Principles as Guiding Lights and the Performance Moments for stabilizing indigenous possessory rights in Brazil.

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ABSTRACT

This study proposes a methodological reflection on the problem raised in the Extraordinary Appeal 1.017.365/ SC, through which the Federal Supreme Court (Brazil) considers the definition of the legal-constitutional statute of the territories of traditional indigenous settlement as a matter of general repercussion. Is it possible to say that there is a conflict between two opposing narratives: traditionality *versus* temporality. To shed light on this issue, we count on Drucilla Cornell and her "Philosophy of the Limit". This philosophy provides a deconstructionist and diachronic analysis of the legal system by promoting the genealogical reconstruction of the problem and the hierarchical relations involved. According to Cornell, legal interpretation is both a discovery and an invention of the solution through the normative orientation of principles, which act as guiding lights. Principles help us to avoid paths that go against their intended purpose, which allows us to handle differences and disputes through the legal system. Despite that, there are several external complexities raised by the parties involved that draw attention to the "Performance Moments", which means the moments for the presentation of different arguments by the different actors involved (not only lawyers but also other interested third parties) to the audience(s), in a responsible way for the intended effects and sensitive to the impressions received. This is a clear allusion to the metaphor of "Law as Performance" developed by Sanford Levinson and Jack Balkin, though with some differences, as their developments focus on the performance of jurists, especially in the role of interpreter/judge. At the same time, the present work also seeks to explore the "responsibilities in performances" of the other actors involved.

KEYWORDS

Indigenous Possessory Rights; Philosophy of the Limit; Law as Performance; Traditionality; Timeframe.

Introduction

Considering the inevitability of living in society, in its plurality of conflicting values and notions of a good life, it is important to pay attention to the "rival narratives" that wish to legitimize themselves through Law. The

conflict of narratives that we face in this essay is about the different interpretations of the right to indigenous possession over traditionally occupied lands in the brazilian context, which is based on article 231 of the brazilian Federal Constitution of 1988.

On the one hand, there is the defense of the "original right thesis" or the "indigenous-born thesis", which recognizes that the right over land comes from the very condition of nativity relative to indigenous peoples. For this reason, the right to land is permanent, unavailable, imprescriptible, and necessary for the well-being of these communities, for their physical and cultural reproduction, and is not and cannot be limited by a matter of time.

On the other hand, there are landowners and rural producers who feel that they carry the country economically "on their shoulders" and, even in the face of the constitutional text, bet on the so-called "time frame thesis" so that only the indigenous communities settled on their lands since October 5 of 1988 can maintain their occupations, except in cases of proof of persistent dispossession and physical violence. This is because they fear that indigenous territories will "expand without limit," which would put their private properties at risk. For this reason, they believe that this is the only thesis capable of reconciling the various conflicting interests and bring about social peace.

This conflict, despite having always existed in the history of Brazil, is highlighted by the Extraordinary Appeal nº. 1.017.365/SC being judged by the Federal Supreme Court of Brazil, with two votes already given, both in opposing directions to each other. Nevertheless, we must remember the participation of the various stakeholders in the dispute in addition to state entities, which includes the non-governmental organizations involved that participate by providing their opinions. It is, therefore, beyond considering the colonial past of violence and discovering the principles of justice that it requires for the future yet-to-come, that is, for the invention of the decision, with the help of Drucilla Cornell in her deconstructivist and diachronic approach of the time of the legal system in the "Philosophy of the Limit". However, it is necessary to consider the performances involved, aimed at achieving its desired results through the mobilization of interpretative possibilities of the text in an appealing way to the audiences involved, which includes the contributions of Sanford Levinson and Jack M. Balkin specifically through the metaphor "Law as Performance", which intends to emphasize the responsibility of the interpreters before the affected audiences, allowing to identifying which interpretations manage to

be more responsible, for "what" and for "whom" exactly, without neglecting the demands of justice implicit in each one of them.

However, it is important to warn that this study is not intended to exhaust the formal and preliminary points of the legal action in question. The focus is on the debate around the material rights involved, which are essential for the strengthening and material cohesion of the Brazilian legal system, since there are thousands of demarcation procedures without a unified legal solution, which has already caused severe instability and conflict. So, it is crucial to carry out a documental investigation of the decisions and its oral arguments, that is, of the performances, as well as of the legal materials summoned for the problem, in a way that is related to the bibliographical review mentioned, through a dialectical approach that dialogues with different points of view in question.

1. The original case

> Article 231. Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property.
>
> Paragraph 1. Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions.

The problem in question is being treated through the Extraordinary Appeal nº 1.017.365/Santa Catarina, which was unanimously submitted to the General Repercussion System because of the social, political, economic and legal relevance of the case, which significantly transcends the individual interests of the parties involved. For this reason, the Federal Supreme Court of Brazil, through the analysis of this appeal, will have to define the legal-constitutional status of the possession of areas of traditional indigenous settlement in the light of article 231 of the Brazilian Federal Constitution of 1988 (Brazil 2019, 1-28).

It is possible to say that the problem, in general terms, is divided between "two rival narratives": the so-called "timeframe thesis", which recognizes the right of indigenous peoples to claim lands only if they prove their occupation since before the enactment of the 1988 Constitution, or if they prove the existence of physical violence for its withdrawal. On the other hand, there is the so-called "original right thesis", or the "indigenous-born thesis", which recognizes that the right over land derives from the very condition of native people. In this sense, the right to land is permanent, indisposable and necessary for the well-being of native communities, for their physical and cultural reproduction, which cannot be limited by a matter of "time", even more so considering the past of violence non-erasable and recurrent in the history of Brazil.

That constitutional provision reads as follows:

> Paragraph 2. The lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein.
>
> Paragraph 3. Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law.
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> Paragraph 4. The lands referred to in this article are inalienable and indisposable and the rights thereto are not subject to limitation.
>
> Paragraph 5. The removal of Indian groups from their lands is forbidden, except ad referendum of the National Congress, in case of a catastrophe or an epidemic which represents a risk to their population, or in the interest of the sovereignty of the country, after decision by the National Congress, it being guaranteed that, under any circumstances, the return shall be immediate as soon as the risk ceases.
>
> Paragraph 6. Acts with a view to occupation, domain and possession of the lands referred to in this article or to the exploitation of the natural riches of the soil, rivers and lakes existing therein, are null and void, producing no legal

> effects, except in case of relevant public interest of the Union, as provided by a supplementary law and such nullity and voidness shall not create a right to indemnity or to sue the Union, except in what concerns improvements derived from occupation in good faith, in the manner prescribed by law.
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> Paragraph 7. The provisions of article 174, paragraphs 3 and 4, shall not apply to Indian lands (Brazil 1988, official translation).

It is important to clarify that the specific case originates from a possessory conflict over an area occupied by indigenous peoples of the Xokleng ethnic group, which is part of the Reserva Biológica do Sassafrás, an integrated Conservation Unit managed by the Fundação de Amparo Tecnológico ao Meio Ambiente – FATMA (in nowadays named Instituto de Meio Ambiente de Santa Catarina). This foundation filed a repossession action against the Xokleng community, which was upheld in the first instance and confirmed in the second instance, essentially sustaining the understanding that there was no proof of the traditional nature of the occupation under the terms of art. 231 of the FC and that the lack of completion of the administrative demarcation process makes it impossible to recognize the traditional nature of indigenous occupation in a given area, which even intuitively seems quite unfair since the demarcation procedure is responsibility of the Union and should have been finalized 29 years ago, in accordance to the article 67 of the Temporary Constitutional Provisions Act (ADCT) (Brazil 1988).[1] In this sense, such judgments understood, in short, that what was happening was a disturbance of possession by the indigenous communities, considering that the Sassafras Biological Reserve was the one who had the legitimate occupation with the purpose of promoting environmental preservation (Brazil 2019) as if indigenous possession was not capable of promoting it.

Therefore, the Fundação Nacional do Índio (FUNAI) filed the Extraordinary Appeal against the confirmatory judgment issued by the Federal Regional Court of the 4th Region, pleading for its annulment or reform in order to enforce article 231 of the FC and accomplish the original right over traditionally occupied lands, as well as the principle of proportionality, given that the community occupies a relatively small portion of the territory.

1 Art. 67. The Union will complete the demarcation of indigenous lands within five years from the promulgation of the Constitution" (Brazil 1988).

2. The attempt through the "principles as guiding lights" of the "Philosophy of the Limit".

For the resolution of this case, I thought it would be possible to find solutions based on Drucilla Cornell's "Philosophy of the Limit" (1992), which, in its diachronic reading of justice, inspired by the deconstruction of Jacques Derrida, assumes the emancipatory commitment of groups marginalized by exposing the limits of the legal system, although still through the law, which summons its quasi-transcendence around a justice-to-come. Such a commitment requires, in practice, that the judge carry out a genealogical analysis of the relations of injustice present in the problem in question in order to deconstruct them. Such deconstruction implies a memory of the future-perhaps inclined towards the transformation of injustice relations.

The case under analysis takes us back to the Brazilian colonial past, established by the invasion of European peoples, slavery, exploitation, if not the decimation of native peoples, wars and the various deaths from diseases brought from the other continent. There is also the recent past of the military dictatorship, considering that the traditional indigenous way of life presented direct obstacles to the predatory developmental project. The "Figueiredo Report" (1967), considered the most important document denouncing such crimes, was found intact in 2013 after rumors that it had been set on fire. The document contains appalling reports of killings of entire tribes, torture, forced prostitution of Indian women, slave labor, human hunts, deliberate spread of disease, and donations of sugar laced with strychnine (Starling 2022). Not to mention the recent complaints about the increase in murders, invasions and rights violations during the pandemic period. The Conselho Indigenista Missionário – CIMI prepared a report called "Violence Against Indigenous Peoples" with data from 2020, the pandemic period, denouncing the increase in violent invasions by prospectors, land grabbers and loggers on indigenous lands and the duplication of territorial conflicts in this period (Conselho Indigenista Missionário 2020).

For these reasons, the justice implied in decision-making responsibility, for Cornell (1992, 111), relies on the process of discovering, in the past, the demanding appeals for transformation and emancipation, which involves a transforming invention that starts from the system and simultaneously breaks through it. It is, therefore, about embracing the aporias, impossibilities, the free and responsible search for justice to come for incomparable singularities, even within the limits of the thematizations offered in a legal system that

survives on comparisons; of deciding even in the face of undecidability; and the interruption of the search for justice because of the needs of the present (Derrida 1992, 22-28). But how to do all this exactly? Well, principles[2] play a very important role in this journey, considering that they are understood as contextual universal appeals that intend to synchronize the different conceptions of good present in society, acting as "the lights of a lighthouse" in the decision-making moment, since they are capable of initially preventing us from reaching completely wrong paths (Cornell 1992, 105-115).

In the present case, we cannot deny the lights of the suprapositive principle of self-determination of indigenous peoples, the principle of maximum effectiveness of constitutional norms, the principle of sustainability and its social dimension, the principle of preventing social retrocession, the principle of proportionality, the right to development and all fundamental rights, including the principle of human dignity, which implies for native peoples the right to their customs, languages and traditions, as well as the right to land based on the condition of original people and the traditional occupation, in the terms of art. 231 of the Federal Constitution, which consequently depends on the fundamental right to land demarcation.

The idea that such principles are universal appeals modulated in specific contexts, especially those arising from the injustices of colonization that have affected today's so-called 'developing countries', and that have resulted in similar appeals in their own constitutions, provides clues for the real construction of a transconstitutionalism, where different states can submit themselves to the same global normative order, contributing to the construction of an international community. This includes developed countries, despite not having experienced the wounds of colonization in their own territories, because it is reasonable for every person, every state, especially in light of the principle of solidarity, to recognize the common responsibility for the injustices arising from colonialism and the legitimacy of the universal appeals of indigenous peoples throughout the developing world. Such cohesion of appeals is what would underpin such transconstitutionalism,

[2] "A principle as I use here is not a rule, a least not as a force that literally pull us down the tracks and fully determine the act of interpretation. A principle is instead only a guiding light. It involves the appeal to enrichment of the "universal" within a particular nomos. We can think of a principle as the light that comes from the lighthouse, a light that guide us and prevent us from going in the wrong direction" (Cornell 1992, 105-106).

which should never stem from external imposition, but from endogenous and spontaneous initiatives that break their own boundaries and meet on equal footing and value, starting from a dynamic of recognition of identities and alterities among normative demands, which is only possible through dialogue (Neves 2017, 290-296).

However, on the side of rural landowners in disputed territories, there are also calls for principles, such as the principle of legal certainty, since their titles can be nullified, as well as for the right to private property. However, agribusiness representatives still call for "external complexities"[3], alleging possible catastrophic consequences for the country's economy if the "indigenous-born thesis" where accepted. According to the Instituto Mato-Grossense de Economia Agropecuária – (IMEA), a decision favorable to the thesis of the "originary right" would contribute to the loss of nine thousand jobs and almost two billion reais in annual revenue for the State, considering that indigenous ownership could expand unlimitedly (Agrosaber 2021). However, things aren't exactly like that due to the need to carry out an anthropological report to prove the relationship of the traditional occupation of the community under the terms of the 2º article of the Decree nº 1.775/1996[4] (which regulates the administrative procedure of demarcation of indigenous lands and other measures), as Judge Edson Fachin also points out in his vote (Brazil 2021, 109). However, even the reliability of the anthropological report is contested as a technical and scientific assessment capable of attesting the traditionality, given that the methods employed would allegedly tend to favor indigenous communities.

After these considerations, I concluded that my search for guiding principles would be able to prevent the taking of some very wrong paths, such as ignorance of original rights and essential conditions for indigenous fulfillment in our country, but which is still confronted with the right to property of the third and fourth generations of landowners, who may not have directly contributed to the history of violence against indigenous peoples in Brazil, which still leaves some issues.

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[3] In the sense used by Richard Posner, which concerns complex interactive systems from other areas of knowledge, present in concrete cases and which confront judges at the time of decision-making (Posner 2013, 1-9).

[4] Art. 2nd. "The demarcation of lands traditionally occupied by the indigenous people will be based on work carried out by an anthropologist with recognized qualifications, who will prepare, within a period established in the appointment ordinance issued by the head of the federal agency for assistance to the Indians, an anthropological identification study" (Brazil 1996, free translation).

3. The "Performance Moments"

To filter our possibilities, considering the various relevant social interests and the complexities that this problem calls for, which is confirmed by the entry of more than forty *amici curiae* who wish to contribute with information and opinions. It is important to pay attention to the "performance moments" of this judgment, in the sense of the metaphor elaborated by Sanford Levinson and Jack Balkin called "Law as Performance" (1998), in which Law is compared to an artistic and musical performance, instead of literature, because the interpretive activity assumes a triangular dynamic between the interpreter himself, the audience and the legal materials, in a chain of emission-reception of impressions that mutually influence and condition each other. It is about privileging the "law on action" to the detriment of the "law on books", considering that the responsibility of the interpreters-performers (judges, but also the representatives of the parties) is especially highlighted before the audience, which is who really tailors the performance, making it authentic and alive[5] (Balkin; Levinson 1999, 6-7). First of all, it's important to note that Sanford Levinson and Jack Balkin play a crucial role in developing normative and critical perspectives on the decisions of the US Supreme Court and the US Constitution. Additionally, we can't forget to mention the deconstructive element in Balkin's thought, which is commonly associated with the second generation of critical legal scholars. Balkin takes a microscopic approach to the interpretation of legal texts, seeking to promote a transcendent concept of justice. This is achieved through a transcendental deconstruction that is not unlimited in scope, but rather indefinite (Gaudêncio 2013, 34-35)[6]. It is,

[5] "The efficacy of their work often depends on acceptance by others: not only by other government officials, but by the people as a whole. The wise judge, like the wise director, understands the limitations and the interests of her co-performers and her audience and tailors her interpretations accordingly. Characterizing law as a performing art emphasizes something that tends to be neglected in comparisons between law and literature—the "audience" for legal performance. Like other performing arts, legal performance is more than the interpretation of a text by a performer: it involves a triangle of reciprocal influences between the creators of texts, the performers of texts, and the audiences affected by those performances." (Balkin; Levinson 1999, 6-7).

[6] "Nevertheless, our idea of justice is not infinite; it does not lack boundaries, even if these are not fully determined. For example, the value of justice is not the same thing as the value of beauty. If general normative concepts really had no limits, they would all be identical because there would be no way to distinguish them from each other. So, although our transcendent notion of justice is not specific enough to match any determinate example of justice or any determinate formula of justice, it is specific enough to be distinguished from other normative concepts. That is why it is indefinite but not infinite." (Balkin 1994, 30).

therefore, necessary to define the responsibilities of each one in the present case within limits textually and casuistically available. Therefore, it is about observing the impetus for the transformation of a situation of injustice through the reversibility of hierarchies, but not at any cost, since it is necessary to explore the textual limits, even if it implies mitigating the effects of an "offensive legal text" through performance strategies (Balkin; Levinson 1999, 35-46). However, what makes a performance authentic and alive? The one that corresponds to its own time, that makes sense for the historically situated community in its contemporaneity, including legal experts and lay people, both equally essential to model the performance according to its traditions, which is different from seeking the will of an author that manifested itself in a remote past. However, one cannot forget that in contemporary society there are severe clashes between the different notions of the good life, considering the plurality of groups that coexist discordantly. The case addressed in this essay manifests precisely one of these conflicts, considering the different *topoi*[7] that are in conflict. For this reason, performance always involves a dialogic negotiation between legal elites, popular performers, and the wider audience[8].

However, Balkin and Levinson, when developing their metaphor, focus too much on the figure of the interpreter-judge and forget the strategic role

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[7] The term "topoi" is used here in the sense given by Boaventura de Sousa Santos (1997, 23): "Topoi are the most comprehensive rhetorical commonplaces of a given culture. They function as argumentation premises that, because they are not discussed, given their evidence, make possible the production and exchange of arguments. Strong topoi become highly vulnerable and problematic when "used" in a different culture. The best that can happen to them is to be demoted from premises of argumentation to mere arguments. Understanding a given culture from the topoi of another culture can prove to be very difficult, if not impossible".

[8] "We believe that there are important lessons here for legal performance, and in particular legal performance of the Constitution. Constitutional interpretation—or what is the same thing, constitutional performance— takes place against both professional and popular understandings of the Constitution. Constitutional performance takes place within a tradition of constitutional interpretations. That tradition involves and requires both constitutional performers and constitutional audiences. Finally, the tradition changes over time, even though it may appear to its participants as a continuous whole. Just as each generation sees different things in canonical works of art, and performs them differently in accordance with that vision, so too each generation has its own Constitution and its own standards of constitutional performance. The performers and the audience for constitutional interpretation include both professionals and laypersons. The meaning of the Constitution is strongly shaped by the professional culture of legal performance: the attitudes of lawyers, judges, as well as the academic culture that trains them. However, the "authentic" meaning of the Constitution as an ongoing tradition—the sense of what it means to be faithful to the Constitution—is also deeply shaped by the understandings of the people who live under it. The meaning of the Constitution demands political acceptance by the people in each generation. That is why social movements shape the meaning of the Constitution even without official amendment: the performance of the Constitution is always a negotiation between legal elites, popular interpretaters, and the great audience of the American people." (Balkin; Levinson 1999, 34).

of other interpreters, lawyers and *amici curiae,* who have responsibilities directed towards their specific audience and who have direct interest in their own victory. However, this pragmatic and strategic aspect of performance cannot nullify the responsibilities before the Law itself in the mediation of human coexistence, which relies on the need to compare and synchronize the different demands, which puts in evidence another type of responsibility, the responsibility for personal relations in the Rule of Law itself. In this judgment, it is possible to identify many interpreters-performers, including the representatives of the parties, the amici curiae, the members of the Public Prosecutor's Office as inspectors of the Law, and the Judges who have voted so far: the Rapporteur Edson Fachin and the Judge Kássio Nunes Marques. Thus, the FUNAI attorney, the *amici curiae* representatives of the indigenous communities, and the Public Ministry assume direct responsibilities with the native peoples of Brazil, belonging to more than 300 different communities, possessing 274 languages. However, only 57% of these people live on officially recognized indigenous lands (Brazil 2010). For this reason, naturally, they defend the "indigenous-born thesis" or the "original right thesis", using the common justification that article 231, first paragraph, already unequivocally establishes the conditions for the right to land, with no established timeframe limit.

It is crucial to start with the analysis of the argument of the lawyer Bruna Maria Palhano Medeiros, representative of FUNAI, that in her oral argumentation clarified the duty of the autarchy to promote public policies and guarantee social, economic and cultural rights for the indigenous communities, regardless of the existence or not of demarcation procedure, considering that it is a public administration institution for the promotion of public policies. The autarchy is responsible for the degree of vulnerability of the community, which tends to be inversely proportional to the degree of regularization of the occupied land (Brazil 2021).

Continuing the discussion, Bruno Vinicius Batista Arruda, who represents the Federal Public Defender's Office, argues that the temporal framework thesis is not suitable for Brazil. This is because it approaches indigenous rights from a traditional private law perspective, which is not appropriate given that indigenous communities have a communal, rather than individual, relationship with the land. The right to indigeneity is an inherent and legitimate right in itself, which differs from a property right that has specific conditions that must be met. Such difference, according to him, is well marked in the

precedent of the "Raposa Serra do Sol" case (Petition 3388). Furthermore, it considers that the "indigenous-born thesis" is a natural right, pre-existing to the constitution itself, inherent to the community experience. The role of the constitution is only to give a status of fundamental right, appearing since the Federal Constitution of 1934 and which is still aggregated in the current constitution. The "temporal framework thesis", therefore, would be a denial of the constitutional normativity of all previous constitutions that approved such a right. Furthermore, it is argued that the temporal framework thesis overlooks the history of indigenous peoples, which has been marked by human rights violations, including those committed by the State. This perspective goes against international human rights standards, including those set by the Inter-American Court of Human Rights. The court has previously recognized communal property rights that encompass both material and spiritual elements, which must be fully enjoyed by the community and passed down to future generations. These rights are not subject to time limits (Brazil 2021).

Also, lawyer Rafael Modesto dos Santos, representative of the Xokleng community in Santa Catarina, points out that the community has already been the target of numerous violence and invasions[9], mentioning the assigned indigenous occupation land titles, which shall be considered null based on the 1988 Constitution, according to article 231, sixth paragraph, and in line with STF precedents, without margin to any restrictive interpretation. The lawyer also mentions that the Union is in debt due to the absence of land demarcation, which contributes to the scenario of instability and legal uncertainty regarding the rights of indigenous peoples. In addition, he declares that the thesis of the temporal framework would legalize all illicit acts committed until 1988 and clarifies that the claimed lands amount to only around 0.3% or even 1% of the States where the indigenous people are most populous, which in his words, it is insignificant. This directly contrasts with the argument that indigenous territories would expand without limits, thus violating the principle of proportionality. In continuity, the other representative of the

[9] The Xokleng people were hunted by "bugreiros". The hunters of indigenous people took their pairs of ears to the Santa Catarina Government, which paid for it. Then, there was the division of land. According to a "bugreiro" interviewed by the late Professor Silvio dos Santos, he said that cutting an indigenous person with a machete was like cutting a banana tree. According to the well-known "Figueredo Report" (1967), the same indigenous people were hunted, tied upside down and cut with a machete while still alive. From pubis to head. Also, dynamites were thrown at the villages, and the sugar was mixed with strychnine. That was the modus operandi, Your Excellency, to expel indigenous peoples from their lands [...]" (Brazil 2021).

Xokleng people, Professor Carlos Marés, says that the conflict between the "timeframe thesis" and the "original right thesis" has existed for a long time. The first represents an integrationist proposal to erase the indigenous culture and the second represents the recognition of their traditional way of life, which was truly embraced by the Constitution (Brazil 2021).

Moving on to the *amicus curiae*, starting with the indigenous lawyer Luiz Henrique Eloy Amado, representative of the Articulação dos Povos Indígenas do Brasil – APIB, who declared that the Brazilian Constitution is categorical in bringing the original right to traditionally occupied lands, with no temporal requirement for its categorization, but only of traditionality, considering how each people relates to its territory. The lawyer warns that over eight hundred demarcation procedures are pending completion and thousands of lawsuits questioning the demarcation of lands that have already been demarcated and ratified, with hundreds of indigenous communities camped in settlements. Amado also highlights that many indigenous communities were not occupying their lands on October 5, 1988 due to being expelled during the dictatorship with the approval of the State and its agents. Therefore, adopting the temporal framework disregards all the violations that indigenous peoples have faced. The demarcation of indigenous lands is a constitutional obligation of the state and not a matter of political discretion. Amado warns that until a decision is made, many indigenous communities are forced to live on the side of roads and on the edges of farms, waiting for a decision that will impact their right to life and self-determination. For these reasons, the temporal framework thesis is considered unconstitutional, and Amado argues for the adoption of the "indigenous-born thesis" instead. (Brazil 2021).

However, the lawyer Lethicia Guimarães, representative of the Xakribá people of Northern Minas Gerais, in addition to defending the "original right", she defends that indigenous communities cannot suffer the negative consequences of State failure to demarcate their land within the five-year period provided constitutionally (art. 67 of the ADCT). If the "timeframe" were the thesis adopted, more than a thousand people will be removed from their homes. The lawyer also draws attention to the history of the Xakriabá people, who in 1987 had their main leaders murdered in a massacre, including chief Rosalino Gomes and two other leaders, given that they claimed the entire territory of traditional occupation. However, the lawyer also denounces an indigenous school and a traditional medicine house that were set on fire in 2021 (Brazil 2021).

On the other hand, in defense of the thesis of the "temporal framework", one can clearly see a responsibility directed to the productive sector and private property in the country through a tautological defense of legal certainty. State's General Attorney, Alisson de Bom de Souza, begins his argument by reporting that in January 2009, there was an «invasion» of approximately one hundred indigenous people in an area owned by the Instituto de Meio Ambiente de Santa Catarina. The Attorney emphasizes that although the 1988 Constitution surpasses the integration guideline and is building the interaction paradigm, it cannot violate other equally relevant fundamental rights of Brazilian society that arise from the Constitution. In this sense, the relationship between the indigenous people and the land would depend on the traditional occupation, which is related to a timeframe, that is, the possession since October 5, 1988, or at least under physical or judicial dispute, according to precedents of the STF itself (the judgment of RE 219983 and the Appeal of the writ of mandamus 29542/DF), which expressly rejects the "indigenous theory", carrying out a so-called "systematic" interpretation of article 231 of the Federal Constitution and with "minimum retroactivity". However, the attorney still points out some requirements of the mentioned device for the recognition of the traditional indigenous possessory right, which would include: i) the temporal factor; ii) the economic factor; iii) the ecological factor; iv) the cultural or demographic factor, reinforcing collective responsibility for environmental preservation, including indigenous responsibility with environmental norms. Still, the representative emphasizes the need for the Union to demarcate the territory, and FUNAI is not responsible for carrying out such a procedure because its role is as an interested party (Brazil 2021).

Next, Izabel Vinchon Nogueira de Andrade, the General-Secretary for Litigation at the Federal Attorney General's Office (AGU), understands that the judgment of Petition 3388, the "Raposa Serra do Sol" case, is an important precedent about the indigenous possessory rights over their lands, although recognizing that it has no binding effect. She understands that its constraints (nineteen in all) are illuminating as legitimizing assumptions of the administrative procedure for the demarcation of indigenous lands, which was in the Opinion nº 01/2017 of the AGU, which was suspended by a preliminary decision of the Judge Rapporteur Edson Fachin. Therefore, in order to ensure legal certainty, the AGU understands the need to consider such conditions for the demarcation process, including the time frame along with traditionality, although it does not consider an "immemorial possession",

except for cases of recalcitrant dispossession by non-indigenous people. It is, therefore, a position that intends to balance the right to permanent indigenous possession of the lands they traditionally occupy with the right to private property. The reversal of the constitutional safeguards of the "Raposa da Serra do Sol" case, in this sense, would have the potential to cause legal uncertainty and even more instability for the demarcation processes. For this reason, such constitutional safeguards should be reaffirmed, in favor of social pacification. Furthermore, the representative points out that only with the conclusion of the demarcation procedure will the acts related to the recognition of non-indigenous occupations and the analysis and judgment of good faith in the construction of improvements will be initiated. It is only with the administrative homologation decision recognizing the demarcation that the original right will be perfected, according to the argument of the representative of the AGU (Brazil 2021).

It is also important to comment on the contributions of the Sociedade Rural Brasileira, participating as *amicus curiae*, in its very concern with the legal security of activities related to agribusiness, considering that the judgment of the case "Raposa Serra do Sol" brought the nineteen conditions that are being observed within the scope of these legal relations, therefore, a possible "jurisprudential turnout", that is, the change in jurisprudential understanding, would cause great instability in the most important brazilian productive sector (Brazil 2021).

In his vote, he discussed the history of policies aimed at exterminating indigenous peoples, which the State deemed necessary at different historical periods, including the Xokleng people. When discussing policies for protecting indigenous peoples, the judge referred to the influence of Auguste Comte and his social evolutionism during the early 20th century. Comte believed that indigenous communities were a "civilization in development" and should be protected from oppression so they could progress spontaneously to the industrial age. In response to this view, the "indigenous-born thesis" was developed, but it has created practical and legal challenges since private property is a fundamental element of capitalist societies. Any theory that questions this principle may lead to a reduction in investments and various conflicts. For this reason, the "timeframe thesis" in the judgment of Pet. 3388 (the "Raposa Serra do Sol" case) came to bring legal certainty and peace to the various conflicting interests. Still, in an extremely grammatical interpretation, the Judge points out that in article 231 of the brazilian Constitution the verb

"to occupy" is in the present tense of the indicative form, therefore, it was in the interest of the legislator to guarantee indigenous traditional possession only for that historical moment and not to a logical model for a future interpreter to adapt to the reality of each moment. It translates, therefore, into a responsibility for the original legislator, for the economic stability of the productive classes of the country and for the capitalist system in which we all live in, which perhaps is not exactly the role of a Judge (Brazil 2021).

However, ownership cannot be validated if based on a fundamental defect in its legal existence, as noted in the sixth paragraph of article 231, when determining the nullity and extinction of acts of occupation and/or exploitation of indigenous lands. The Judge Rapporteur of the case, Edson Fachin, in his vote, reinforces this understanding, excepting only the rights related to occupations in good faith, which include compensation for improvements. But it is important to start at the beginning, and the beginning of the argument of the rapporteur also rescues the history of the decimation of indigenous communities since colonial times, but also discusses the historical development of the recognition of the legitimacy of the indigenous occupation of their lands since 1660 with Álvaro Régio, passing through Land Laws nº 601/1850 and Decree 1318/1854 that already recognized the original right to indigenous possession. Furthermore, the rapporteur acknowledges the existence of the "original right" since the Brazilian Constitution of 1934. He highlights that the current Constitution of 1988 breaks away from the assimilationist paradigm and adopts a paradigm of recognition and encouragement of sociocultural pluralism and the right to exist as an indigenous person. That said, specifically on the consideration of the judgment of the "Raposa Serra do Sol" case and its nineteen conditions for the recognition of the right to possession, the judge speaks of the impossibility of generating binding effects, since the decision rendered in a class action is devoid of binding force in a technical sense, while sustaining moral and persuasive force. However, the Judge points out that even if there was binding force, there are sufficient reasons to overcome such an understanding, considering that the solution has lost its coherence and weakens the legal order, which authorizes reviewing the conditions of Petition 3388's judgment and the so-called "timeframe thesis". Specifically on the right to indigenous possession, Fachin recognizes that this is one of their fundamental rights, therefore, it is within the list of stony clauses, that prevents the reforming constituent power from promoting changes aimed at abolishing or hindering its exist-

ence, under the terms of art. 60, fourth paragraph, of the Brazilian Federal Constitution[10].

In addition, these communities are safeguarded by principles such as the prohibition of retrogression and insufficient protection, which are crucial for their survival. However, Fachin does not view the demarcation process as establishing the original right to indigenous possession. Instead, he regards it as a mere declaratory procedure that enables such a right, which is inherent, non-transferable, and inalienable under Article 231 of the Brazilian Constitution. He also notes that the nature of indigenous ownership is distinct from traditional civil ownership, as their connection to the land is fundamental to their physical and cultural existence and perpetuation. This perspective aligns with the principles of sustainability and environmental protection and does not depend on proof of dispossession or physical violence. Therefore, there is no need to speak of a "timeframe" for such recognition, as there is no way to extract it from the constitutional reading. However, it is necessary to carry out the anthropological report under the terms of Decree nº 1.776/1996, which is a fundamental element for demonstrating the traditional nature of the occupation, also considering that there may be a resizing of the land if there is non-compliance with the elements contained in article 231 of the Constitution of the Republic through the demarcation procedure. Finally, in a very forceful way, it determines that acts that have as their object the possession, domain or occupation of lands of traditional indigenous occupation are considered null, without the production of any legal effects, which is not a mystery considering the sixth paragraph of article 231, with the exception of improvements made in occupations in good faith, which authorize the right to compensation by the Union.

Final considerations

So who delivered the most authentic performance yet? Well, to achieve authenticity, interpretations of the law must be responsive to contemporary audiences, which involves negotiating different interests and promoting ma-

[10] Art. 60 § 4º The proposed amendment tending to abolish: I - the federative form of State; II - direct, secret, universal and periodic voting; III - the separation of Powers; IV - individual rights and guarantees (Brazil 1988).

terial justice while mitigating violent relationships. This task relies heavily on identifying legal principles that contextualize appeals for justice, and prioritizes fundamental rights for coexistence over a single group's political-economic agenda. In general, interpretations that prioritize the coexistence of people, and defend fundamental rights, are the most authentic, from the viewpoint of "Law as Performance". And what would those be? Now, the rights of indigenous peoples to their cultural and physical self-reproduction have long been present in the Brazilian legal system, despite their ineffectiveness through state policies.

However, the state options for violating human and fundamental rights do not invalidate the normativity of the original right for a land of traditional indigenous settlement.

The interpretative gymnastics of creating a "timeframe" for the restriction of such rights is something that does not have compatibility with Law, but only through with the finalists-economical attitude in favor of part of the productive sector of the country, considering that the conditions established in the precedent "Raposa Serra do Sol" were observing that specific case, not extending to all the others. Even if they were, it is not part of the legal justice to weaken the conditions for emancipation and dignity of persons, or even the direct violation of the principle of self-determination of indigenous peoples, in its fundamental aim of achieving essential equity.

In terms of the fundamental right to private property and legal certainty, it's not new in brazilian law that an invalid legal relationship doesn't become valid over time, as stated in article 169 of the Brazilian Civil Code. The principle of the imprescriptibility of indigenous possessory rights perfectly aligns with Article 231, which nullifies acts related to the occupation, domain, and possession of indigenous lands, as well as the exploitation of their natural resources. Although it may seem unfair to hold current landowners responsible for the actions of their ancestors, Brazilian law has a solution to address invalid legal relationships. The Union is held responsible and required to compensate bona fide non-indigenous landowners for any improvements made. Setting a "timeframe" for the establishment of the right to indigenous possession would ignore the history of past violence that has contributed to their rights. Instead, it's crucial to recognize that the demarcation procedure is declaratory and that the indigenous-born condition constitutes the right to indigenous possession. This right should not be confused with a civil possessory right and is fundamental to their human existence, belonging,

sustainability, and proportionality. Indigenous possessory rights are inalienable, imprescriptible, and irrevocable due to the principle of the prohibition of social retrogression, which safeguards fundamental rights.

These principles, as universal appeals modulated in specific contexts, particularly in countries that have suffered from the injustices of colonialism, demand solidarity from every state that adheres to the Rule of Law. They reinforce the possibility of building a transconstitutionalism based on endogenous, spontaneous, and dialogic initiatives among different states, starting from a dynamic of recognition of identities and alterities among normative appeals, which are rooted in different experiences of participation.

However, we cannot be naive to think that these principles will become effective magically just because they are fundamental rights described by the Brazilian Constitution. In reality, it is still up to the Union to decide whether or not to promote such public policies, as explicitly stated in the text of Article 231, Paragraph 6 of the Federal Constitution, which safeguards the relevant public interest of the Union for the use of the resources mentioned in the article. Consequently, the State's own responsibility was the most neglected. It treated the constitutional text as a mere symbolic device to appease the masses, but in the end, it weakened the Rule of Law, rendering the Constitution a project without a future.

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