the judgment concerning Raposa Serra do Sol is in no way legally binding in a technical sense, and that the grounds adopted there do not automatically extend to other cases in which similar matters are discussed.<sup>4</sup>

Bill PL 490 currently proceeding through Brazil's lower house of Congress (Chamber of Deputies) is one example of how the legislative branch has picked out isolated criteria from the aforementioned Supreme Court judgment to propose radical changes to the current legislation on demarcation of Indigenous lands. The bill PL 490 itself seeks to apply the "time frame limit" theory to all demarcations to come. As if the decades of delay on behalf of the executive branch in demarcating Indigenous lands were not enough, in 2017 then President Michel Temer approved the Normative Opinion 001/2017/GAB/CGU/AGU<sup>5</sup>. The purpose of this directive was to confer binding effects on the so-called "institutional safeguards" or "19 conditions" of the Raposa Serra do Sol case (PET. 3,388), making compliance mandatory for all federal agencies, directly and indirectly, in all demarcation processes. In this sense, FUNAI, which is the indigenist agency of the federal government responsible for carrying

4. BRASIL. Supremo Tribunal Federal. Pet 3388 Embargos de Declaração. Relator: Min. Roberto Barroso, Tribunal Pleno, julgado em 23 out. 2013, Acórdão Eletrônico Diário de Justiça Eletrônico-023, Divulgado em 03 fev. 2014, Published February 4, 2014. Available at: <<http://redir.stf.jus.br/paginador-pub/paginador.jsp?docTP=TP&docID=5214423>>.

5. Normative Opinion 001/2017/GAB/CGU/AGU has had its effects suspended since May 2020, due to a decision of the STF (Federal Supreme Court), in the case of RE 1.017.365/SC, until the merits of said action are judged.

out demarcations of Indigenous lands, would be from then on directed to enforce the “time frame limit” theory, along with other non-precedential notions.

While we witness the recent intensification of efforts by the legislature and the executive to prevent the demarcation of Indigenous lands, the Federal Supreme Court has been preparing to confront this question yet again through a case that, once decided, will have large and generalized repercussions. The Court’s collective decision in this case will be binding and will serve as a guide for future judicial decisions that concern the demarcation of Indigenous lands in Brazil. The case at hand is the Extraordinary Appeal nº 1.017.365/SC, which concerns the Ibirama-La Klãnõ Indigenous Territory, where the Xokleng, Kaingang and Guarani Indigenous peoples live, with an approximate area of 37,108 hectares, located in the southern state of Santa Catarina (specifically within the municipalities of Doutor Pedrinho, Itaiópolis, José Boiteux, and Vitor Meireles). The case involves a challenge filed by FATMA, the Environmental Foundation of the State of Santa Catarina, which sought to recover an area of land that FUNAI had declared as traditionally occupied Indigenous land. Claiming that it had deeds to the lands in question, lower courts found that the area should be ceded to FATMA, to the detriment of the constitutional rights of Indigenous peoples. After these lower court rulings, FUNAI filed a special appeal so that the case could reach the Supreme Court. Upon initial review of the case, STF Justice Edson Fachin asserted that the Court had unanimously decided that its findings in this case will be legally binding as precedent. Thus, it will be up to the STF to face the question “defining the legal and constitutional statute that concerns tenure of the areas of traditional Indigenous occupation, under the terms of article 231 of the Constitutional text” (item 1031).

Currently, all attention regarding the future of Indigenous peoples’ rights to territory is focused on the STF’s expected decision in this case, which has already been added and removed from their docket several times over the past two years. The court heard arguments on the merits back in August 2021, but the summary judgement has been suspended since September of the same year, with no new date set to resume it. Meanwhile, the lack of definition on the part of the STF of the legal-constitutional status of Indigenous lands in the light of article 231 of the 1988 Constitution only increases the legal uncertainty of Indigenous peoples in relation to their territorial rights, in addition to exposing them to possible harms from the legislature, administrative agencies, and even the judiciary itself. It is hoped that the trial will soon resume and that the Supreme Court, as guardian of the Constitution, will be able to face this issue in order to protect the original right of Indigenous peoples to their lands and that the Brazilian State will fulfil its constitutional duty to demarcate and protect Indigenous lands, without the use of restrictive criteria, but rather with respect for constitutional principles and by valuing the fundamental right to dignity for all of the more than 305 Indigenous peoples of this country.

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