Scientific Research Publishing

Beijing Law Review, 2025, 16(2), 718-748
https://www.scirp.org/journal/blr
ISSN Online: 2159-4635
ISSN Print: 2159-4627

Indigenous Lands: An Analysis through the Lens of Democratic Constitutionalism

Raquel Osowski

Applied Social Sciences Sector, Pontifical Catholic University of Paraná, Curitiba, Brazil
Email: raquelosowski@gmail.com

How to cite this paper: Osowski, R. (2025). Indigenous Lands: An Analysis through the Lens of Democratic Constitutionalism. *Beijing Law Review, 16,* 718-748.
https://doi.org/10.4236/blr.2025.162035

Received: February 25, 2025
Accepted: April 27, 2025
Published: April 30, 2025

Abstract

The analysis proposed in this article is to verify the treatment given to indigenous issues, with a focus on the original right to land, by the Brazilian Supreme Court (STF), considering its non-exclusive role in attributing democratic legitimacy to the Constitution, according to the model of Democratic Constitutionalism proposed by Robert Post and Reva Siegel. To this end, empirical research was carried out on the database available on the STF's website, searching for all decisions on indigenous issues published up to October 6, 1988. To complement the work, other existing studies relating to the period after the 1988 Brazilian Federal Constitution were used. Regarding the period before the 1988 Federal Constitution, only 5 decisions on the merits were found, while all others were limited to procedural issues. Regarding the period after the Constitution, due to the difference in the methodology used in existing studies, there was a tendency to keep decisions within a logic more restricted to procedural issues. Thus, by observing an inclination towards more minimalist decisions, we demonstrated that, in addition to being few, the decisions were not effective in resolving the conflict underlying the disputes brought before the Court. This conclusion challenges the view that the Supreme Court has managed to confer democratic legitimacy on its decisions, confirming the initial hypothesis that it is a reproducing body of a colonial, uniform, universalizing, centralizing, and monistic system, given its difficulty in recognizing socio-diversity and promoting intercultural dialogues.

Keywords

Brazilian Federal Supreme Court, Indigenous Lands, Land Conflict, Democratic Legitimacy, Pluralism

1. Introduction

The resistance of indigenous peoples to a uniform, centralizing, universalizing, and monistic model of colonization, especially during the work of the National Constit-

uent Assembly, resulted in the express recognition of the original rights of indigenous peoples in Brazil to the lands they traditionally occupy, alongside the guarantee of respect for their social organization, customs, languages, beliefs, and traditions in the text of Brazil's 1988 Constitution. This represented, at least in normative terms, a rupture with an assimilationist constitutional paradigm based on a tutelary regime that was founded on the idea of the provisionality and inferiority of the indigenous subject.

This rupture causes repercussions in various aspects related to interculturality, especially with regard to the recognition, at the very least, of the multiethnic and multicultural nature of Brazilian society[1]. Regarding the dispute over the meanings of the rights constitutionally guaranteed to indigenous peoples in Brazil, we can highlight a series of studies—starting with "O Renascer dos Povos Indígenas para o Direito", Professor Carlos Frederico Marés de Souza Filho's doctoral thesis. In it, the author looks back at how indigenous peoples have been made invisible for centuries, how their rights have been disregarded, and how the articulation of indigenous movements—especially in the second half of the 20th century—resulted in the expression and guarantee of rights in the 1988 constitutional text (Souza Filho, 1999).

On the other hand, even though constitutional rights have been guaranteed and some paradigms have been overcome—at least normatively—with the promulgation of the 1988 Constitution, the Brazilian State has not stopped violating or denying these rights—quite the opposite. An analysis of the decisions of the Brazilian Supreme Court (STF) on the matter indicates that the Court played an important role in the conflicts both prior to the 1988 Constitution, when it failed to deal with the conflicts brought before it and in the years that followed, in decisions that represented setbacks to constitutionally guaranteed rights.

The analysis proposed in this article is to verify the treatment given to indigenous issues by the Supreme Court, considering its non-exclusive role in attributing democratic legitimacy to the Constitution, according to the model of Democratic Constitutionalism proposed by Robert Post and Reva Siegel in 2007.

The central object of this research is to understand the historical process of the Supreme Court's decisions in relation to indigenous lands, as well as the reactions and counter-reactions of the groups involved in the dispute, through the lens of democratic constitutionalism. In addition to this understanding, the structural nature of the conflicts submitted to the STF must be demonstrated, in order to help analyze the cases presented and verify the proposed solutions. This perspective also helps to understand the nature of the reaction and counter-reaction observed, requiring other elements to be considered in the Brazilian case beyond the dichotomy between progressives and conservatives.

The recognition of indigenous peoples as subjects of rights obviously also gives them the legitimacy to dispute the meanings attributed to the constitutional text. On the other hand, Brazil's multiethnic nature is a factual reality that cannot be

[1]In this context, Carlos Frederico Marés de Souza Filho distinguishes a pluriethnic society from a sociodiverse one, and advances legal pluralism to recognize jusdiversity (Souza Filho, 2021: p. 22).

disregarded, which demonstrates the complexity of the issue and points to the need to rethink ways of resolving conflicts, as well as representation in the STF.

2. Methodology

Initially, considering that the research intends to make a quantitative and qualitative analysis of all the Supreme Court's decisions regarding indigenous lands, it was divided into two parts, with the first part referring to decisions before October 6, 1988, and the second referring to decisions after that date.

In the first part of the research, 109 occurrences of the term "indígenas" (indigenous) were obtained directly from the Supreme Court's electronic search system. These 109 occurrences were analyzed and classified, leaving 64 decisions that actually referred to indigenous issues, 3 of which had a judgment date before October 6, 1988, but were actually judged at later dates. Of these 61 decisions, 7 were related to the criminal area, and two were linked to Original Civil Actions Nos. 265, 268, 297, and 355, considering that the criterion was to locate all the decisions handed down by the Federal Supreme Court in relation to the issue, not just the decisions on the merits. This resulted in a total of 54 judgments, referring to 50 claims related to indigenous lands that were presented to the STF.

In the first stage, regarding data up to 1988, the period of analysis goes from December 21, 1951, the date of the most remote decision available on the STF's electronic monitoring system, to October 6, 1988, the date of the promulgation of the Federal Constitution that recognized the indigenous people's original rights to traditionally occupied lands.

For the second part of the research, we opted to use a secondary source of data, consisting of the research carried out by Erika Macedo Monteiro, entitled "ONHEMOIRÕ: o judiciário frente aos direitos indígenas" (ONHEMOIRÕ: the judiciary in the face of indigenous rights), presented in her doctoral thesis at the University of Brasilia, since the research also has an empirical basis.

In this thesis, Moreira set out to "verify the actions of the different social forces at work within the judiciary, in order to understand which arguments and factors become preponderant at the moment of judicial construction" (Moreira, 2014: p. 22). The empirical basis of her research is a survey of decisions dealing with indigenous rights, complemented by a bibliographical survey and interviews with procedural actors (lawyers, judges, public defenders, prosecutors, attorneys general, and public prosecutors) involved in litigation concerning indigenous rights.

The time frame established by Monteiro begins in 1988 and runs until 2013, analyzing decisions of the STF, STJ, TRF1, and TJ of Mato Grosso do Sul. She identified decisions considering two paths: 1) cases with final and unappealable judgments, through the electronic monitoring system, in the Supreme Court, STJ, TRF of the 1st Region, and TJ of Mato Grosso do Sul, based on the following categories: indígena; pluralismo jurídico; diversidade cultural; cultura indígena; direitos indígenas; usos, costumes e tradições (Indian; indigenous; legal pluralism; cultural diversity; indigenous culture; indigenous rights; uses, customs and tradi-

tions); and 2) ongoing cases in the State Courts of Mato Grosso do Sul (Moreira, 2014: p. 23). However, considering the scope of this article, only the data and conclusions relating to indigenous lands in the STF were used.

Another source of data used in this part of the research was the Manual of Jurisprudence on Indigenous Rights, prepared by the 6th Chamber of Coordination and Review of the Federal Public Prosecutor's Office in 2019, which gathers data from 1988 to 2019 (Brasil, 2019a). In addition, cases considered to be emblematic in terms of guaranteeing original rights over indigenous lands were selected.

3. Democratic Constitutionalism

Reva Seigel and Robert Post propose, through what they have called "democratic constitutionalism", a model for analyzing the understandings and practices through which constitutional rights have historically been established in American society, making up what they have called the public cultural controversy (Post & Siegel, 2007: p. 3). Their aim is to establish a method for demonstrating how courts operate in American democracy. The authors' proposal is to provide a lens for understanding the structural implications of the conflict, as well as the technical response given by official bodies to these claims.

In their view, Democratic Constitutionalism seeks to understand the relationship between law and politics, constitutionalism and democracy, and judicial supremacy and self-government of the people, avoiding any conception centered on the dichotomy between these phenomena. They understand that there is tension between these phenomena, and the aim is to understand how this relationship is constructed (Post & Siegel, 2007: p. 16). Therefore, they move away from should-be propositions towards an analysis that rejects the juris-centric conception, admitting the contribution of other actors in the attribution of constitutional meanings. For them, as Dantas and Fernandes point out, the courts' decision does not end the political debate and does not put an end to the possibility of the people, other institutions, and the government disagreeing with their meanings (Dantas & Fernande, 2019: p. 62).

The premise of Democratic Constitutionalism is based on the conception that the constitution's authority depends on its democratic legitimacy, as well as on its ability to inspire Americans to recognize it as their constitution (Post & Siegel, 2007: p. 2). In this way, through popular engagement in claiming the meaning of the constitution, it would be possible to assess the democratic legitimacy achieved by the constitutional text.

The authors point out that this claim can take the form of opposition to the government, such as in the drafting of laws, electoral policies, and within civil society institutions (Post & Siegel, 2007: p. 3), but that, on the other hand, authorities must resist and respond to these claims.

Thus, the constitution's meaning would gradually be shaped by complex patterns of exchange based on dissensus and conflict (Post & Siegel, 2007: p. 27). For them, Courts play an important role in this process, as citizens end up turning to

the Courts to protect important social values and restrict the government whenever it exceeds constitutional limitations (Post & Siegel, 2007: p. 4). The most emblematic cases cited in this North American context would be Brown v. Bd. of Educ. (Post & Siegel, 2007: p. 3)—since the internal protests shaped the government's understanding of civil rights—and Roe v. Wade, which caused an extremely angry reaction from conservatives, showing that, in addition to the issue of abortion, the role of women, sex, family, and religion were also present in the discussion (Post & Siegel, 2007: p. 27).

To this extent, constitutional courts, alongside other institutions, the government, social movements, and the people, would be constitutive parts of the political system in which they are immersed and interconnected, progressively collaborating so that constitutional law assumes a more inclusive role in the disputes over the meaning of the constitutional text, enabling minorities to achieve greater representation and exposing the moral and political conflicts underlying the demands (Post & Siegel, 2007: p.56).

In practice, Democratic Constitutionalism, from the perspective of these authors, analyzes the practices of citizens and public officials to reconcile potentially conflicting commitments (Post & Siegel, 2007: p. 4). In Dantas and Fernandes' analysis, they seek to go beyond idealizations about constitutionalism, democracy, and judicial supremacy, moving away from theories of constitutional interpretation aimed at achieving consensus, which is usually achieved at the expense of valuing one constitutional interpreter (the courts or parliament) to the detriment of the others (people, social movements, and other political institutions) (Dantas & Fernande, 2019: p. 63).

They thus argue that there is a need to build a shared constitutional tradition and that its fundamental characteristic would be to offer a new perspective on the potentially constructive effects of reaction (Post & Siegel, 2007: p. 4). The authors' proposal is to understand the legitimacy of the constitution as an achievement through a historical process that establishes a dialogical relationship between the members of the judiciary and society. The authors' proposal is to understand the legitimacy of the constitution as an achievement through a historical process that establishes a dialogical relationship between the members of the judiciary and society.

Furthermore, they also aim to recognize that the meaning of the Constitution, within a free society, is being constructed in a continuous flow of interaction between society and the Judiciary. In this process, the analysis of the reaction and also of the counter-reaction plays a fundamental role since, for them, this popular activism would be able to boost constitutional solidarity, thus reinvigorating the democratic legitimacy of constitutional interpretations (Post & Siegel, 2007: p. 5), as long as it is based, of course, on the desire of a "free people" to influence the content of their Constitution, even if this reaction is directed against the interpretation given by the Courts (Post & Siegel, 2007: p. 5).

An important point to highlight in this regard is that, for the authors, the Courts

could not be guided in their decisions by fear of reaction, nor should they elevate the prevention of conflicts to the fundamental condition of a constitutional principle, since it is precisely the constitutional conflict and the resulting dispute over meanings that are capable of conferring democratic legitimacy on the Constitution. Thus, the involvement of citizens in constitutional conflict could "contribute to the social cohesion of a heterogeneous normative political form" (Post & Siegel, 2007: p. 6).

But what are the controversial constitutional issues? Post and Siegel summarize that these would be issues of circumstantial historical contingency and could be related to: a) the cultural war over national ideals, such as the rights of the LGBTQA + population; b) political mobilization by organized groups; c) the overthrow of a status quo or the redistribution of goods; and d) the struggle for recognition and legitimacy of some groups (Post & Siegel, 2007: p. 8).

With this, the authors define the criterion for the democratic legitimacy of US constitutional law as its responsiveness to popular opinion (Post & Siegel, 2007: p. 13). Otherwise, the existence of a persistent gap between the understandings of law enforcers and of the people regarding the meaning of the Constitution, about "issues that matter to the public", could threaten the democratic legitimacy of constitutional law (Post & Siegel, 2007: p. 8).

Furthermore, Post and Siegel do not fail to understand that, in a way, the final authority of the courts is necessary for constitutionalism and democracy, considering that a minimum of material equality and basic social rights must be guaranteed so that citizens can actually participate in the public debate (Post & Siegel, 2004: pp. 1035-1036).

For them, how the Supreme Court accomplishes this dialogue between ascribing a legitimately constitutional attribution of meaning and remaining faithful to the integrity of the law is what deserves to be studied.

4. Decisions Handed Down before October 6, 1988

Indigenous territoriality occupies a central place when it comes to guaranteeing the rights of indigenous peoples, because besides marking the indissoluble cultural and spiritual bond of indigenous peoples with the land, it is directly linked to the right to self-organization, as well as to the very origin of the indigenous collective subject, its way of life, and its traditions (Souza Filho, 2018).

In this way, the analysis proposed in this article is to verify the treatment given to indigenous issues, with a focus on the original right to land, by the Brazilian Supreme Court, considering its non-exclusive role in attributing democratic legitimacy to the constitution, according to the model of Democratic Constitutionalism proposed by Robert Post and Reva Siegel.

In the first part of the research, as explained, we analyzed the 54 collegiate decisions collected and handed down by the Supreme Court between December 21, 1951, and October 6, 1988. The aim of this first stage was to locate all the decisions handed down by the Supreme Court in relation to the issue (not just the decisions

on the merits). In this way, 50 demands submitted to the STF were identified.

The first step in processing the data collected was to identify how the conflict was presented to the members of the Court. As a result, 14 Writs of Mandamus (MS)[2] were identified, 12 of which were filed against administrative acts by the President of the Republic declaring lands to be of indigenous occupation. 12 Original Civil Actions (ACOs)[3] were also found, which dealt with federal conflicts involving land disputes between the Union and States of the Federation with repercussions on indigenous lands. Related to the ACOs, we also identified 4 Questions of Order (QO), 9 Regimental Appeals (AgR)[4], and 2 Motions for Clarification in Regimental Appeals (ED. AgR)[5]. Finally, 10 Extraordinary Appeals (RE)[6], 2 Civil Appeals "ex officio" (ACI)[7], 2 Conflicts of Jurisdiction (CJ), 1 Representation (Rp), and 1 Interlocutory Appeal in an Interlocutory Appeal of an Extraordinary Appeal (AI RE AgR)[8] were located.

The second step was to separate the demands by state. On this point, it was noteworthy that of the 54 decisions analyzed, 35 referred only to the state of Mato Grosso. The others were divided between São Paulo (4), Mato Grosso do Sul (3), Bahia (3), Pará (2), and Amazonas (1). This data becomes even more relevant when considering the time frame since, given the period within which the analyzed decisions were made, that is, from 1951 to 1988, it can be inferred that the majority of conflicts related to indigenous lands were located in the Central-West region of Brazil, corroborating a series of studies which indicate that the Getúlio Vargas government's colonization projects for this region disregarded the indigenous presence in this area[9]. Another influential factor would have been the creation of the Parque Indígena do Xingu (Xingu Indigenous Park), considering that out of the 35 decisions, 30 involved the granting of titles by the Mato Grosso government, and 5 were directly related to conflicts arising from the establishment of the Parque Indígena do Xingu.

The next step consisted of identifying the decisions that faced the merits[10], with only 4 decisions being identified in the universe of 50 demands previously identified[11]. All others dealt only with procedural issues, 11 of which ruled that the STF did not have jurisdiction, referring the cases to State Courts (5), Federal Courts (5) and to the Tribunal Federal de Recursos (Federal Court of Appeals) (1). A

[2]In Portuguese, Mandados de Segurança.

[3]In Portuguese, Ações Cíveis Originárias.

[4]In Portuguese, Agravos Regimentais.

[5]In Portuguese, Embargos de Declaração em Agravo Regimental.

[6]In Portuguese, Recursos Extraordinários.

[7]In Portuguese, Apelações Cíveis *ex-ofício*.

[8]In Portuguese, Agravo Regimental em Agravo de Instrumento de Recurso Extraordinário.

[9]In 1945, the Fundação Brasil Central was created to integrate this region with the rest of the country. Extensive vacant lands in the north of Mato Grosso were allocated to the Fundação Brasil Central, which took on broad territorial management powers over them (Instituto Socioambiental, 2011).

[10]Decisions on the merits in Brazil are decisions that address the conflict presented to the courts, while procedural or formal decisions do not address the controversy and therefore do not resolve the conflict.

[11]For a more complete analysis, all the lawsuits filed during this period will need to be identified, not limiting the research to the decisions, since many lawsuits were judged after 1988.

further 6 judged that the claim should not be heard, while 11 were dismissed without analysis of the merits on the grounds that the matter was complex and required analysis of the evidence (all in MS), and 16 other decisions referred to other procedural issues.

In a preliminary analysis, it is noticeable that the Federal Supreme Court, during this period, acted in an extremely formalistic and procedural manner and consequently had little concern for resolving the conflicts that arose and escalated before the Court, following a more minimalist model in its decisions, as proposed by Sunstein (1999), without worrying about resolving the territorial conflict presented to it.

Regarding the Writs of Mandamus, all were requested by individuals or legal entities against acts of the President of the Republic declaring lands to be of indigenous occupation, with the exception of MS 6344-MT. In this MS, Erico Sampaio, Chief Director of the 5th Regional Inspectorate of the Serviço de Proteção aos Índios (Indian Protection Service), questions the act of the President of the Legislative Assembly of the State of Mato Grosso, who promulgated Law No. 1077, of April 10, 1958, after rejecting the governor's veto, arguing that this law violated acquired rights over lands reserved for the usufruct of Indians since it reduced the areas of land already declared to be of indigenous occupation. In this Writ of Mandamus, the Federal Supreme Court ruled that the interest to be protected was that of the Indians, through their attorneys, and that the Union was not a party to the case, nor was there a conflict between it and the State, declaring that the State Court had jurisdiction to hear the matter (Brasil, 1959).

All other Writs of Mandamus were dismissed on the grounds that there was no proof of original acquisition or of the granting of a title by the state, and that the registration of the property could not in itself constitute an instrument capable of proving the claimants' right over the disputed areas[12,13]. Thus, they repeatedly understood that:

> (...) The transcription of the title of acquisition of property does not, in and of itself, represent a liquid, certain, and indisputable right, since it is subject to challenge; the instrument of acquisition and its transcription constitute a *iuris tantum* presumption, and not a *juris et de jure* presumption (Brasil, 1980a: p. 15).

Thus, the prevailing understanding in the period was that it was only through ordinary action that conflicts over the "occupation of forest dwellers or not" on the lands in dispute could be resolved, disregarding the context of the colonization of these lands.

This understanding was inaugurated in Writ of Mandamus No. 20215, on March 5, 1980, in which UTA Agropecuária S/A and others challenged Decree No. 83.262,

[12]MS 20215 (1980), MS 20234 (1980), MS 20235 (1980), MS 20453 (1984), MS 20515 (1986), MS 20556 (1986), MS 20575 (1986), 20751 (1988), MS 20722 (1988) and MS 20723 (1988).

[13]Exception MS 20227-BA-writ of mandamus. Act of authority not listed in article 119, i, letter i of the federal constitution. Incompetence of the supreme court. Remittance of the case file to the origin (Brasil, 1980b).

of March 9, 1979, issued by President Ernesto Geisel. The Decree increased the limits of Reserva Indígena Pimentel Barbosa (Pimentel Barbosa Indigenous Reserve), in the municipality of Barra do Garças, MT, which was occupied by the Xavante people.

In this judgment, although it did not deal with the merits of the issue, the Supreme Court signaled a third hypothesis, in the sense that the lands in dispute could have three fates: a) to have indigenous occupation recognized, being considered Union property and, therefore, inalienable (Brazilian Constitution, art. 4, item IV); b) to be considered vacant lands and therefore constitute State property (Brazilian Constitution, art. 5, item IV); and c) to be considered "lands not previously occupied by the Indians, but which the Union wishes to reserve for them, in the form of arts. 26 and 27 of the Estatuto do Índio (Indian Statute) (Law n. 6.001, of 19/12/1973, Brasil, 1973), in which case it could be claimed that the Union's ownership must result from a prior indemnification process" (Brasil, 1980a: pp. 13-14).

Also noteworthy is the decision in MS 20234 and 20235, both filed by individuals and legal entities against an act by President João Figueiredo, being Decree 84.337 of December 21, 1979, which set the boundaries of the "Parabubure" Indigenous Reserve, located in the state of Mato Grosso:

> (...) The solution to the controversy between the requestants and the Federal Government depends, therefore, mainly on clarifying matters of fact, through evidence that is not presented in these proceedings, nor could it be proven to be pre-constituted, since it must result from testimonial and even expert evidence, i.e., whether or not these are lands occupied by forest dwellers, integrated into the Union's patrimony and destined for the exclusive possession of its primitive inhabitants, or whether these are lands not previously occupied by indigenous people, but which the Union wishes to reserve for them, in the form of arts. 26 and 27 of the Estatuto do Índio (Law no. 6.001, of 19/12/73), in which case it could be claimed that the Union's ownership must result from a prior indemnification process.
>
> The petitioners themselves understand this, stating that:
>
> The problem, therefore, boils down to discriminating between the lands that the Union reserves for the Indians, so that the necessary and indispensable harmony between forest dwellers, farmers, owners, or squatters is no longer disturbed. Once the discrimination has been made by means of competent legal action, and the obligations arising from indemnifications have been fulfilled, the Indians can easily have access to the areas they need to survive (Brazil, 1980c: pp. 121-122).

It is noteworthy that in these MS 20235 and MS 20234, both decided on June 4, 1980, Justice Cordeiro Guerra, although he "voted" in agreement with the rapporteur, in the sense of denying provision to the case on account of it being a matter of fact that required analysis of evidence, expressed his "apprehension" in both cases in the face of art. 198, §§ 1˚ and 2˚, of the Federal Constitution, initiating the thesis

of the so-called "Copacabana effect".

> I believe that these articles will still "give us a lot of work" because, if interpreted literally, they would have established the confiscation of private property in this country, in rural areas, as long as the administrative authority said that the lands were, at some point, occupied by forest dwellers. (...)
> In my opinion, this can only be applied in cases where the land is actually inhabited by the forest dwellers, because otherwise, we could even confiscate all the lands of Copacabana or Jacarepaguá, because they have already been occupied by the Tamoios. (...) So, without examining the merits of the case, I do not want to deny, and nor should I, that the State has the right to create indigenous reserves, but the Estatuto do Índio itself stipulates that it cannot do so abruptly, without payment, without compensating the holders of the land, the owners of that place (...) (Brazil, 1980c: pp. 123-125).

Next, we come to the four decisions on the merits handed down between 1951 and 1988. They are: RE MS 44.585-MT (1961), ACI 9620-MT (1969), ACO 278-MT (1983), and Rp 1100-AM (1984).

RE MS 44.585-MT was judged on August 30, 1961, and the STF recognized the unconstitutionality of Mato Grosso State Law No. 1.077 of April 10, 1950, which had reduced the area of land that was in the "possession of forest dwellers", confirming the decision of the Court of Justice of Mato Grosso. The area in question referred to the territory of the Kadiweu people, recognized by Law-Dec. No. 54, of April 9, 1931, which was reduced by that law, after measurement by the Delegacia Especial de Terras e Colonização de Campo Grande (Campo Grande Special Land and Colonization Office).

Two important conceptions appeared in this judgment. Firstly, it should be noted that it was not a unanimous decision. Reporting Justice Ribeiro Costa ruled that State Law 1.077/1950 was constitutional, because the indigenous people had not been dispossessed and they still had a considerable area of land of 100,000 hectares, and the reserved lands could be reduced as the indigenous peoples assimilated into the national community:

> (...) I am therefore of the opinion that the lucid understanding of noble Judge Antonio Arruda's losing vote, President of the Court of Justice of the State of Mato Grosso, is correct when he argues (page 60):
> *Data venia*, the constitutional precept cited, refers to the possession where the forest dwellers are permanently located. This means, in my opinion, that the State can legally reduce the area that the Indians no longer effectively occupy. It is well known that the savages gradually assimilate into civilization, thus reducing the areas that they may need for their rudimentary existence. This is what has constantly occurred in the course of our history (Brasil, 1961: p. 470).

Another conception is reflected in the vote of Justice Victor Nunes Leal, who was joined by Justices Gonçalves de Oliveira, Vilas Boas, Cândido Motta, Ary Franco, Luiz Galotti, Hanemann Guimarães, and Lafayette de Andrada.

This conception recognizes the Indians the right to live in their territories, as a people, in order to maintain their culture, recognizing the condition of the subject to the indigenous peoples:

> This is not about common property rights; what was reserved was the territory of the Indians. This area has been transformed into an indigenous park, under the guardianship and administration of the Serviço de Proteção aos Índios, since they don't have the land.
> The aim of the Federal Constitution is for the cultural traces of the former inhabitants to remain there, not only for the survival of the tribe, but also for study by ethnologists and for other effects of a cultural or intellectual nature. What is at stake is not really a concept of possession, nor of dominion, in the civil sense of the words, but the habitat of a people (...) (Brasil, 1961: p. 471).

In ACI 9620-MT, originally brought as a Popular Action by Judge Ernani Lins da Cunha before the 1st Public Finance Court of Cuiabá, in which the nullity of the titles granted by the State of Mato Grosso based on the same State Law No. 1077/1950 was requested, the Ministers also understood that, based on Decree No. 5.484/1928, "The lands reserved for the Cadiuéo Indians belong to the Federal Union (art.10)", combined with Decree-Law 9960 of 1946, which established that Indian lands and military colonies were Union property, so it was not possible for the state to appropriate these lands[14]. However, although rapporteur Amaral Santos recognized the unconstitutionality of this state law, he did not rule on the nullity of the titles. The plenary decision was handed down on March 27, 1969, and was unanimous[15].

The only decision that considered the merits in relation to the Xingu Indigenous Park during this period was that of ACO 278-MT, on August 10, 1983, in which Oswaldo Daunt Salles do Amaral, with the State of Mato Grosso as an active co-party, requested the recognition of the indirect expropriation of his property. The rapporteur, Soares Munoz, accepting the opinion of the official expert, recognized the applicant's titles as valid, because there had been no evidence of Kaiabi indigenous occupation on those lands when they were transferred by the State of Mato Grosso in 1959, considering that the Kaiabi had been brought to the region when the Park was created in 1961 (Brasil, 1983).

As a result, the Supreme Court ruled that only the lands where indigenous people were permanently located in an uninterrupted manner would be part of the Union's patrimony, defining the 1934 Constitution as the defining landmark of this guarantee.

It is important to transcribe part of Justice Munoz's vote, who, even though he voted against the rapporteur, reproduces excerpts of jurist Miguel Reale's opinion

[14]On the occasion of the judgment, Precedent 480 was published, which states that "The lands occupied by forest dwellers belong to the domain of the Union, under the terms of articles IV and 186 of the Federal Constitution of 1967" (Brasil, 1969).

[15]It should be noted that on March 8, 1972, in ACI 9680 MT, proposed by the Head of the SPI's 5th Regional Inspectorate, which requested the nullification of all titles granted on the basis of Law 1077 of 1950, the case was referred to the Federal Supreme Court for necessary re-examination, as the action was deemed admissible. The STF Justices saw no conflict between the Union and the State and sent the case back to the STF (Brasil, 1972).

and expresses concern about the discretion over land:

> (...) the nomadism or mobility of forest dwellers does not, however, authorize the Union to extend ad libitum, by a unilateral act of pure discretion, the area that Article 4, item IV, of the current Constitution confers on it. If we accept that there is no proportional relationship between tribes and the territory they need in order to maintain their own type of life intact and untouchable, there would be no more vacant lands for many states, nor would there be any room for private property (Brasil, 1983: p. 12).

Finally, the fourth decision on the merits, handed down on March 15, 1984, in Representation 1100-AM, concerned the state of Amazonas. The Federal Supreme Court, in the opinion of Justice Francisco Rezek, ruled that State's Law 1427/1980 was unconstitutional, as only the Union had the power to legislate on vacant lands (Brasil, 1984)[16].

Here again, two conceptions were under discussion. Rapporteur Justice Néri da Silveira made a true legal maneuver to rule that the law was constitutional, accompanied by Justice Décio Miranda. But Justice Francisco Rezek dissented and understood that the law was unconstitutional on the grounds of mere formal unconstitutionality. In his view, there was no need to discuss at what time the lands were no longer occupied by indigenous people, only to analyze whether the state could consider former settlements to be vacant. He was joined by Moreira Alves, Djaci Falcão, Soares Munoz, Rafael Mayer, Neri da Silveira, Alfredo Buzaid, Oscar Correa, and Aldir Passarinho (Brasil, 1984)[17].

An analysis of the decisions handed down during this period leads us to conclude that the STF acted in an extremely formalistic manner, reflecting an option for minimalist theory (Sunstein, 1999: p. 5), avoiding, for the most part, decisions that could generate major social repercussions[18]. Furthermore, in the few cases in which the merits of the issue were addressed[19], two (RE MS 44.585-MT and ACI 9620-MT) had the potential to change the factual reality and guarantee that the Kadiweu people would remain on their land, despite losing half of their territory to colonization companies[20]. Even so, the STF made no progress in questioning the

[16]The contested provision was worded as follows: "Art. 15—Vacant lands, under the terms of this law, are those that: a) (...); c) have been the object of the constitution of indigenous settlements, extinguished by the subsequent abandonment of their inhabitants" (Brasil, 1969).

[17]This decision is already an indication that the conflicts were advancing to that region and that the agricultural frontier was extending to the north of the country.

[18]See note 11.

[19]See note 10.

[20]According to the Comissão Nacional da Verdade (CNV), "The very presence of squatters in the Kadiweu reserve, it is known, was the result of the actions and omissions of the SPI and Funai, which acted to 'legalize' the leasing of areas within the indigenous land. State Law 1077/1958 sought to reduce the size of the reserve to 100,000 hectares, which had been established at 1 million hectares after a donation made by Dom Pedro II in gratitude for the indigenous people's participation in the Paraguayan War. Later, Funai itself ended up endorsing a reduction of almost 50%, ratifying the TI with 538,535 hectares in 1981. To this day, the Kadiweu are still fighting to remove invaders who raise cattle on around 150,000 hectares in their area" (Brazil, 2014).

property titles granted to the colonization companies, so the political, economic and social reality regarding the other conflicts established on indigenous lands remained unchanged, considering that the decisions only had an impact on the specific case of the Kadiweu.

Although some decisions have expressed the different conceptions of the surrounding Brazilian society on the treatment to be given to indigenous lands, there has been no significant decision capable of causing any more significant reaction from the parties involved in the conflict, showing a gap in the Court's decisions regarding territorial rights over indigenous lands.

Furthermore, another extremely relevant issue to be highlighted is the total exclusion of indigenous peoples from the demands submitted to the Court. The institute of guardianship and the assimilationist conception prevalent at the time completely excluded indigenous peoples from the possibility of directly defending their rights before the Court, and the representative bodies were unable to carry out this defense consistently. This circumstance hindered a more democratic analysis of these issues by the STF and reflects the invisibility of these minorities in the period prior to the Federal Constitution.

Furthermore, it can be seen that the prevailing view of the STF was that indigenous peoples could not be considered subjects of rights. The decisions reflect almost exclusively, with the exception of the vote cast by Justice Victor Nunes Leal, a merely patrimonial dispute between private individuals, Federated States (almost exclusively Mato Grosso), and the Federal Union[21]. The underlying interest was to define which of these entities had dominion/ownership over the disputed lands, disregarding the indigenous subjects.

On the other hand, it is worth pointing out, considering the paradox surrounding the issue, although it is not the subject of this study, that out of the 7 criminal questions submitted to the Court, all of those that discussed capacity considered the indigenous subject to be fully capable for the purposes of submission to Brazilian criminal law[22]. In other words, for criminal purposes, the indigenous people were considered to be liable to local courts, but when it came time to defend their lands, they didn't have the capacity to do so on their own; they depended on bodies linked to the state to represent them.

It should be noted that in Brazil, according to indigenous historiography, there is a tradition of violations against indigenous peoples dating back to the colonial period (Cunha, 2012). However, the work of the National Truth Commission and the reports presented by some State Truth Commissions (Ex. AM, SP, and PR) in 2014 ended up pointing out that a series of violations against these peoples, including genocide, extermination, murders, forced disappearances, slavery, forced

[21]Justice Victor Nunes Leal was persecuted and forcibly retired in 1969 during the civil-military dictatorship (1964-1988). On that occasion, Justices Hermes Lima and Evandro Lins e Silva also retired. In reaction, Justices Antonio Carlos Lafayette de Andrada and Antônio Gonçalves de Oliveira resigned from their posts and applied for retirement (Paraná, 2017).

[22]See RE 97064, of 24/09/1982; RE 97065/AM, of 26/10/1982; RE 100319-PR, of 30/03/1984; RHC 62327-PB, of 04/12/1984; and RHC 64476, of 10/10/1986.

displacements, illegal arrests, and restrictions on freedom of movement were carried out in the 20th century, especially during the period of investigation of these Commissions, which extended from 1946 to 1988, including the civil-military dictatorship (1964-1988), illegal imprisonment, restrictions on freedom of movement, torture, sexual assault, persecution of indigenous leaders and movements, usurpation of land and property, dispossession, procedures to deny indigenous identity, prohibitions on carrying out certain social and religious practices, including the prohibition of the use of the native language (Brasil, 2014).

It is in this context that the STF's pre-88 decisions on indigenous lands took place, a context of violence, land expropriation, and forced displacement. The report presented by the Comissão Nacional da Verdade (CNV), for the most part, focuses on cases in which development projects for the central-western and northern regions, consisting of the distribution of land through colonizing companies, the exploitation of minerals and timber, and also the construction of major infrastructure works (basically hydroelectric dams and highways), represented a set of violent acts that led to genocide, the extermination of more than 8,000 people and the forced displacement of almost a hundred peoples (Brasil, 2014). It should be noted that despite focusing on the violence practiced by the state by omission, especially from 1946-1968, and by action (1964-1988) (Brasil, 2014), the CNV records the involvement of companies in the violations, whether through direct complicity, indirect complicity or favoritism. The involvement of private individuals and land disputes before the Constitutional Court, which most of the time ended up issuing merely formal decisions, i.e., those that relied on procedural obstacles to avoid deciding on the merits of the claims, represented just one more example of how the STF's decisions in the period followed Sunstein's minimalist line, moving away from the structure proposed by democratic constitutionalism, which seeks to verify the Court's ability to respond to the conflicts presented.

One example is the case of the Kadiweu people, as although the STF decided on the merits and recognized the unconstitutionality of Law 1.077/1950, which made the lands of the Kadiweu Indians vacant, it did not decide on the nullity of the property titles granted and they ended up losing half of their territory (Brazil, 2014). This left a gap in the Court's understanding of the nature of indigenous lands.[23]

5. Decisions Handed Down after October 6, 1988

For the second part of the research, we opted to use a secondary data source, being the research carried out by Erika Macedo Monteiro, entitled "ONHEMOIRÕ: o judiciário frente aos direitos indígenas" (Moreira, 2014). In it, Moreira set out to "verify the actions of the different social forces at work in the judicial sphere, in order to understand which arguments and factors become preponderant at the moment of judicial construction" (Moreira, 2014: p. 22).

[23]In this context, it is possible to extract from the report presented by the CNV, in addition to the Kadiweu, the situation of the Xetá, Xavante, Nambikwara, Tapayuna, Avá-Canoeiro, Waimiri-Atroari and Cinta-Larga. However, practically all the ethnic groups located in the Central-West region have been victims of deterritorialization.

With this, she intended to analyze "how the judicial decision represents a worldview clothed in a procedural rhetoric, which may or may not recognize, tolerate, and guarantee the reproduction of a way of life, in whole or in part, conflicting with one's own way of thinking" (Moreira, 2014: p. 22). Thus, her aim was to verify to what extent these decisions reiterated prejudiced and racist practices, which maintain a notion (be it implicit or explicit) that follows the paradigm of the inferiority of Indians (Moreira, 2014: p. 23).

The research revealed the occurrence of 629 results for the expression "indígenas" (indigenous), which was later reduced to the terms: "pluralismo jurídico"; "diversidade cultural"; "cultura indígena"; "direitos indígenas"; and "usos, costumes e tradições" (legal pluralism, cultural diversity, indigenous culture, indigenous rights, and "uses, customs and traditions", respectively), with 465 results analyzed, under the categories: a) criminal; b) development; c) land and territory; and d) uses, customs and traditions (Moreira, 2014: p. 123).

96 decisions that concerned the STF were identified, of which between 50 and 60 were related to the "land and territory" category, according to the graph presented by Moreira in her study (Moreira, 2014: p. 127)[24]. In her conclusions, Moreira states that, despite the new normative frameworks and the challenges presented to the new model of State, and therefore, of access to justice, the foundations of the old normative-formalist tradition of legal dogmatics have proven to be incompatible and insufficient to deal with the complexity of current conflicts (Moreira, 2014: p. 30). She also points out that efforts should be made to identify other procedural forms for the construction of judicial decisions, as well as for the implementation of justice, which guarantees the incorporation of different worldviews (Moreira, 2014: p. 31).

Thus, she concludes that the judiciary is challenged to think of a model of access to justice that is based on the "recognition of ethnic diversity, of the meanings constituted by each people, in the face of the specific case—be it a conflict between Indians or between Indians and whites, inside or outside indigenous lands" (Moreira, 2014: p. 143). This rules out the possibility of adopting any model that condones the inferiorization or mischaracterization of what it means to be indigenous.

This was also the conclusion of the study carried out by the Federal University of Paraná, with support from the Ford Foundation, entitled Direito, Propriedade e Conflitos: estudo de casos judicializados (Law, Property and Conflicts: a study of judicialized cases). The work presents an analysis of some paradigmatic lawsuits and case studies involving social conflicts related to indigenous peoples, quilombolas, and other traditional communities. The result of this analysis was that "the conflicts brought before the Judiciary also reaffirm the colonial roots of the Brazilian state, the denial of the original rights of traditional peoples and communities over the land, and business strategies on a global scale" (Correa & Santos, 2015: p. 5).

[24]The "land and territory" category is of interest here, given its similarity to the research developed in the previous topic. All types of demands/actions (possessory claims, repossessions, interdicts, demarcations, declarations of nullity, etc.) were also analyzed (Moreira, 2014: p. 126).

Another survey that can be highlighted is the Manual of Jurisprudence on Indigenous Rights, developed by the 6th Chamber of Coordination and Review of the Federal Public Prosecutor's Office in 2019, which brings together the jurisprudence of the STF from 1988 to 2019, as well as decisions of the Inter-American Court of Rights and paradigmatic decisions of other Brazilian courts on indigenous rights (Brasil, 2019a). The data gathered in the aforementioned manual points to the existence of a judiciary attentive to the new times, but still evolving, moving towards "recognizing the aspirations of these peoples to take control of their own institutions and ways of life and their economic development, and to maintain and strengthen their identities, languages, and religions, within the framework of the States where they live", as provided for in Convention 169 of the International Labour Organization (Brasil, 2019a: p. 16).

For illustrative purposes only, in order to highlight the conclusions presented in the aforementioned studies, it is imperative to highlight at least a few decisions considered to be of great relevance to the subject. At the outset, without a shadow of a doubt, it can be said from the reaction caused that one of the paradigmatic judgments in relation to the indigenous issue after the 1988 Federal Constitution took place in 2009. The STF restricted the original rights guaranteed in the Constitution in its judgment of Petition No. 3,388, which concerned the demarcation of the Terra Indígena Raposa Serra do Sol (Raposa Serra do Sol Indigenous Land), located in Roraima.

In this judgment, the STF established that the date for assessing the traditionality of indigenous occupation of their lands would be the day of the promulgation of the Federal Constitution of 1988 (Brasil, 1988), adopting what it called Teoria do Fato Indígena (Theory of the Indigenous Fact), suggested by Justice Menezes de Direito, replacing the "Indigenato" and defining what was called the "temporal milestone" for the demarcation of indigenous lands (Brasil, 2009).

Thus, the indigenous lands to be demarcated would be, in the words of Justice Carlos Ayres Britto, "the lands they traditionally occupy and not those they may occupy. Nor the lands already occupied at other times, but without sufficient continuity to reach the objective milestone of October 5, 1988" (Brasil, 2009: p. 295). On the other hand, in the same decision, the STF also created 19 conditions or "institutional safeguards" related to the demarcation of indigenous lands, including a ban on the expansion of indigenous lands that have already been demarcated.

Despite the fact that it was clarified in the judgment of the Motion for Clarification in Petition No. 3388 that "the decision handed down in a popular action is devoid of binding force, in a technical sense" (Brasil, 2013: p. 2), in the judgment of the Ordinary Appeal in Writ of Mandamus No. 29.087, concerning the Guyraroká indigenous land of the Guarani Kaiowá, in September 2014, the 2nd Panel of the STF adopted the understanding established in Petition No. 3388, to the effect that the temporal milestone for establishing traditional occupation would be the date of the promulgation of the 1988 Federal Constitution.

In this judgment, Justice Ricardo Lewandowski, the appeal's rapporteur, was un-

successful, as he took the view, in line with the jurisprudence of the STF, that a Writ of Mandamus was not the appropriate way to annul the demarcation of indigenous lands, given the complexity of the issue. For his part, Justice Gilmar Mendes, responsible for opening the dissenting vote, understood that it was possible to analyze the validity of the demarcation procedure in the MS, noting that "the temporal milestone is related to the existence of the community and the effective and formal occupation of the land" and that the "jurisprudence of the STF does not understand the word 'traditionally' as immemorial possession" (Brasil, 2014a: p. 25).

In the same vein followed the vote of Justice Cármen Lúcia, stating that the recognition of the traditionality of indigenous occupation only by immemorial possession, in this case, would establish "a serious case of legal insecurity to destabilize the harmony that citizens today enjoy even in urban centers that, in remote times, were occupied by indigenous communities" (Brasil, 2014a: p. 54). In order to do so, they mistakenly evoked Precedent No. 650 of the STF[25], formulated based on the opinion of Justice Nelson Jobim, in the judgment of RE No. 219.983/98.

In this regard, the judgment of RE 219.983, on December 9, 1998, whose rapporteur was Justice Marco Aurélio, is also fundamental, because, in addition to again raising concerns about the so-called "Copacabana effect", Justice Nelson Jobim's vote clearly demonstrates the restriction of the issue to the property dispute[26]. It was concluded at the time that indigenous lands only came under Union dominion with the 1967 Constitution, and Precedent No. 650 of the STF was issued (Brasil, 1998).

Another important decision that restricted indigenous fundamental rights took place in December 2014, in the judgment of Appeal in Extraordinary Appeal 803.462 (ARE 803.462 -AgR/MS), in the case of the Limão Verde Indigenous Land[27]. In this decision, Justice Teori Zavascki annulled the demarcation and affirmed that renitente esbulho (persistent dispossession) could not be confused with past occupation or forced eviction, requiring proof of the actuality of the possessory conflict, again evoking Precedent No. 650 of the STF (Brasil, 2014b).

Here it is worth highlighting the monocratic decisions in Rescission Actions 2686 (2018), 2756 (2019), and 2750 (2019), as well as the decision in ACO 1100 (2016), where Justice Edson Fachin's vote inaugurated the understanding that indigenous communities should be included as legitimate parties to file lawsuits in defense of their rights and interests in cases that affect their lands, given the constitutional provisions that removed indigenous people from a protective-diminutive sphere and recognized them as subjects of rights, which already shows a certain de-

[25]STF Precedent 650: "Items I and XI of Article 20 of the Federal Constitution do not extend to lands of extinct villages, even if occupied by indigenous people in the remote past" (Brasil, 1998).

[26]The Copacabana effect thesis emerged in MS 20235 and MS 20234, both judged on June 4, 1980, when Justice Cordeiro Guerra expressed his concern about recognizing the lands of villages considered extinct as Union land, at the risk of the entire distribution of land in Brazil, such as Copacabana and Jacarepaguá, being questioned (Brasil, 1980c; Brasil, 1980d).

[27]Also that year, in RMS 29.542, with Justice Cármen Lúcia as rapporteur, the same Panel ruled for the nullity of a declaratory ordinance that redefined the limits of Terra Indígena Porquinhos (Porquinhos Indigenous Land), of the Kanela people, in Maranhão (Brasil, 2014c).

gree of influence from external reactions in the STF's decisions (Brasil, 2016).

In the decision granting a precautionary measure in AR 2759 (Brasil, 2019c), Justice Cármen Lúcia's concern about the reaction to her decision can be perceived:

> The climate of violence resulting from the imminent fulfillment of the rescinded decision to the detriment of the indigenous people, with serious consequences for all, shows the configuration of a situation justifying the exceptional measure of anticipation of the effects of the relief sought in this rescission action, considering the plausibility of the allegation of a manifest affront to the legal norm, due to the lack of participation of the indigenous community in the annulment process, resulting in apparent contravention of the constitutional principles of the adversarial process and of full defense (Brasil, 2019b: p. 10).

Similarly, in AR 2750, when Justice Rosa Weber considered granting a precautionary measure, she justified her decision on the "risk of intensification of the conflict in the areas subject to removal of indigenous people" (Brasil, 2020c: p. 23).

In AR 2.686, filed by the Guyraroká indigenous community of the Guarani Kaiowá people, the aim is to reverse the 2014 decision that applied the temporal milestone to deny the Guarani the right to their land. The lack of indigenous participation in the process is one of the main points questioned in the Rescission Action (Brasil, 2021). Not only were the Guarani Kaiowá not summoned to the proceedings, but their admission was twice denied in 2018 on the basis of the "tutelary regime of the Indian" brought up by rapporteur Gilmar Mendes.

According to Rafael Modesto dos Santos, legal advisor to the Conselho Indigenista Missionário (Indigenous Missionary Council) (Cimi) and lawyer for the Guarani Kaiowá in the lawsuit, "the Guyraroka case could be important for establishing a jurisprudence that breaks away from the remnants of the tutelary regime" (Cimi, 2019)[28].

These actions show the capacity of indigenous movements to mobilize in the current scenario, demonstrating organized action against the decisions that established the temporal milestone and reinterpreted the constitutional text. The landmark decision in Petition No. 3.388, which dealt with the merits of the original ownership of indigenous lands, generated a reaction that ended up reversely increasing the possibilities of discussing these rights in the Supreme Court and in other spaces for popular participation, such as the recent creation of the Ministry of Indigenous Peoples.

Finally, given the great reaction to the temporal milestone thesis proposed by the Supreme Court—a thesis that was corroborated in various legislative initiatives originating from the ruralist and anti-indigenous caucus in the National

[28]Keep in mind that the case of the Guarani and Kaiowá was brought before the Human Rights Council of the United Nations (UN) and the Inter-American Commission on Human Rights (IACHR) in 2018. The IACHR classified the situation as a "serious humanitarian situation." In 2019, the Commission adopted precautionary measures in favor of the indigenous people, asking the Brazilian state to take measures to guarantee the right to life and personal integrity of the members of the community (IACHR, 2019).

Congress—consisting of mobilizations, occupations and new strategies for the defense of indigenous rights, the STF recognized, in 2019, general repercussion in RE 1.017.365, which discussed a repossession case brought against the Xokleng people in Santa Catarina (Cimi, 2021).

This General Repercussion was judged in September 2023, when the STF, in a new composition, following the vote of Justice Edson Fachin, revised its understanding of the temporal milestone thesis and rejected the possibility of adopting the date of the promulgation of the Federal Constitution (5/10/1988) as the temporal milestone to define the traditional occupation of lands by indigenous communities. In this judgment, in addition to finding the temporal milestone thesis unconstitutional, the STF set guidelines in Theme 1.031 for the judgment of more than 200 cases that were suspended pending this decision, as well as the Administrative Proceedings suspended due to AGU Opinion 001/2017[29]. This decision, considering its extent and repercussions, is more in line with what democratic constitutionalism proposes, since the historical process for the response offered by the Court is demonstrated.

Such was it that, in a counter-reaction, the National Congress passed Law 14.701/2023, which re-established the temporal milestone. Since then, four actions have challenged the validity of this law (ADI 7582, ADI 7583, ADI 7586, and ADO 86), and another has asked the Supreme Court to declare its constitutionality (ADC 87), with the Supreme Court having set up a Joint Commission between representatives of the three branches of government and civil society to come up with proposals that could bring about conciliation on the issue (Brasil, 2024).

Although this Commission may represent a step forward in increasing intercultural dialogue between the state, surrounding society, and indigenous peoples on the issue of land, it still faces challenges in terms of its legitimacy, since indigenous representatives have already threatened to withdraw from it due to a lack of dialogue.[30] [31]

It should also be noted that the study Agenda dos Direitos Socioambientais no Supremo Tribunal Federal (Agenda of Socio-Environmental Rights in the Supreme Federal Court), in which researchers Eloísa Machado de Almeida, Lívia Gil

[29]After the impeachment of former president Dilma Rousseff, in an arbitrary manner and contrary to the wishes of the indigenous people for demarcation, Opinion No. GMF-05 was approved by Michel Temer, in case file No. 00400.002203/2016-01 of the Federal Attorney General's Office. In this opinion, it is determined that "the entire federal public administration observe, respect, and effectively comply with the STF's decision in the Raposa/Serra do Sol case, which established 'institutional safeguards for indigenous lands'" (Brasil, 2017).

[30]See Ribeiro (2024). Indígenas abandonam negociação sobre o marco temporal no STF. https://www.cnnbrasil.com.br/politica/indigenas-abandonam-negociacao-sobre-marco-temporal-no-stf/

[31]Intercultural dialog, in the legal field, is based on the idea that there should be reciprocity of knowledge in the decisions and constitutional interpretations handed down by the STF, considering the multiethnic nature of Brazilian society, according to Araújo Júnior (2018) "for an intercultural dialog to be effective, it is necessary for each group to bring a point of view, not a truth". There have been attempts to implement these dialogues with the creation of the Situation Room in ADPF 709 and in ADI 7582, ADI 7583, ADI 7586, ADO 86, and ADC 87.

Guimarães, and Luíza Pavan Ferraro, from the Getúlio Vargas Foundation, analyzed 365 actions of constitutionality control exercised by the STF—including those dealing with indigenous lands—concluded that, as of 2019, "the Union begins to be questioned repeatedly in the face of the dismantling of public policies and institutions aimed at protecting socio-environmental rights", citing as an example the recent Supreme Court decision in ADPF 709, "forcing the Union to adopt emergency measures for the indigenous population during the COVID 19 pandemic" (Almeida, Guimarães, & Ferraro, 2020: p. 92)[32].

It should be noted that in 2017 alone, there were 848 movements on these proposals, which indicates that congressmen worked tirelessly to see the 33 anti-indigenous proposals advance (Cimi, 2018: p.13). During this period, the work of indigenous organizations, alongside that of the Cimi, to monitor the actions of the so-called anti-indigenous parliamentary front in the National Congress is worth highlighting. In the publication called "Anti-Indigenous Congress", the Cimi analyzes anti-indigenous policies and the main parliamentarians who act against the rights of indigenous peoples in the National Congress, such as PEC 215/2000, PL 1216/2015, and PL 490/2007. For Cimi, after the 2014 elections, "a project managed by the military, religious fundamentalists, and ruralists was installed in the Brazilian Congress", classifying the legislature (2015-2019) as the most conservative since 1964" (Cimi, 2018: p. 13)[33].

The anger seen in the hate speech of many congressmen demonstrates the reaction to the conquests made by the indigenous movement in the late 1970s and 1980s, embodied in the 1988 constitutional text. But, in fact, there was no single decision to which such a reaction could be attributed, because the Brazilian Court, as has been shown, had made no progress in implementing the constitutional text until the 2023 decision. When called upon to resolve the conflicts that arose, on the contrary, the decision of PET 3388/2009 went backward, and the reaction observed came from the indigenous peoples. The conclusions, therefore, point to the consolidation of a conservative model of interpretation in the face of the paradigmatic rupture of the 1988 Federal Constitution, with extremely rare exceptions.

The observed reaction to this pendulum movement of regression in the interpretation of historically and constitutionally guaranteed rights was felt both in the judiciary and in the legislative and executive branches. In relation to the temporal milestone, the rescission actions were filed on the grounds of the lack of participation of indigenous communities in decisions that directly affected them, with the aim of including indigenous organizations as parties, as already seen. This represented an important turning point in the Supreme Court's handling of cases, since, until 2016, indigenous peoples had been denied this participation.

[32]In this ADPF 709, a mechanism was created that was intended to increase intercultural dialog called the Situation Room, but due to the presence of military personnel in the Coordination of the Room, the indigenous people questioned its legitimacy, according to Godoy, Santana and Oliveira (2021).

[33]A survey carried out by the Cimi identified that, in 2018, there were 33 anti-indigenous proposals being processed in Congress and the Senate. When you add up the proposals that have been joined because they deal with similar issues, they exceed a hundred (Cimi, 2018: p. 13).

In addition, we can mention the important mobilization work being carried out by Indigenous Organizations, such as APIB, Arpinsul, and COIAB, with emphasis on the judicial and political acting of these organizations in the Acampamento Terra Livre (Free Land Camp).

On the other hand, the Relatório Violência Contra os Povos Indígenas do Brasil (Report on Violence Against the Indigenous Peoples of Brazil), published annually by the Indigenous Missionary Council (Cimi), has shown that violence against indigenous peoples continues, with encroachment on their territories, invasions, illegal exploitation of natural resources, and various types of property damage. In addition, President Lula's government has not been able to make as much progress in demarcations as was expected, considering only 8 lands have had their demarcations approved since the beginning of 2023 (Cimi, 2024: p. 41).

Added to this is the absolute erasure of the conclusions and recommendations of the Comissão Nacional da Verdade (National Truth Commission) (CNV) Report, which officially recorded the practice of serious violations against indigenous peoples in the period between 1946 and 1988 and recommended a series of measures to be implemented by the Brazilian state (Nuzzi, 2019; IACHR, 2021).

Furthermore, the signs that the Brazilian state's indigenist policies, especially in terms of access to justice, indicate a regression to the integrationist ideals of the past, which disregarded the condition of the indigenous subject, the right to be and remain indigenous, with respect for customs, languages, and traditions, can be seen in the analysis of the decisions referred to in the previous topic – with emphasis on the recent discussion about the capacity of the individual and collective indigenous subject to be in court, as well as the failure of initiatives such as the situation room in ADPF 709 and the criticism of the Joint Commission in the actions discussing the constitutionality of Law 14.701/2023.

The counter-recognition of the indigenous subject's right to be different and the few decisions that have effectively redistributed land have provoked fierce attacks from the "internal colonial" elite, represented by sectors of agribusiness, who are afraid of losing their properties and privileges. This movement comprises an organized attack on indigenous peoples and their way of life.

6. On the Nature of the Conflict

From the analysis of the data collected and analyzed, it can be said that the nature of the conflicts brought before the STF shows that, rather than a dispute over the possession or ownership of land, there is a confrontation between two completely disparate conceptions of nature, land, property, and State. In this respect, two particularly significant demands stand out, demonstrating the procedural use of the law to reproduce a colonial matrix internally and impose this conception on native peoples.

In October 2020, the Federal Supreme Court ruled on the oldest lawsuit pending before that Court, Original Civil Action 304, which had been filed in 1981 by Agropecuária Serra Negra Ltda[34]. The lawsuit requested compensation from the

[34]Survey by the newspaper Metrópoles, carried out on October 19, 2020 (Schuquel, 2020).

Federal Government for the indirect expropriation of property of 353.40 ha, remaining from the Fazenda Divina Graça, when establishing the limits of the Parabubure Indigenous Reserve, in the state of Mato Grosso, destined for occupation by the Xavante people (Schuquel, 2020).

The vote cast by Justice Ilmar Galvão, after 20 years (15/05/2002), was to recognize indigenous possession of the land and dismiss the initial claim. On the same date, Justice Nelson Jobim asked to review the case, but never voted, having retired before then.

The case remained on hold awaiting judgment by the plenary until, on March 13, 2016, Justice Cármen Lúcia voted in the sense that, although the STF's jurisdiction to judge the action had already been admitted, "the jurisprudence of the Federal Supreme Court has evolved to establish that the provision of article 102, inc. f, of the Constitution of the Republic is only configured when the matter raised in the case may result in a real federative conflict", recalling that in the 1980s and 1990s, the Supreme Court had declined jurisdiction to hear dozens of actions for compensation for indirect expropriation that had been filed by private individuals against the Union and FUNAI, with the state of Mato Grosso joining the lawsuit, because its lands were encompassed by indigenous reserves (Brasil, 2020d)[35]. In other words, countless lawsuits have not been submitted to the STF due to the reduction in the concept of federative conflict, which excludes questions about strictly property interests in disputes between federated entities.

Justice Cármen Lúcia voted in a more "formalist" direction, taking the view, in line with countless STF judgments, which she lists exhaustively, that the case in question was not among those listed as falling within the ordinary jurisdiction of that Court.

The case remained on hold for many years until it entered the plenary agenda. In a vote, Justice Edson Fachin, making a broad distinction between vacant lands and indigenous lands, corroborated Justice Ilmar Galvão's arguments, finally proposing that the company's claim be denied. The decision was then handed down by a majority on the grounds that there was no just title that would give rise to the plaintiff's right to compensation since the titles had been granted by the State of Mato Grosso over indigenous lands, as established in the Federal Constitution of 1891. Justices Cármen Lúcia, Celso de Mello, Rosa Weber, and Dias Toffoli were defeated (Brasil, 2020d).

The judgment of this case in 2020 represents an evolution in the Supreme Court's understanding of indigenous lands, but it still demonstrates the internal dispute between members of the Court who are attached to formal issues that do not con-

[35]Original Civil Action n. 318/MT (1987), Original Civil Action n. 377/MT, 6.12.1991. In the same vein, the Plenary judged ACO n. 385/MT, 20.5.1988; ACO n. 410-QO/PA, DJ 30.4.1990; and ACO n. 343-QO/MT, DJ 26.4.1991.Ação Cível Originária n. 363/MT 4.9.1992, Agravo Regimental na Ação Cível Originária n.1.802/MS 31.7.2013, PDJ 20.05.2013, Plenário na ACO n. 644-AgR/GOACO 1295 AgR-14/10/2010, 20.3.2012, ACO 359 QO, 04/08/1993, in 29.2.2012, Agravo Regimental na Ação CivilOriginária n. 1.551/MS.

front the merits of the question.

The issue raised in this case originated in 1960, when the state of Mato Grosso granted the title of the disputed land to the plaintiffs, but was submitted to the STF in 1981, when the reserve was created. It took forty years of processing before the Supreme Court finally recognized the nullity of the title granted in 1960.

According to the survey, a large part of the court's jurisprudence related to the matter originated in territorial conflicts in the state of Mato Grosso, a fact that was even recognized in the judgment.

Another action that stands out because it is related to the granting of vacant lands by the state of Mato Grosso to private ownership by colonization companies is ACO 79, filed by the Union in 1959, which was only judged in 2012 (also the court's oldest at that time, having been processed for 43 years)[36]. The action is extremely emblematic and is of particular interest to this study, as it highlights the major conflict underlying all these issues. This action, in itself, would require a separate article; in it, some Justices question the very legitimacy of the STF to deal with the issue, given the repercussions of the decision, since it begins with a provocation from a Parliamentary Commission of Inquiry set up by the National Congress. However, the STF went on to decide, based on the fait accompli, that the titles granted by the colonization companies that operated in the state of Mato Grosso were valid, ignoring the diversity of other issues involved and explicitly cited in the votes cast by Justices Ricardo Lewandowski, Ayres Brito, and Marco Aurélio de Melo. At the time, the Justices considered that the situation had already been consolidated and that the nullity of the concessions on merely formal grounds, being the lack of authorization from the Senate, would not justify declaring the titles null and void (Brasil, 2012).

However, in order to demonstrate the nature of the conflict, we quote part of the vote of Justice Ricardo Lewandowski, in which he points out the STF's lack of legitimacy to decide, supporting this condition in the impact of the decision on indigenous lands, the environment, and border lands:

> Mr. President, within this concern of the eminent Justice Rosa Weber, and this is the reason why I posed the question to you, perhaps it would be convenient, I think, for us to simply endorse your vote, as it was cast, in the sense of saying that, in fact, we validate the initial act of concession, without commenting on the nature of the titles, because, in addition to these areas, these properties may eventually coincide with indigenous areas, they may be located in environmental areas, of permanent preservation, and subject to other conflicts. And, as we settle the ownership, the domain, by a decision of the Plenary of the Supreme Court, in the other actions that have already been filed, and others that may be filed, we will have great difficulty in eventually rec-

[36]Plaintiff: Federal Union. X defendants: Estado de mato grosso, empresa colonizadora rio ferro ltda, cia. Comercial de terras do sul do brasil, construções e comércio camargo corrêa, cia. Pan-americana de administração, sociedade melhoramentos irmãos brunini ltda. And others, cia. De terras de aripuanã and others (Brasil, 2012).

onciling these conflicting situations. (Brasil, 2012: p. 38).

And on:

> Mr. President, I'm going to ask Your Excellency and those learned Justices who accompanied you to give me their permission. I will judge the action to be admissible. I think there is an absolutely irremediable original defect; we are talking about forty thousand square kilometers of land that we are validating. Mato Grosso do Sul and Mato Grosso are lands—the states—known to have problems with indigenous lands, environmental problems, the wetlands of Mato Grosso, borderlands. I, for one, don't feel comfortable regularizing, in a Supreme Court decision, this entire extensive area, which is equivalent, as you rightly pointed out, to twice the size of the state of Sergipe. I don't have any concrete, factual data to better assess the situation. Of course, I do not exclude Your Excellency's learned observations regarding the principle of legal certainty, of trust, of maintaining situations that have already been consolidated, but this the Union, together with the states of Mato Grosso and Mato Grosso do Sul, will know perfectly well how to resolve in specific cases. So, with Your Excellency's permission and congratulations on your study of the issue, I consider the action admissible (Brasil, 2012: p. 76).

In the same vein, Justice Ayres Britto points out his concern about the human tragedies arising from this decision:

> Mr. President, I renew my compliments to you for the consistency of the study that you, as rapporteur, have offered us. But I understand that the case comes to us surrounded by a cloudy atmosphere as to the real beneficiaries of these public lands, whether they are real settlers, companies, even economically portentous ones, or NGOs; a cloudy atmosphere as to the very legal nature of the acts formally signed. There is a back-and-forth of information here in the case file that makes me unsure of the true facts. From the point of view of human dramas, as our decision to uphold the law will imply the return of these lands to the Public Power itself, the Public Power, in partnership—State, Municipalities, Union—will manage these remaining issues from a perspective of social justice, of sensitivity, for situations that have been definitively constituted. That's why I'm going to follow the dissenting opinion, begging the pardon of those who think differently, such as Your Excellency (Brasil, 2012: p. 77).

Thus, once again, the interests of indigenous peoples, other traditional populations, and nature were excluded, and it was also ignored that the issue had already been submitted to the Legislative Branch through a Parliamentary Commission of Inquiry.

7. Two Conceptions of Nature, Land, and State

Understanding the different historical processes that have led national societies

and indigenous societies to establish completely different relationships with nature is the essential starting point, as already mentioned, for understanding the importance of traditional territories for the latter, as well as their relationship with the organized form of State.

While the construction of modern rationality established a clear separation between man and nature, relegating land to the role of a commodity, in indigenous and traditional societies, especially in Latin America, land represents much more than a simple means of subsistence. It forms the basis of the means of production and establishes social relations.

Modern Eurocentric rationality, according to Souza Filho (2018), in order to build civil society, denied and deconstructed the collective rights of these people and established the exclusivity of individual rights, attributing the legal maintenance of collective rights or their disregard as the distinguishing mark between civil society and so-called natural society.

This was the basis for the development of national states, founded on constitutional models that recognized property as the basis of all rights and, more than that, the foundation of law itself (Souza Filho, 2003: p. 28). In this way, "property becomes a fact of reality, absolute and indefinable and of cogent protection for capitalist constitutions and constitutional states" (Souza Filho, 2003: p. 35). As a result, nation-states emerged and were organized into constitutions to defend this property and the system of production that surrounded it.

The land has always been seen as "a collective good, generously offered by the ancestors who discovered its secrets and a necessary legacy to the heirs who would perpetuate it" (Souza Filho, 2003: p. 50). Therefore, the modern model of individual ownership has not been adopted by indigenous peoples, even today when they find themselves surrounded by expanding national societies, often suffering dramatic reductions in their traditional territories and having to carry out a new task, which is the defense of the boundaries already defined, the land that remains to them continues to be the object of communal ownership or possession (Ramos, 1988: p. 14).

Individual appropriation is restricted to goods for personal use, and when there is a scarcity of natural resources to guarantee subsistence, this scarcity is shared by all (Ramos, 1988: p. 16). According to Ramos (1988: p. 17), when there is sociopolitical inequality in these societies, it "does not occur at the cost of economic deprivation of some for the benefit of others; it is generally linked to social, political, or ritual privileges that do not involve the disproportionate accumulation of material goods or differential access to natural resources".

In this way, the various indigenous societies are constituted under a different logic, with distinct forms of social organization that do not resemble those of national states focused on individualism and private property. These are basically egalitarian societies that reject the idea of State.

In this respect, the Guarani's search for a land without evil, classified by Ramos (1988: p. 87) as a kind of messianic movement, may, based on a particular inter-

pretation of this migratory process by Pierre Clastres, represent the opposition of this egalitarian society to the emergence of the State, which uses religion as a mechanism for preserving the former and rejecting the latter:

> The messianic movements of these peoples, occurring in cycles, corresponded to the confrontation between the emergence of a centralized government, resulting from concentrated growth and population concentration, and the rejection of this centralization of power by the egalitarian values of these societies. Thus, when a political leader came to dominate several villages and showed signs of exercising certain privileges, such as the exclusive use of force, a prophet arose who was able to mobilize the population against this leader, looking for other places where there was no domination or coercion, in short, a land without evil. The effect of this was the fragmentation of a large political unit and the resettlement, elsewhere of practically autonomous, decentralized communities, where the form of government was dictated by the principle of persuasion rather than coercion. These cycles of alternation between centralization and decentralization, between social inequality and egalitarianism, are seen by Clastres as an escape from domination and exploitation before they were definitively established, a struggle by society against the possible emergence of the state, a struggle that was already underway before the Portuguese arrived on the Atlantic coast (Ramos, 1988: p. 87).

Over time, due to the series of violations suffered by the Guarani and the consequent reduction of their territories, as well as the almost absolute degradation of the remaining spaces outside Conservation Units, this search for a land without evil became the search for a land free from white people and environmentally preserved (Ramos, 1988: p. 88).

Each people, therefore, has its own organization, alien to the surrounding nation-state, with its own rules, autonomy, and self-determination.

However, according to Souza Filho, it is not necessary for national states to incorporate the institutes, rules, and procedural forms of each people into their legal system, but they must guarantee the existence of the people and respect the autonomy and determination in the territory of each one, understanding and obeying the existing jusdiversity (Souza Filho, 2021: p. 29).

8. Final Considerations

Thus, transposing to Latin American lands, being progressive consists of radically recognizing the differences between different peoples, as well as their different conceptions of nature, land, property, and State. There is no way we can start from the same concept of recognition proposed by Post and Siegel, when they propose recognition as equals, gathered under the mantle of the nation-state. It must be considered that the indigenous movements' disputes for recognition, in general, are not within the liberal model—they are at the root of the economic system, because they are anti-colonial reaction movements.

In this way, access to justice must be interpreted in the light of the pluriethnic (Santana, Terena, & Modesto, 2021) or sociodiverse (Souza Filho, 2021: p. 7) context, considering that today Brazil has more than 305 people speaking more than 274 indigenous languages, as well as quilombola communities and other traditional societies. Thus, the dispute over the meanings attributed to the constitutional text must also be open and fully made possible in an intercultural way for indigenous peoples, respecting the social organization and each people's own way of seeing and understanding the world (Santana, Terena, & Modesto, 2021).

On the other hand, to be conservative is not limited to the supremacy or originality of the constitutional text, nor to morally conservative ideals. To be conservative is to reproduce in judicial decisions the colonial model's logic of exploitation of land and people, in its own forms of internal colonialism (Stavenhagen, 1963). To be conservative is to enable the maintenance of a capitalist world system that commodifies relationships and only gives rights to those who are able to produce economically.

Thus, it is impossible, in the way it has been proposed and organized, to give the Federal Supreme Court the legitimacy to decide the conflict between two extremely different conceptions of social organization and relations with nature and modes of production, because there are no parameters of material equality, nor even of understanding of the State, Law, and Constitution, that would guarantee it the necessary democratic legitimacy. It is not possible to gauge the popular values and ideals at stake in this issue, since there is a lack of historically constructed social interaction and sharing of these conceptions in the public space, since only in 2016 were indigenous people able to directly claim their rights before the Supreme Court, but still within the logic imposed by the state.

Although the participation of numerous amici curiae, who provide this vision in the STF's judgments, has grown in recent years, it should be noted that, as recently as 2018, the capacity of indigenous communities to be heard in court was discussed (Brasil, 2019b). Thus, if even the guarantee of directly claiming one's rights was not guaranteed, what about the desired intercultural dialogue needed to legitimize decisions of this nature? Nor is there the necessary representativeness in the Court of a State that claims to be plural, as there are no indigenous Supreme Court Justices, although their nominations are political choices.

Plurinationality is a fact of life in Latin American states. Thus, like sociodiversity and jusdiversity, although the power of the anti-colonial reaction is recognized, there are still not enough mechanisms for dialogue—as demonstrated by the initiatives of ADPF 709 and the lawsuits challenging the constitutionality of Law 14.701/2023—to enable indigenous peoples to attribute the necessary democratic legitimacy to the constitutional text, dialoguing with the colonial counterreaction. In this way, when we deal with issues related to indigenous peoples, it is not simply a question of a dispute between progressives and conservatives, as we generally see in the decisions of the US Supreme Court, it is a question of con-

fronting the very concept of the State.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

References

Almeida, E. M., Guimarães, L. G., & Ferraro, L. P. (2020). *Agenda dos direitos socioambientais no Supremo Tribunal Federal*. FGV Direito. https://repositorio.fgv.br/server/api/core/bitstreams/c960f947-37d7-4665-ad6e-26c826f303d4/content

Araújo Júnior, J. J. (2018). *Indigenous Territorial Rights—An Intercultural Interpretation* (389 p.). Processo.

Brasil (1959). *Supremo Tribunal Federal. MS 6344-MT*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=83084

Brasil (1961). *Supremo Tribunal Federal. RE MS 44.585-MT*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=144244

Brasil (1969). *Supremo Tribunal Federal. ACI 9620-MT*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=25054

Brasil (1972). *Supremo Tribunal Federal. ACI 9680-MT*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=25106

Brasil (1973). *Lei n˚ 6.001/73 (Estatuto do Índio)*. Diário Oficial da União. https://www.planalto.gov.br/ccivil_03/leis/l6001.htm

Brasil (1980a). *Supremo Tribunal Federal. MS 20215-7/MT*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85026

Brasil (1980b). *Supremo Tribunal Federal. MS 20227-BA*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85035

Brasil (1980c). *Supremo Tribunal Federal. MS 20234*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85037

Brasil (1980d). *Supremo Tribunal Federal. MS 20235*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=85038

Brasil (1983). *Supremo Tribunal Federal. ACO 278-MT*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=266042

Brasil (1984). *Supremo Tribunal Federal. Representação 1100-AM*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=263874

Brasil (1988). *Constituição da República Federativa do Brasil*. https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

Brasil (1998). *Supremo Tribunal Federal. RE 219.983*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=248790

Brasil (2009). *Supremo Tribunal Federal. Petição 3.388*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=630133

Brasil (2012). *Supremo Tribunal Federal. ACO 79*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=2073053

Brasil (2013). *Supremo Tribunal Federal. Embargos de Declaração na Petição 3.388*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=5214423

Brasil (2014). *Comissão Nacional da Verdade. Relatório Nacional da Comissão da Verdade*.

CNV.

Brasil (2014a). *Supremo Tribunal Federal. Recurso Ordinário em Mandado de Segurança n.˚ 29.087*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=6937880

Brasil (2014b). *Supremo Tribunal Federal. ARE 803.462-AgR/MS*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7734834

Brasil (2014c). *Supremo Tribunal Federal. RMS 29.542/DF*. Diário Oficial da União. https://jurisprudencia.stf.jus.br/pages/search/sjur284414/false

Brasil (2016). *Supremo Tribunal Federal. ACO 1100*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=777525074

Brasil (2017). *Parecer n.˚ GMF-05. Processo n.˚ 00400.002203/2016-01*. Advocacia-Geral da União. https://www.planalto.gov.br/ccivil_03/AGU/PRC-GMF-05-2017.htm

Brasil (2019). *Supremo Tribunal Federal. AR 2759*. Diário Oficial da União. https://portal.stf.jus.br/processos/downloadPeca.asp?id=15342737027&ext=.pdf

Brasil (2019a). *Ministério Público Federal. Manual de Jurisprudência dos Direitos Indígenas. Brasília/DF, 6ª Câmara de Coordenação e Revisão, Populações Indígenas e Comunidades Tradicionais*. https://www.mpf.mp.br/atuacao-tematica/ccr6/documentos-e-publicacoes/manual-de-atuacao/manual-de-jurisprudencia-dos-direitos-indigenas.pdf/view

Brasil (2020c). *Supremo Tribunal Federal. AR 2750*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=753953097

Brasil (2020d). *Supremo Tribunal Federal. ACO 304*. Diário Oficial da União. https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=755925097

Brasil (2021). *Supremo Tribunal Federal. AR2686-Agr/DF*. Diário Oficial da União. https://jurisprudencia.stf.jus.br/pages/search/sjur445445/false

Brasil (2024). *Supremo Tribunal Federal. Entenda as audiências de conciliação do STF sobre a lei do Marco Temporal*. https://noticias.stf.jus.br/postsnoticias/entenda-as-audiencias-de-conciliacao-do-stf-sobre-a-lei-do-marco-temporal/

Conselho Indigenista Missionário (Cimi) (2018). *Congresso Anti-Indígena: Os parlamentares que mais atuaram contra os direitos dos povos indígenas*. https://cimi.org.br/congressoantiindigena/

Conselho Indigenista Missionário (Cimi) (2019). *STF julgará recurso que busca reverter anulação da Terra Indígena Guyraroka*. https://cimi.org.br/2019/06/stf-julgara-recurso-anulacao-terra-indigena-guyraroka/

Conselho Indigenista Missionário (Cimi) (2021). *Após mobilização dos povos indígenas, STF retoma julgamento que define o futuro das demarcações no país*. https://cimi.org.br/2021/06/apos-mobilizacao-povos-indigenas-stf-retoma-julgamento-futuro-demarcacoes-pais/

Conselho Indigenista Missionário (Cimi) (2024). *Relatório Violência Contra os Povos Indígenas do Brasil—Dados de 2023*. https://cimi.org.br/wp-content/uploads/2024/07/relatorio-violencia-povos-indigenas-2023-cimi.pdf

Cunha, M. C. (2012). *Índios no Brasil: História, direitos e cidadania*. Claro Enigma.

Dantas, I. C., & Fernandes, B. G. (2019). Constitucionalismo democrático: Entre as teorias populares do constitucionalismo e um novo aporte do papel das cortes na democracia. *Revista da Faculdade de Direito UFPR, 64,* 61-88.

https://doi.org/10.5380/rfdufpr.v64i2.62962

Gediel, J. A. P., Corrêa, A. E., & Santos, A. M. (2015). Direitos em conflito: Movimentos sociais, resistência e casos judicializados. *Estudos de Casos Judicializados, 1,* 66-91.

Godoy, M. G. d., Santana, C. R., & Oliveira, L. C. d. (2021). STF, povos indígenas e Sala de Situação: Diálogo ilusório. *Revista Direito e Práxis, 12,* 2174-2205. https://doi.org/10.1590/2179-8966/2021/61730

IACHR (Inter-American Commission on Human Rights (Washington)) (2019). *Resolução 47/2019. Concede medidas cautelares em favor dos membros da comunidade Guyraroká do Povo Indígena Guarani Kaiowá. Resolução de 19 de setembro de 2019*. OAS. https://www.oas.org/pt/cidh/prensa/notas/2019/244.asp

IACHR (Inter-American Commission on Human Rights (Washington)) (2021). *Organização dos Estados Americanos (org.). Situação dos Direitos Humanos no Brasil* (207 p.). OAS. http://www.oas.org/pt/cidh/relatorios/pdfs/Brasil2021-pt.pdf

Instituto Socioambiental (2011). *Almanaque Socioambiental Parque Indígena do Xingu: 50 anos/Instituto Socioambiental (ISA)*. Instituto Socioambiental. https://www.socioambiental.org/sites/blog.socioambiental.org/files/publicacoes/10380_0.pdf

Moreira, E. M. (2014). *ONHEMOIRÕ: O judiciário frente aos direitos indígenas*. Tese de Doutorado em Direito, Universidade de Brasília, PPGD. https://repositorio.unb.br/handle/10482/15760

Nuzzi, V. (2019). *Núcleo para monitorar recomendações da Comissão da Verdade será "pedra no sapato do Estado" Rede Brasil Atual.* https://www.redebrasilatual.com.br/politica/2019/09/nucleo-para-monitorar-recomendacoes-da-comissao-da-verdade-sera-pedra-no-sapato-do-estado/

Paraná, Comissão Estadual da Verdade do Estado do (2017). *Relatório Final da Comissão Estadual da Verdade—Teresa Urban, 2017*.

Post, R., & Siegel, R. (2004). Popular Constitutionalism, Departmentalism, and Judicial Supremacy. *California Law Review, 92,* 1027-1044. https://doi.org/10.2307/3481316

Post, R., & Siegel, R. (2007). *Roe Rage: Democratic Constitutionalism and Backlash*. Harvard Civil Rights-Civil Liberties Law Review, 2007; Yale Law School, Public Law Working Paper N. 31. http://ssrn.com/abstract=990968

Ramos, A. R. (1988). *Sociedades Indígenas*. Ática.

Ribeiro, L. (2024). *Indígenas abandonam negociação sobre o marco temporal no STF*. CNN, Brasília, 28 ago. 2024. https://www.cnnbrasil.com.br/politica/indigenas-abandonam-negociacao-sobre-marco-temporal-no-stf/

Santana, C., Terena, L. E., & Modesto, R. (2021). *Os povos indígenas e o acesso à Justiça: O caso Guyra Roká na pauta do Supremo*. JOTA. https://www.jota.info/artigos/povos-indigenas-acesso-justica-guyra-roka-stf

Schuquel, T. (2020). *Com caso da princesa Isabel encerrado, veja as 6 ações mais antigas no STF*. Metrópoles. São Paulo. https://www.metropoles.com/brasil/justica/com-caso-da-princesa-isabel-encerrado-veja-as-6-acoes-mais-antigas-no-stf

Souza Filho, C. F. M. (1999). *O Renascer dos Povos Indígenas para o direito* (2˚ tir.). Juruá.

Souza Filho, C. F. M. (2003). *A função social da terra*. Sérgio Antonio Fabris Editor.

Souza Filho, C. F. M. (2018). Marco Temporal e Direitos Coletivos. 2017. In M. C. Cunha, & S. R. Barbosa (Eds.), *Direitos dos Povos indígenas em disputa* (75-100). Editora UNESP.

Souza Filho, C. M. d. (2021). Jusdiversidade. *Revista Videre, 13,* 8-30.

https://doi.org/10.30612/videre.v13i26.13934

Stavenhagen, R. (1963). Clases, colonialismo y aculturación en América Latina. *América Latina-Revista do Centro Latinoamericano de Ciencias Sociales, México, 6,* 63-104.

Sunstein, C. (1999). *One Case at a Time: Judicial Minimalism on the Supreme Court*. Harvard University Press.