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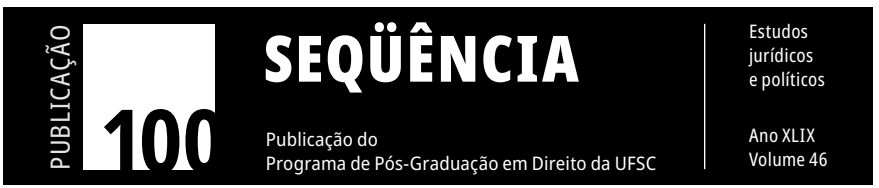

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ORIGINAL ARTICLE

Delineation of indigenous lands in the brazilian Supreme Federal Court and the decolonisation of the concept of possession

Demarcação de terras indígenas no Supremo Tribunal Federal e a decolonização do conceito de posse

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Resumo: Um dos casos de maior impacto para ações de decolonização e mudanças transformadoras na estrutura constitucional brasileira se observa com os julgamentos pela Corte Constitucional sobre a proteção de terras indígenas e a discussão sobre a existência de marco temporal capaz de definir o período apto a justificar o banimento dos povos tradicionais e a alienação para fins de colonização. Esta pesquisa pretende, a partir dos fundamentos e entendimentos proferidos pelo Supremo Tribunal Federal, analisar o rompimento com a tradição de ocupação e normatização das terras indígenas, a começar por distinguir a noção de posse de terras indígenas da noção de posse proveniente da tradição germânico-romana. Destaca-se, nesse sentido, o uso de modelos de argumentação com fundamentos em marcos teóricos e decisões judiciais majoritariamente produzidos no Brasil, rompendo igualmente com a tradição de uso de citações e julgados estrangeiros, mostrando a necessidade de limitar, por meio do transconstitucionalismo, um novo instrumento de dominação hegemônica. Segundo o entendimento da Suprema Corte, as terras ocupadas pelos povos tradicionais são de posse permanente dessa comunidade, sendo seu direito o usufruto das riquezas do solo, dos rios e lagos ali existentes, o que importa em um reconhecimento de pluralismo jurídico tipicamente decolonial e endêmico.

Palavras-chave: Decolonização. Demarcação de terras. Pluralismo sociocultural. Posse. Povos tradicionais.

Abstract: One of the most impactful cases for decolonization efforts and transformative changes in the Brazilian constitutional structure can be observed in the Constitutional Court's rulings on the protection of Indigenous lands and the debate over the existence of a marco temporal (time frame) capable of defining the period that would justify the displacement of traditional peoples and the alienation of their lands for colonization purposes. This research aims, based on the principles and interpretations established by the Federal Supreme Court, to analyze the break with the historical tradition of occupation and regulation of Indigenous lands, beginning by distinguishing the notion of Indigenous land possession from the concept of possession derived from the Germanic-Roman legal tradition. In this sense, it highlights the use of argumentative models grounded in theoretical frameworks and judicial decisions primarily developed in Brazil, thus breaking with the tradition of relying on foreign citations and precedents, and demonstrating the need to limit, through transconstitutionalism, a new instrument of hegemonic domination. According to the understanding of the Supreme Court, the lands occupied by traditional peoples are the permanent possession of these communities, and they hold the right to the usufruct of the resources of the soil, rivers, and lakes existing therein. This represents the recognition of a form of legal pluralism that is typically decolonial and endemic.

Keywords: Decolonization. Land demarcation. Sociocultural pluralism. Possession. Traditional peoples.

1. INTRODUCTION

The formation of Brazil, much like that of other parts of Latin America since colonization, has been shaped by deeply conflictual relationships with the land. Enduring dynamics of occupation, domination, and systems of forced servitude have historically defined its social and economic structures. These colonial legacies continue to impose social, cultural, anthropological, legal, and political constraints that hinder the development of a truly autonomous Brazilian identity, within which the legal framework plays a particularly significant role.

Indigenous communities in Brazil continue to experience grave situations that are frequently reported in the media, including persistent threats of disease, violence, land invasions, contamination of

water and soil, intimidation, and systematic neglect of those living in non-demarcated territories or urban areas (Bonilla & Artionka, 2021). The Inter-American Commission on Human Rights (IACHR, 2024) has expressed deep concern over the ongoing hardships faced by these communities, emphasizing that international human rights law safeguards the collective right to property. These conditions are further exacerbated by the drastic reduction in the National Indian Foundation (FUNAI) budget, which has severely limited its capacity to act due to chronic funding and personnel shortages. Taken together, these factors render the Indigenous question in Brazil an urgent national issue, requiring immediate and effective state action to ensure the survival and respect for the way of life of Indigenous peoples.

Courts have long served as arenas of contestation where structural inequalities and historical injustices—often embedded in the language and reasoning of law itself—have been persistently challenged, though not always with favorable outcomes for affected communities. In this regard, the Brazilian Constitutional Court has issued landmark rulings recognizing and protecting the land rights of Indigenous peoples. Among these, one of the most transformative and consequential for decolonial constitutional thought is the Court's jurisprudence concerning the protection of Indigenous lands, the scope of their occupation, and the debate surrounding the so-called *marco temporal* (temporal framework) doctrine, which sought to restrict constitutional protection to lands occupied by Indigenous peoples as of 5 October 1988, the date of promulgation of the current Constitution.

This controversy culminated in the decision delivered on 27 September 2023 in *Extraordinary Appeal No. 1.017.365/SC*, where the Supreme Federal Court rejected the temporal limitation and reaffirmed the constitutional protection of Indigenous territories. The case concerned the possibility of excluding lands not physically occupied by Indigenous groups in 1988 from constitutional protection—despite the fact that most traditional territories had already been expropriated, colonized, or commodified through state-sanctioned

land distribution (*terras devolutas*) long before that date. Acceptance of the *marco temporal* hypothesis would have legitimized centuries of displacement, persecution, and cultural eradication endured by Indigenous peoples, perpetuating a legacy of dispossession that continues into the twenty-first century.

By rejecting this framework, the Supreme Federal Court decisively broke with the colonial tradition that regulated Indigenous territories through doctrines of occupation and property derived from the Germanic-Roman legal heritage. The Court distinguished traditional Indigenous possession from civil possession, emphasizing that while civil possession is individual, economic, and proprietary in nature—dependent on formal title—Indigenous possession is collective, congenital, anthropological, and non-commercial. It constitutes, in the Court's words, a "habitat of a people," a material and spiritual foundation of existence that embodies Brazil's commitment to sociocultural pluralism.

The Court's reasoning was also transformative in its epistemological dimension. By grounding its argumentation in theoretical frameworks and precedents predominantly developed within Brazil, the Court departed from the long-standing judicial practice of citing foreign authorities. This rhetorical and methodological shift signals an assertion of epistemic sovereignty—what may be understood as a form of *transconstitutionalism* that resists the reproduction of hegemonic models of legal reasoning. Through this approach, the Court affirmed a genuinely Brazilian interpretive voice within constitutional adjudication.

The 1988 Constitution itself marked a crucial departure from the assimilationist paradigm that had long guided state policy. Instead of seeking to integrate Indigenous peoples into the national society through the erasure of their identities, the Constitution inaugurated a paradigm of recognition—one that embraces sociocultural pluralism and the right to exist as Indigenous. Yet, the transformative power of this paradigm has been realized primarily through the interpretive intervention of the Brazilian Constitutional Court.

The Court has established that Indigenous possession reflects the *habitat* of a community and is integral to its identity, survival, and way of life. The traditionality of such possession refers to the mode of land occupation in accordance with the customs, usages, and traditions of each community, as determined through anthropological and ethnographic studies that analyze historical, sociological, and environmental factors. Abandonment of such lands must be voluntary and cannot result from coercion or violence; thus, involuntary displacement does not negate the traditional character of the occupation.

Consequently, the demarcation of Indigenous lands constitutes a declaratory act recognizing a pre-existing legal situation that cannot be governed by the classical institutions of colonial law. Its purpose is to provide legal certainty to collective ownership, consistent with the jurisprudence of the Inter-American Court of Human Rights. By acknowledging these rights as *original*, the Constitution affirms that they predate and prevail over purported acquired rights, even when formalized through public deeds or possession titles.

In summary, the Supreme Federal Court's interpretation of Indigenous land rights represents a transformative decolonial interpretation of Brazilian constitutional law. It affirms that lands of traditional Indigenous occupation are permanently possessed by their communities, who enjoy exclusive usufruct of the natural resources of the soil, rivers, and lakes within them. This jurisprudence embodies a distinctly decolonial and endogenous form of legal pluralism—one that acknowledges the coexistence of multiple normative orders within Brazil and recognizes Indigenous peoples as original subjects of law.

2. CONSTITUTIONAL DEVELOPMENT OF OCCUPATION AND DOMINATION OF INDIGENOUS LANDS AND BRAZILIAN LAW

Historically, the recognition of possession and domain over the lands they occupy begins with the Portuguese Royal Charter of 1680, which stated, in loose translation:

> "[…] And so that the said Gentiles, who thus descend, and the others that exist at present, are better preserved in the Villages: I hereby decree that they are the owners of their estates, as they are in the Hinterlands, without them being taken away, nor any harm being done to them. And the Governor, with the opinion of the said Religious, will assign to those who descend from the Hinterlands convenient places to plough and cultivate, and they may not be moved from these places against their will, nor be obliged to pay any fee or tribute for the said lands, even if they have been given in Land Grants to private individuals, because in the granting of these, the harm to third parties is always reserved, and it is much more understood, and I want it to be understood to be reserved the harm and right to the Indians, the primary and natural lords of them".[1]

This Royal Charter represents one of the earliest formal acknowledgments of Indigenous territorial rights in Brazil, recognizing them as the original and legitimate owners of their ancestral lands.

The Indigenous right to possession and use of the lands they occupy was not undermined by the Land Law No. 601/1850, and it was also ensured by Article 24, § 1 of Decree No. 1318/1854, which regulated the law mentioned above, as it is understood that possession is legitimised to the first occupant, and the original right of the Indigenous peoples to the lands in their possession was already recognised.

The Federal Constitution of 1934 was the first to enshrine the right to possession of their lands, a provision repeated in all subsequent

[1] Loose translation from the original: *"... E para que os ditos Gentios, que assim decerem, e os mais, que há de presente, melhor se conservem nas Aldeias: hey por bem que senhores de suas fazendas, como o são no Sertão, sem lhe poderem ser tomadas, nem sobre ellas se lhe fazer moléstia. E o Governador com parecer dos ditos Religiosos assinará aos que descerem do Sertão, lugares convenientes para neles lavrarem, e cultivarem, e não poderão ser mudados dos ditos lugares contra sua vontade, nem serão obrigados a pagar foro, ou tributo algum das ditas terras, que ainda estejão dados em Sesmarias e pessoas particulares, porque na concessão destas se reserva sempre o prejuízo de terceiro, e muito mais se entende, e quero que se entenda ser reservado o prejuízo, e direito os Índios, primários e naturais senhores delas."*

constitutional texts. It is a settled understanding in the doctrine that this constitutional recognition rendered null and void any act of transfer of possession or ownership of these areas to third parties. Indigenous possession reflects the habitat of a community, contributing to the very formation of identity, to the conservation of survival conditions and the Indigenous way of life, distinguishing itself from civil possession, which is markedly economic and commercial in nature.

The 1988 Constitution breaks with an assimilationist paradigm that aimed for the progressive integration of Indigenous peoples into the national society, so that they would gradually abandon their condition, towards a paradigm of recognition and encouragement of sociocultural pluralism and the right to exist as Indigenous.

As José Afonso da Silva (2012, p. 889) attests: "[…] The land issue has become the central point of the constitutional rights of the Indians, because for them it has a value of physical and cultural survival".[2]

The 1988 Constitution recognizes the original territorial rights of Indigenous peoples, affirming that these rights predate the State itself. Indigenous lands are configured as *res extra commercium*, respecting the public nature and their dedication to the maintenance of Indigenous well-being, which is why, under the terms of §4 of Article 231 of the constitutional text, they are inalienable, unavailable, and the rights over them are imprescriptible. By recognising for Indigenous peoples "their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy", Article 231 of the Brazilian Federal Constitution protects the fundamental rights of Indigenous peoples, with the consequent guarantees inherent to their protection, which constitute unamendable clauses, safeguards against temporary majorities, extensive interpretation, and prohibition of regression.

[2] Loose translation from the original: "*A questão da terra transformara-se no ponto central dos direitos constitucionais dos índios, pois para eles ela tem um valor de sobrevivência física e cultural.*"

The traditionality of Indigenous occupation encompasses areas permanently inhabited by them, those used for their productive activities, those essential to the preservation of environmental resources necessary for their well-being, and those necessary for their physical and cultural reproduction, according to §1 of Article 231 of the Federal Constitution of 1988, always according to the community's uses, customs, and traditions.

The traditionality of Indigenous possession refers to the mode of land occupation, in accordance with the customs, usages, and traditions of the community, demonstrated through technical anthropological work, which assesses the historical, ethnographic, sociological, and environmental characteristics of the occupation to determine whether the provisions of Article 231, §1 of the constitutional text are met.

In possessory actions where there is a conflict between the right to civil possession, understood as the expression of proprietary powers, and the Indigenous constitutional right to possession of traditionally occupied lands, the presence of the elements characterising Indigenous possession must be assessed. Beyond possessory protection, the Federal Constitution of 1988 also grants special protection to the Indigenous way of being and living, placing their culture and identity under specific guarantees, as well as ensuring the traditional way of occupying the lands.

As can be observed, and as will be further elucidated, the 1988 Constitution breaks with an assimilationist paradigm that aimed for the progressive integration of Indigenous peoples into the national – and white – society, so that they would gradually abandon their Indigenous condition, towards a paradigm of recognition and encouragement of sociocultural pluralism and the right to exist as Indigenous.

In this regard, the judgment rendered in Extraordinary Appeal No. 1,017,365, from the State of Santa Catarina[3], innovates by under-

[3] The case RE 1.017.365/SC (2024) dealt with the dispute between the Xokleng people and the State of Santa Catarina over possession of the Ibirama-Laklãnõ Indigenous

pinning its arguments not only on the constitutional norm but also by prioritising the adoption of national doctrinal precepts instead of reproducing foreign dogmatic lessons and precepts.

It is worth transcribing Edison Vitorelli's (2016, p. 189) guidance, who argues that the assessment of Indigenous lands should take a radical existential perspective, to admit that "[…] it is as if land possession, for the Indigenous person, were a right of personality, not a patrimonial right."[4]

This is a relationship of identity, spirituality, and existence, making it possible to state that there is no Indigenous community without land, from an ethnic and cultural standpoint, inherent to the very recognition of these communities as traditional and specific peoples in relation to the surrounding society.[5]

The loss of possession of traditional lands by an Indigenous community signifies the progressive ethnocide of its culture, through the dispersion of the group's members, as well as casting these people into a state of poverty and acculturation, denying them the right to identity and difference in relation to the lifestyle of the surrounding society, the greatest expression of political pluralism.

As José Afonso da Silva (2010, p. 887) argues:

> "[…] that is to say, an Indian is someone who feels like an Indian. This self-identification, which is based on the sense of

Land. When ruling on the case with general repercussion (Theme 1.031), the Federal Supreme Court (STF) rejected the "time frame" thesis and stated that Indigenous rights over their lands are original and imprescriptible, not depending on occupation as of October 5, 1988. The decision reaffirmed the theory of indigenato and established a binding precedent for all land demarcations in the country.

[4] Loose translation from the original: "*... é como se a posse da terra, para o índio, fosse um direito da personalidade, e não um direito patrimonial.*"

[5] For a transnational perspective on the self-determination of traditional peoples from a Peruvian context, see: GRADOS, G. C. A. La protección de los derechos fundamentales de los pueblos indígenas en aislamiento. **Novos Estudos Jurídicos**, v. 28, n. 2, p. 311–336, 2023. Disponível em: https://periodicos.univali.br/index.php/nej/article/view/19763.

> belonging to an Indigenous community, and the maintenance of this ethnic identity, grounded in the historical continuity of the pre-Columbian past that reproduces the same culture, constitute the fundamental criterion for the identification of the Brazilian Indian".[6]

3. JUDICIAL APPROACH TO INDIGENOUS RIGHTS

Although the Constitution establishes that lands traditionally occupied by Indigenous peoples are designated for their permanent possession and exclusive usufruct of the resources of the soil, rivers, and lakes—stemming from the qualified possession they exercise over areas under Union domain and essential to maintaining their communal way of life—the effective realization of these rights remains incomplete. Despite the significant progress represented by the 1988 Constitutional Charter, the recognition and protection of Indigenous peoples' possession of their traditional lands continue to face serious challenges. The Courts have been a fertile soil for the fights and re-vindications of the rights.

On multiple occasions, the Supreme Federal Court has determined that Indigenous possession is not assessed in the same manner as civil possession, as land for the Indigenous peoples does not have the same primarily economic purpose; rather, it serves as a habitat, a source of food, and a means of practising their culture, necessitating recourse to specialised knowledge for determining the traditionality of possession.

The Brazilian Supreme Federal Court, in the Raposa Serra do Sol case[7] (Brasil, Supremo Tribunal Federal, 2009), asserted that the

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[6] Loose translation from the original: "*a dizer, é índio quem se sente índio. Essa auto-identificação, que se funda no sentimento de pertinência a uma comunidade indígena, e a manutenção dessa identidade étnica, fundada na continuidade histórica do passado pré-colombiano que reproduz a mesma cultura, constituem o critério fundamental para a identificação do índio brasileiro.*"

[7] The Raposa Serra do Sol case dealt with the continuous demarcation of an extensive Indigenous territory in Roraima, inhabited by several Indigenous groups, including the

1988 Federal Constitution embraced the Theory of Indigenato, whereby the relationship established between the land and the Indigenous person is congenital and, consequently, original, not depending on title or formal recognition. In this ruling, it emphasized that the process of demarcating Indigenous lands is declaratory, not constitutive, aiming at the spatial delimitation of these areas to enable the exercise of the constitutional prerogatives granted to the Indigenous peoples.

It further affirmed that the right to lands traditionally occupied by Indigenous communities is imprescriptible, and such lands are inalienable and unavailable. It is not admissible, in view of the entire legal system, to understand that Indigenous rights to the usufruct of the lands, or any others that the Constitution confers upon them, arise from the administrative demarcation of the area, as the titles of domain relating to lands occupied by Indigenous peoples are unenforceable against them (Brasil, Supremo Tribunal Federal, 2009).

Previously, the Supreme Court had already established this position on several occasions before the constitutional order of 1988, with the understanding expressed by Justice Victor Nunes Leal in the judgment of Extraordinary Appeal No. 44,585, concluded in 1961, remaining a classic:

> "[...] The Federal Constitution states the following: 'Article 216: The possession of lands where the Indigenous peoples are permanently located shall be respected, with the condition that they do not transfer it.' This does not concern the common right of property; what was reserved was the territory of the Indigenous peoples. This area was transformed into an Indigenous park, under the guard and administration of the Indian Protection Service, as they do not have the disposal

Macuxi, Wapichana, and Ingarikó. In the judgment of Petition 3.388/RR (2009), the Federal Supreme Court (STF) confirmed the continuous demarcation and stated that the 1988 Constitution adopted the "theory of indigenato", recognizing the original rights of Indigenous peoples over their lands, regardless of formal title. The decision also established 19 conditions to guide future demarcations.

of the lands. The objective of the Federal Constitution is for the cultural traces of the ancient inhabitants to remain there, not only for the survival of this tribe but also for the study of ethnologists and other cultural or intellectual purposes. It is not about a concept of possession or domain in the civilist sense of words; it is about the habitat of a people. If the Indigenous peoples, at the time of the Federal Constitution, occupied a certain territory because they derived their food resources from it, even without having constructions or permanent works that would testify possession according to our concept, this area, in which and from which they lived, was necessary for their subsistence. This area, existing at the time of the Federal Constitution, was to be respected. If it was reduced by a later law; if the State diminished it by ten thousand hectares, tomorrow it would reduce it by another ten, then more ten, and it could eventually confine the Indigenous peoples to a small plot, even to the village courtyard, because it is there that the 'possession' would be materialised in the communal houses. That was not what the Constitution intended. What it determined was that, in a true Indigenous park, with all the primitive cultural characteristics, the Indigenous peoples could remain, living in that territory, because to say so is to say that they would continue in possession of the same. I understand, therefore, that even though the demarcation of this territory originally resulted from a State law, the Federal Constitution addressed the matter and removed any possibility from the State of reducing the area that, at the time of the Constitution, was occupied by the Indigenous peoples, occupied in the sense of being used by them as their ecological environment".[8] (Brasil, Supremo Tribunal Federal, 1961).

[8] Loose translation from the original: *"(...) A Constituição Federal diz o seguinte: 'Art. 216: Será respeitada aos silvícolas a posse das terras onde de achem permanentemente localizados, com a condição de não a transferirem.' Aqui não se trata do direito de propriedade comum; o que se reservou foi o território dos índios. Essa área foi transformada num parque indígena, sob a guarda e administração do Serviço de Proteção aos Índios, pois estes não tem a disponibilidade das terras. O objetivo da Constituição Federal é que ali permaneçam os traços culturais dos antigos habitantes, não só para*

The issue regarding the possession of their traditional lands, despite the significant progress represented by the 1988 Constitutional Charter, remains unresolved or at least unsettled, which is why it is necessary that the Brazilian Supreme Court perform its role as guardian of the Constitution, once again examining all the issues intertwined in this theme that, beyond settling merely possessory and domain issues, involves the very survival of individuals, communities, ethnicities, languages, and ways of life that, in their own way, comprise the inherent plurality of Brazilian society.

When adjudicating the Raposa Serra do Sul case, through Petition No. 3,388, Rapporteur: Min. Carlos Britto, Full Court, judged on 19/03/2009, the Brazilian Constitutional Court established that, in a loose translation: "the demarcation of Indigenous lands is an advanced chapter of fraternal constitutionalism, community inclusion through ethnic identity". In the same judgment, it was also noted that

> "[…] the noun ‚Indians' is used by the Federal Constitution of 1988 invariably in the plural, to express the differentiation of the Indigenous peoples into numerous ethnicities. The constitutional purpose is to portray Indigenous diversity both

sobrevivência dessa tribo, como para estudos dos etnólogos e para outros efeitos de natureza cultural ou intelectual. Não está em jogo, propriamente, um conceito de posse, nem de domínio, no sentido civilista dos vocábulos; trata-se do habitat de um povo. Se os índios, na data da Constituição Federal, ocupavam determinado território, porque desse território tiravam seus recursos alimentícios, embora sem terem construções ou obras permanentes que testemunhassem posse de acordo com o nosso conceito, essa área, na qual e da qual viviam, era necessária à sua subsistência. Essa área, existente na data da Constituição Federal, é que se mandou respeitar. Se ela foi reduzida por lei posterior; se o Estado a diminuiu de dez mil hectares, amanhã a reduziria em outros dez, depois, mais dez, e poderia acabar confinando os índios a um pequeno trato, até ao terreiro da aldeia, porque ali é que a 'posse' estaria materializada nas malocas. Não foi isso que a Constituição quis. O que ela determinou foi que, num verdadeiro parque indígena, com todas as características culturais primitivas, pudessem permanecer os índios, vivendo naquele território, porque a tanto equivale dizer que continuariam na posse do mesmo. Entendo, portanto, que, embora a demarcação desse território resultasse, originariamente, de uma lei do Estado, a Constituição Federal dispôs sobre o assunto e retirou ao Estado qualquer possibilidade de reduzir a área que, na época da Constituição, era ocupada pelos índios, ocupada no sentido de utilizada por eles como seu ambiente ecológico".

> interethnic and intraethnic. Indians in the process of acculturation remain indians for the purpose of constitutional protection".[9] (Brasil, Supremo Tribunal Federal, 2009).

Furthermore, in the aforementioned case, the Supreme Federal Court considered that:

> "The rights of the Indians over the lands they traditionally occupy were constitutionally 'recognised', and not simply granted, with the act of demarcation being of a declaratory nature, rather than constitutive. A declaratory act of a pre-existing active legal situation. This is why the Constitution refers to them as ‚original', signifying a right that is older than any other, prevailing over purported acquired rights, even those formalised in public deeds or titles of legitimation of possession in favour of non-Indians".[10]

The Court further asserted that "each Indigenous ethnicity has for itself, exclusively, a portion of land compatible with its peculiar form of social organisation. Hence the continuous model of demarcation, which is monoethnic".[11]

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[9] Loose translation from the original: "*... a demarcação das terras indígenas como capítulo avançado do constitucionalismo fraternal, inclusão comunitária pela via da identidade étnica.*" No mesmo julgado pontuou ainda que "*o substantivo "índios" é usado pela Constituição Federal de 1988 por um modo invariavelmente plural, para exprimir a diferenciação dos aborígenes por numerosas etnias. Propósito constitucional de retratar uma diversidade indígena tanto interétnica quanto intra-étnica. Índios em processo de aculturação permanecem índios para o fim de proteção constitucional.*"

[10] Loose translation from the original: "*Os direitos dos índios sobre as terras que tradicionalmente ocupam foram constitucionalmente "reconhecidos", e não simplesmente outorgados, com o que o ato de demarcação se orna de natureza declaratória, e não propriamente constitutiva. Ato declaratório de uma situação jurídica ativa preexistente. Essa a razão de a Carta Magna havê-los chamado de "originários", a traduzir um direito mais antigo do que qualquer outro, de maneira a preponderar sobre pretensos direitos adquiridos, mesmo os materializados em escrituras públicas ou títulos de legitimação de posse em favor de não-índios.*"

[11] Loose translation from the original: "*cada etnia autóctone tem para si, com exclusividade, uma porção de terra compatível com sua peculiar forma de organização social. Daí o modelo contínuo de demarcação, que é monoétnico.*"

Moving forward, the Supreme Federal Court, during the judgment conducted in 2024 (Extraordinary Appeal No. 1,017,365, from the State of Santa Catarina), establish that: "the correct hermeneutics of the constitutional provision under examination will represent the true condition of existence and survival for more than 300 distinct Indigenous ethnicities in our country". (Brasil, Supremo Tribunal Federal, 2024, p. 32).[12]

Faced with this, the Court assumed its responsibility not only to be the guardian of the Federal Constitution but, above all, to promote the institutional, political, and legal protection of vulnerable and minority ethnic groups that do not find protection for their way of life and cultural practices in the law shaped by European colonial legacies.

As is evident from the constitutional text itself, Indigenous original territorial rights are recognised and thus pre-exist the promulgation of the Constitution, which acknowledges their specific function of serving as a habitat for the ethnicity that traditionally occupies it, thereby distancing itself from the Romano-Germanic notion of possession and property. The Constitutional Court argued that, in the case of Indigenous lands, the economic function of the land is linked to the conservation of Indigenous survival conditions and way of life, but it does not function as a commodity for these communities. This establishes an interpretative shift regarding the meaning and extent of possession beyond the traditional interpretation of the law. Therefore, Indigenous possession is not equivalent to civil possession; it contributes to the very formation of the communities' identity and does not qualify as merely acquiring the right to use the land.

It is important to note that, in its decision, the Supreme Federal Court explicitly referred to the arguments contained in the

[12] Loose translation from the original: "... *a correta hermenêutica do dispositivo constitucional ora em exame representará verdadeira condição de existência e sobrevivência das mais de 300 distintas etnias indígenas de nosso País*."

International Labour Organization's Convention No. 169 concerning Indigenous and Tribal Peoples. The Court emphasized that, for Indigenous peoples, land does not possess commercial value in the private sense of ownership. Rather, it constitutes a fundamental relationship of identity, spirituality, and existence. From this perspective, it is possible to affirm that there can be no Indigenous community without land—an essential element of their ethnic and cultural identity that underpins their recognition as traditional and distinct peoples within the broader society. Thus, the occupation of Indigenous lands is entirely detached from the Western lifestyle, which demands a constitutional hermeneutics that is appropriate and distinct from that which legitimises colonial institutions and foreign legal precepts. (Brasil, Supremo Tribunal Federal, 2024, p. 118).

The forms of Indigenous resistance to the unlawful occupation of their lands should be examined according to each ethnicity's conception of how to resist invasions. In this manner, "…the concept of the dispossession of Indigenous lands cannot be a monological concept of civil law dogmatics. Voluntary retraction (cessation of resistance to dispossession) or abandonment of land cannot be presumed or determined solely according to civil law criteria".[13] (Barbosa, 2018, p. 133).

4. A TRANSFORMATIVE APPROACH TO INDIGENOUS RIGHTS

The manner in which the Supreme Federal Court of Brazil has interpreted the scope and reach of Indigenous land rights reflects a truly transformative approach. It moves beyond a narrow liberal conception of property rights to embrace the unique worldviews (*cosmovisiones*)

[13] Loose translation from the original: "*O conceito de esbulho de terras indígenas não pode ser um conceito monológico da dogmática do direito civil. Retração voluntária (desistência de resistir ao esbulho) ou o abandono da terra não podem ser presumidos nem constatados exclusivamente segundo critérios do direito civil.*"

of Indigenous peoples and the human rights protections recognized under international law. Moreover, this jurisprudence imposes a duty on justice system actors to engage with and understand the specific ways in which each Indigenous group conceives and organizes its territories and spaces of belonging. Only through such contextual understanding can the judiciary guarantee the original rights of these communities and foster genuine legal autonomy capable of responding effectively to their claims for justice.

The Supreme Federal Court, in the opinion of Justice Edson Fachin, by dismissing Jhering's objective theory of possession[14], enables a transformative epistemological model in which

> "Indigenous possession does not correspond to the mere factual power over a thing for its custody and use, with the consequent intention of owning it. It is a constitutional institution based on ancestry and the appreciation of Indigenous culture, whose function is to maintain uses, customs, and traditions. Therefore, it is not centred on an individual but on the group, the community". (Brasil, Supremo Tribunal Federal, 2024, p. 207).[15]

In this context, the Supreme Federal Court uses the Theory of Indigenato as a theoretical foundation for its judgment. The Theory of Indigenato was developed in the early 20th century by João Mendes Júnior (1912). According to this theory, Indigenous possession of

[14] The objective theory of possession, developed by Rudolf von Jhering, defines possession as the factual exercise of the powers of ownership, regardless of the intention to be the owner. What matters is the external behavior of the person who acts as the owner, not their internal intent. This theory strongly influenced the Brazilian Civil Code of 2002, especially Article 1,196, which defines the possessor as one who, in fact, exercises any of the powers of ownership.

[15] Loose translation from the original: "*a posse indígena não corresponde ao simples poder de fato sobre uma coisa para sua guarda e uso, com o consequente ânimo de tê-la como própria. É instituto constitucional embasado na ancestralidade e na valorização da cultura indígena, cuja função é manter usos, costumes e tradições. Portanto, não se centra em um indivíduo, mas no grupo, na comunidade.*"

the lands they traditionally occupy is considered a congenital, innate right, predating the creation of the Brazilian state, which is responsible only for demarcating and declaring the territorial boundaries (Mendes Júnior, 1912).

Justice Alexandre de Moraes, in his opinion, begins with an analysis of the issues surrounding historical reparations for Indigenous peoples, not only concerning events that occurred in Brazil but extending them across the entire American context, from Canada to Argentina. He seeks to demonstrate the need for a plausible and structured legal solution based on these realities and injustices. For the justice in question, the constitutional protection of Indigenous lands is at the fundamental level of safeguarding human dignity, making the protection of traditional lands a reparation for the dignity of these peoples (Brasil, Supremo Tribunal Federal, 2024, p. 277-280).

To further support his argument, Justice Alexandre de Moraes introduced into the Supreme Federal Court discussion contributions from judgments by the Inter-American Court of Human Rights regarding the protection of Indigenous lands and their legal regime. Thus, from the condemnations faced by Nicaragua, Paraguay, Mexico, and Ecuador, the thesis was established that the concept of possession diverges from classical European standards, viewing the occupation of Indigenous lands as an identitarian, congenital, and existential attribute (Brasil, Supremo Tribunal Federal, 2024, p. 319-325).

Throughout the discussion among the justices of the Brazilian Constitutional Court, there is a noticeable epistemological shift towards colonial thought paradigms in Justice André Mendonça's vote. He seeks the foundations in European constitutionalism and Enlightenment thinkers to recognise the occupation of Indigenous lands without disrupting the properties belonging to private individuals, thus attempting a reconciliation between heterogeneous premises (Brasil, Supremo Tribunal Federal, 2024, p. 430-463).

The discussion between epistemological bases produced in Brazilian facticity, with its challenges and creative strengths, as seen in

precedents from the Inter-American Court of Human Rights, equally contributes to the densification of International Law in addressing local problems, dismantling the elitist, colonialist, and Eurocentric vision stemming from its foundational ideas.

5. THE SCENARIO OF INDIGENOUS LAND DEMARCATION IN BRAZIL AFTER THE JUDGMENT OF RE NO. 1.017.365/SC

Notwithstanding the paradigmatic decision rendered by the Federal Supreme Court in the judgment of RE No. 1,017,365/SC – endowed with binding effect on all instances of the Judiciary in cases involving the demarcation of Indigenous lands – Law No. 14.701 was enacted in 2023, adopting premises completely opposed to those established by the Constitutional Court, by reinstating and providing normative support to the temporal framework hypothesis as a guiding criterion for the recognition of territories traditionally occupied by Indigenous people (Brasil, 2023).

The entry into force of said legislative act has created a scenario of institutional tension and legal uncertainty regarding the matter, given that the binding decision rendered within the scope of an Extraordinary Appeal, although issued by the highest instance of the Judiciary, does not, by itself, possess the authority to automatically invalidate a subsequent infraconstitutional norm approved by the Legislative Branch (Funai, 2024).

Although several provisions of Law No. 14.701/2023 were vetoed by the Presidency of the Republic – precisely because they contravened constitutional parameters previously established by the Federal Supreme Court – the National Congress resolved to override the vetoes, thereby restoring highly controversial provisions (Funai, 2024). Among these, the imposition of the temporal framework hypothesis as a requirement for the demarcation of Indigenous lands

and the imposition of limits on the expansion of already demarcated lands are particularly noteworthy.

Considering this, the matter returned to the examination of the Federal Supreme Court, as the constitutionality of the aforementioned legislation became the subject of three *Ações Diretas de Inconstitucionalidade* (ADIs 7582, 7583, and 7586), one *Ação Declaratória de Constitucionalidade* (ADC 87), and one *Ação Direta de Inconstitucionalidade por Omissão* (ADO 86). Justice Gilmar Mendes, reporting judge of these actions, ordered the suspension of all judicial proceedings concerning the validity of Law No. 14.701/2023, pending a definitive ruling by the Constitutional Court regarding the compatibility of the legislation with the principles of the 1988 Federal Constitution. To this end, he also ordered the creation of a Special Commission, with the objective of presenting proposals for resolving the legal-political impasse in question. (Supremo Tribunal Federal, 2024).

In recent meetings of the Commission, held in February 2025, and in an attempt to bridge the divergent positions surrounding the issue, Justice Gilmar Mendes proposed a draft Complementary Law which, in the view of human rights organizations and advocates for Indigenous peoples' rights, could represent a significant regression and even legitimize the removal of Indigenous peoples from their traditional territories, if approved. The proposal allows that, in cases of conflict predating the official demarcation and under the justification of seeking "social peace", Indigenous people may be removed from their ancestral lands in exchange for compensation with other "equivalent" areas, provided that express consent is obtained. This possibility revives practices that predate the 1988 Constitution, which guaranteed Indigenous people original rights to their territories and prohibited removals except in exceptional circumstances. The provision for compensation, based on vague concepts such as the "absolute impossibility" of demarcation and "social peace", opens loopholes for interpretations that may benefit economic interests and lead to further rights violations, in addition to distorting the standards

set by International Labor Organization Convention 169 on forced displacements. (Brasil, Supremo Tribunal Federal, 2025).

6. CONCLUSION

The 1988 Brazilian Constitution marks a departure from an assimilationist paradigm, which aimed for the progressive integration of Indigenous peoples into the national society, so that they would gradually abandon their Indigenous identity, towards a paradigm of recognition and encouragement of sociocultural pluralism and the right to exist as Indigenous, although the strength of this measure arises from the intervention of the Brazilian Constitutional Court.

The Constitutional Court has established the understanding that Indigenous possession reflects the habitat of a community, contributing to the very formation of identity, to the preservation of survival conditions and the Indigenous way of life, distinguishing itself from civil possession, which is markedly economic and commercial in nature.

The traditionality of Indigenous possession refers to the mode of land occupation, in accordance with the customs, usages, and traditions of the community, demonstrated through technical anthropological work, which examines the historical, ethnographic, sociological, and environmental characteristics of the occupation, with no allowance for generic and/or forced situations of abandonment.

Such abandonment must be eminently voluntary on the part of the community, without any form of dispossession by third parties, and without the requirement of a physical conflict or a possessory claim. The Brazilian Constitutional Court decided that involuntary abandonment of traditional lands, perpetrated by violent means, does not disqualify the traditional nature of the occupation.

Therefore, the demarcation of Indigenous lands constitutes a declaratory act of a pre-existing legal situation that cannot be governed by the classical institutions of the coloniser's law. This demarcation aims to provide legal certainty to collective ownership, as well established

by the Inter-American Court in cited precedents. By admitting such rights as original, the Constitution recognised them as rights that are older than any other, prevailing over purported acquired rights, even if materialised in public deeds or titles of legitimation of possession.

Additionally, the aforementioned judgment employs argumentation models grounded in theoretical frameworks and judicial decisions predominantly produced in Brazil, likewise breaking away from the tradition of using foreign citations and rulings, demonstrating the need to limit, through transconstitutionalism, a new instrument of hegemonic domination.

In summary, the Supreme Federal Court determined that the lands of traditional Indigenous occupation are permanently possessed by the community, with Indigenous peoples having exclusive usufruct of the riches of the soil, rivers, and lakes therein, which implies a recognition of a typically decolonial and endemic legal pluralism.

Particularly iconic and relevant in Extraordinary Appeal No. 1,017,365/SC the rhetorical and persuasive stance of the Supreme Federal Court departed from its classical model of argumentation to prioritise Brazilian epistemological models, authors, and scholars formed in Brazil instead of foreign figures of authority. The Court has shown greater attention to its own precedents than to foreign judgments, thereby reinforcing its institutional capacity to provide judicial responses without dependence on alien references.

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Data Availability

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