

The Constitutional Interpretation of the Demarcation of Indigenous lands in the Brazilian Federal Supreme Court: Time Framework vs Indigeneity Theory

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The article explores the constitutional controversies linked to the demarcation of lands occupied and traditionally destined for indigenous peoples in Brazil. Two theories confront each other in the field: the temporal framework theory and the indigeneity theory. The work adopts a tripartite approach, covering: i) the history of institutional violence perpetrated or financed by the Brazilian State against indigenous communities; ii) the position of the Brazilian Federal Supreme Court concerning the theses of the temporal framework and indigeneity; iii) the backlash of the Brazilian National Congress, which seeks to contest the thesis established by the Federal Supreme Court. In conclusion, the article argues that the 1988 Constitution only allows for the prevalence of the temporal framework theory.

1. The history of violations against indigenous peoples in Brazil

The formation of the Brazilian State is permeated by a history of violence directed against indigenous peoples.¹ Applied social and human sciences have contributed with critical analyses, shedding light on the relationship between the development of the state and traditional communities. In general, the literature highlights an oscillating pattern of ethnocide and genocide of indigenous populations in Brazil.² The distinctive feature of this systematic violence in Brazil lies in the civilizational justification, whose evolutionary conception of progress (or a type of social Darwinism) overlaps with the respect for traditional diversity. This discourse, which originated during the colonial period persists, to some extent, to the present day.

A significant record of the history of violence is documented in the Figueiredo Report (1967).³ The document is the result of a parliamentary investigation led by the Ministry of the Interior, under the supervision of prosecutor Jader de Figueiredo Correia, still during the dictatorship period of 1964-1985. The report exposes the violations suffered by indigenous peoples, especially in the context of land policy, such as usurpation of indigenous labor, forced confinement, and abuse of power, among other types of violence.⁴

¹ Hereafter, the terminology adopted by the inaugurated by International Labor Organization (ILO) Convention No. 169 is adopted. Standards after the Convention 169/ILO abolished the use of the term *tribal peoples*, increasingly adopting expressions such as traditional and original communities, among others. It is important to highlight that there is a small difference between the term traditional communities (previously known as tribal people) and indigenous peoples. The concept of traditional communities refers to groups that present specific social, cultural, and economic conditions, distinguishing them from Western societies. On the other hand, *indigenous peoples* is a more specific concept, in which the geographic element is presented as a differentiator. Indigenous peoples descend from those who inhabited the country or a geographic region belonging to the country at the time of colonization and the establishment of current state borders. Clarification is essential to understand that the relationship between land and indigenous people differs from the relationship between land and individual in the Western context.

² Schwarcz, L. M., & Starling, H. M. (2015). *Brazil: a biography*. Companhia das Letras.

³ National Truth Commission. (2014). *Report: thematic texts, volume II* (p. 207). Brasilia: CNV.

⁴ <https://www.ufmg.br/brasildoc/temas/5-ditadura-militar-e-populacoes-indigenas/5-1-ministerio-do-interior-relatorio-figueiredo/>

Another extremely relevant document in the context of recording violence against indigenous populations is the report produced by the National Truth Commission (NTC). The Indigenous Peoples Thematic Axis Report (text 5 of the report)⁵ aimed to systematize violations that occurred during the period of the Brazilian military dictatorship. However, the NTC report goes beyond this period, carrying out a comprehensive assessment of the history and colonization directed at originally indigenous lands. This report also highlights how the state has neglected communities' traditional ways of life in favor of economic interests. In the end, the NTC report recommended the regularization for the dispossession of plundered or stolen indigenous lands in addition to the environmental recovery of such areas. Those recommendations were based on the normative architecture established by the 1988 Constitution.

The Indigenous Missionary Council (IMC), a civil society organization, has been compiling data in the form of reports since 2003. The reports have as their central theme the violence against indigenous peoples.⁶ The reported violations include acts against property, physical attacks against indigenous people, omissions by the Public Power, attacks on the memory of the people, among others.

In the last report, with data from 2022,⁷ the intensification of the offensive by the federal government was portrayed under the then administration of former president Jair Bolsonaro, who was aligned with an authoritarian and illiberal perspective.⁸ According to this report, there was greater social support for the idea “that crimes against minorities and against nature were necessary to make the economy grow”.⁹ The report also highlights the halt in demarcation procedures. The data presented offers a clearer representation of the reality faced by indigenous peoples in Brazil. Despite some progress in realizing rights over territories, significant challenges still persist for these populations.¹⁰

The concern with the territorial issue was also noted by the Inter-American Commission on Human Rights (IHR Commission). The document on the situation of human rights in Brazil prepared by the commission pointed out the failure of the Brazilian state to deal with the issue,¹¹ in addition to identifying the significant budget cuts in indigenous overseeing bodies. The commission also highlighted that the lack of effective demarcation of indigenous lands creates an environment of constant uncertainty and legal insecurity for communities. The results presented by the commission confirmed the positions already presented in its previous periodic reviews.¹²

When conducting a comparative analysis between the 2018 context and the context of the 1967 Figueiredo Report, Álvaro Ricardo de Souza Cruz highlights a notable convergence in the data

⁵ National Truth Commission. (2014). *Report: thematic texts, volume II* (pp. 203-264). Brasilia: CNV.

⁶ CIMI. (2003-2022). *Violence Observatory: Previous Editions*. <https://cimi.org.br/observatorio-da-violencia/edicoes-anteriores/>.

⁷ Indigenous Missionary Council. (2023). *Report on violence against indigenous peoples in Brazil: 2022 data*. Brasilia: CIMI. <https://cimi.org.br/wp-content/uploads/2023/07/relatorio-violencia-povos-indigenas-2022-cimi.pdf>

⁸ Meyer, E. P. N. (2022). Illiberal Constitutionalism. *Law and Praxis Magazine*, 13 (4), 2595-2622. <https://www.scielo.br/j/rdp/a/vqSdQdCFrDZPF34dsHX7MmO/?format=pdf&lang=pt>

⁹ Indigenous Missionary Council. (2023). *Report on violence against indigenous peoples in Brazil: 2022 data* (p. 49). Brasilia: CIMI. See p. 24 to view the timeline of Public Authority omissions; p. 33 to check violence in criminal justice.

¹⁰ An updated overview of the situation regarding the demarcation of indigenous lands can be seen on the CIMI official website: <https://cimi.org.br/terras-indigenas/>

¹¹ Inter-American Commission on Human Rights. (2021). *Situation of human rights in Brazil* (OAS. Official documents, p. 29-39). <https://www.oas.org/pt/cidh/relatorios/pdfs/brasil2021-pt.pdf>.

¹² Jara, SA, & Campos, DP Interculturality and Brazil's Timeframe. *International Journal of Constitutional Law*. <http://www.iconnectblog.com/stronginterculturality-and-brazils-emmarco-temporal-em-strong/>

regarding documented crimes.¹³ The results of his research highlight the persistence of violent acts against indigenous peoples, even after the enactment of the 1988 Constitution. The findings reinforce and solidify the understanding that the resistance and insecurity faced by indigenous people persist over time, challenging the expectations of a significant improvement after the current Constitution. Furthermore, more general data estimate that more than 70% of the indigenous population has died since the beginning of the colonization process.¹⁴

The legal perspective, combined with the data presented so far, allows the conclusion that the normative structure has always reflected the political direction of acculturation and ethnocide or genocide of indigenous peoples. The purpose of different politics is to eliminate the original characteristics of cultural diversity. Although there are constitutionally guaranteed rights since the 1934 Constitution,¹⁵ such as the occupation of traditional lands, the realization of these rights remains distant. These conclusions, however, must be compared with the constitutional normative architecture reformed by the 1988 Constitution.

The current 1988 Constitution establishes that the demarcation of indigenous lands process is represented by an administrative instrument to identify and set the limits of territories traditionally occupied by indigenous peoples. A relevant detail is that the 1988 Constitution contains specific guidance regarding the five years, counting from its promulgation, for this allocation, as established in Article 67 of the Constitutional Transitional Provisions Act.

Responsibility for conducting demarcation acts rests exclusively with the executive branch. The guidelines for this process are regulated by Decree No. 1.775 of 1996.¹⁶ The decree provides that indigenous groups, represented in their forms of organization, have the right to actively participate in all phases of the demarcation regularization procedure. These steps include claiming and verifying the demand, identification, and delimitation studies, adversarial proceedings involving political entities, the declaration of the lands' limits by administrative bodies, the physical demarcation, land survey, and the evaluation of betterments made by non-indigenous people.

Furthermore, the participation of indigenous groups is also inserted on: the approval acts made by the President of the Republic, the removal of non-indigenous people procedures, the registration of indigenous lands with the Union's Heritage Secretariat and the closure of areas for the protection of isolated indigenous peoples. The legislative background reinforces the importance of consultation and active involvement of indigenous peoples throughout the demarcation regularization process, recognizing and respecting their traditional forms of organization and decision-making.

Faced with a context characterized by a conflict in which, on the one hand, there is an institutional trajectory marked by violence in favor of economic interests, to the detriment of original rights, and, on the other hand, the constitutional and legal consecration of land occupation by indigenous people, the Brazilian Federal Supreme Court (STF) was challenged to rule on the theses of the temporal framework and indigeneity.

¹³ Souza Cruz, AR (2018). *Figueiredo Report: Brazilian genocide* (p. 113-157). Rio de Janeiro: Lumen Juris.

¹⁴ Third Sector Observatory. *Genocide in Brazil: more than 70% of the indigenous population was killed*. Retrieved from <https://observatorio3setor.org.br/noticias/genocidio-brasil-mais-de-70-da-populacao-indigena-foi-morta/>

¹⁵ Constitutions of 1934 (Article 129), 1937 (Article 154), 1946 (Article 216), 1967 (Article 186), 1969 (Article 198), 1988 (Article 231). Check the Brazilian Constitutions at: <https://www4.planalto.gov.br/legislacao>

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https://www.planalto.gov.br/ccivil_03/decreto/d1775.htm#:~:text=DECRETO%20No%201.775%2C%20DE.da%20Constitui%C3%A7%C3%A3o%2C%20e%20no%20art.

2. The position of the Brazilian Federal Supreme Court on the time framework and theory of indigeneity

The main case that called for the rulings of the STF was presented in Extraordinary Appeal No. 1.017.365/SC,¹⁷ with general repercussion (Theme 1.031),¹⁸ originating from the discussion on the suitability of the reintegration of possession requested by the Environmental Foundation of the State of Santa Catarina in an area administratively declared to be of traditional indigenous occupation, located in part of the Sassafras Biological Reserve. The extraordinary appeal presented the confrontation of two theses: temporal framework *vs* indigeneity, according to the controversy over the constitutional interpretation of Articles 5, XXXV, LIV, and LV; and 231 of the 1988 Constitution.

The time framework thesis, or theory of the indigenous fact, refers to the decision handed down by the STF in 2009, within Petition No. 3.388/RR,¹⁹ which case concerned the Raposa Serra do Sol Lands. On that occasion, the STF provided the general guidance that indigenous peoples would only be entitled to the recognition of lands that were occupied as of the date of promulgation of the current Constitution, that is, October 5, 1988.²⁰ The case was not, however, a proper precedent, since it was not decided with general repercussion – as it would be case in extraordinary appeal ruled in 2023.

According to Zayda Coelho, after this ruling, the judicial and executive authorities began to adopt a restrictive interpretation on the recognition of traditional lands.²¹ The IHR Commission also noted that the time framework thesis was being widely used, as in the cases of demarcation of the lands of Limão Verde, Buritim of the Terena People, and Guyraroká of the Guarani-Kaiowá People.²²

Another relevant event for the discussion of the time framework thesis was Opinion 001/2017 GAB/CGU/AGU,²³ approved by former President Michel Temer in 2017. The act established, in a binding manner, that all public administration bodies federal government, including the National Foundation of Indigenous Peoples (FUNAI), should adhere to the guidelines outlined by the document. Notably, the time framework thesis was enshrined as an integral part of this opinion.

¹⁷ The extraordinary appeal has a primary function of challenging decisions issued by lower judicial courts and judges that, in general, violate constitutional provisions, as provided for by Article 102, III, of the 1988 Constitution. For the extraordinary appeal to be admitted, it is imperative that it meets the requirement of the so-called *general repercussion*, showing that the matter discussed in the decision has an impact on interests that go beyond the limits of the specific case, considering criteria of economic, political, social or legal relevance.

¹⁸ The theses of the case are available on the STF platform: <https://portal.stf.jus.br/jurisprudenciaRepercussao/verAndamentoProcesso.asp?incidente=5109720&numeroProcesso=1017365&classeProcesso=RE&numeroTema=1031>

¹⁹ <https://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=2288693>.

²⁰ Burckhart, T. (2017). *Indigenous rights and constitutional jurisdiction: a critical analysis of the Raposa/Serra do Sol case*. Master's Dissertation in Law. Faculty of Law, Federal University of Santa Catarina, Postgraduate Program in Law. Curitiba. <https://repositorio.ufsc.br/handle/123456789/215285>.

²¹ Coelho, ZTL (2019). *Demarcation of indigenous lands and the STF: an analysis beyond the occupation time framework established in PET 3388/RR* (p. 16-37). Master's Dissertation in Law. Faculty of Law, Federal University of Ceará, Postgraduate Program in Law. Strength. Retrieved from <https://repositorio.ufc.br/handle/riufc/72572>

²² Inter-American Commission on Human Rights. (2021). *Situation of human rights in Brazil* (OAS. Official documents, p. 33).

²³ https://www.planalto.gov.br/ccivil_03/AGU/PRC-GMF-05-2017.htm

The content of the opinion conferred an essentially political decision on the executive branch, thus enabling the automatic disregard of indigenous rights.²⁴ The opinion ignored constitutional, legal, and international guidelines. It turns out that its content represented a contradiction of the democratic legitimacy, as it conditioned the constitutional right of a historically oppressed legal minority to the political arena of the majority. In essence, the opinion reflected the clear neoliberal political inclination of the federal administration at that time, whose content encouraged the carrying out of projects on lands occupied by indigenous communities.

Unlike the time framework thesis, the indigeneity thesis reflects a tradition that recognizes the right of indigenous peoples to land as an original right prior to the formation of the Brazilian state. This understanding aligns with the definition of indigenous peoples presented in the Convention No. 169/ILO, indicating a vision that recognizes the historical and ancestral connection of these communities with the lands they occupy.

On the topic, the Inter-American Court of Human Rights (IHR Court) has set several precedents.²⁵ The case of the Xukuru Indigenous People *vs* Brazil recognized the right to collective property and established the theory of indigeneity.²⁶ The IHR Court ruled that the ownership of indigenous lands is a congenital and immemorial right. For the court, indigenous peoples have a spiritual relationship with their territories and, because of this, the right to land precedes the creation of the state itself.²⁷

In Brazil, the conflict between such theses regained its centrality in the STF in February 2019, when the court recognized that it was a constitutional issue with general repercussions capable of, once again, invoking its action. In May 2020, Justice Rapporteur Edson Fachin granted an incidental provisional injunction requested to suspend the effects of Opinion No. 001/2017/GAB/CGU/AGU until the end of the judgment on the matter.²⁸ Consequently, all processes related to the demarcation of indigenous lands in the federal public administration or the judicial bodies were suspended.

Ruling on the merits, the STF overturned the time framework thesis by nine votes against two.²⁹ The court's full bench ruled that the date of promulgation of the 1988 Constitution cannot be used anymore as a parameter for the occupation of territories by indigenous communities. As the case has a general repercussion, the ruling shall bind all executive and

²⁴ Menezes, RB (2018). *The demarcation of indigenous lands and their socio-environmental function: the obstacles of Opinion nº 001/2017/GAB/CGU/AGU* (p. 59-79). Master's Dissertation in Law. Faculty of Law, Federal University of Santa Maria, Postgraduate Program in Law. Santa Maria. Retrieved from https://repositorio.ufsm.br/bitstream/handle/1/14147/DIS_PPGDIREITO_2018_MENEZES_ROSSA_NA.pdf?sequence=1&isAllowed=y

²⁵ Salomão Cambi, EA, Padilha, E., & Mantoan Rorato, PG (2021). The precedents of the Inter-American Court of human rights on indigenous lands and the adoption of the indigeneity theory. *Brazilian Journal of Public Policies*, 11(2). Check out the cases: Mayagna Awas Tingni indigenous community vs. Nicaragua (2001), Yakye Axa indigenous community vs. Paraguay (2005) and Xákmok Kásek indigenous community vs. Paraguay. (2010).

²⁶ Inter-American Court of Human Rights. (Date not available). *Judgment in the case of the Xukuru indigenous people and their members vs. Brazil* (OAS. Official documents). Recovered from https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_por.pdf

²⁷ Cambi, E., & Porto, L. de A. (2019). *Resolutive Public Prosecutor's Office and protection of human rights* (p. 97-106). Belo Horizonte: D'Plácido.

²⁸ The temporary decision granted meets the cumulative requirements of probability of law and risk of harm or prejudice to the effective outcome of the process. Its purpose is to preserve the right claimed, avoiding any injury or aggravation during the process. This measure is regulated by Book V of the Brazilian Civil Procedure Code. https://www.planalto.gov.br/ccivil_03/ato2015-2018/2015/lei/113105.htm

²⁹ All opinions can be accessed on the following page: <https://www.poder360.com.br/justica/por-9-a-2-stf-rejeita-tese-do-marco-temporal/>

judicial authorities.³⁰ According to the court, the thesis served to resolve at least 226 similar cases, which were halted and awaiting the court's position.³¹

Two Justices were in favor of the time framework thesis: Nunes Marques and André Mendonça, both appointed by former President Jair Bolsonaro. They argued that the decision taken in the case of the Raposa Serra do Sol Indigenous Land was the best solution for balancing of indigenous and agrarian interests. For these Justices, legal certainty should prevail to reduce conflicts between opposing interests, according to the idea of fraternity and unity enshrined in the 1988 Constitution. The Justices also argued that it was the will of the Brazilian constituent power to stabilize the situation of indigenous peoples according to the demarcated time period.

In these opinions in favor of the time framework thesis, a distinction was made between traditional possession and immemorial possession. The first would be characterized by the continuous and peaceful possession of a certain area by a traditional community, while the second is characterized by the difficult definition of the beginning of possession. The Justices concluded that, for the recognition of lands by indigenous peoples, it would be necessary to prove that the area was occupied by indigenous people on the date of promulgation of the 1988 Constitution or that such area had been subject to expropriation.

The opinions against the time framework thesis, nine in total, were represented by Justices Edson Fachin, Gilmar Mendes, Luís Barroso, Alexandre de Moraes, Carmen Lúcia, Dias Toffoli, Luiz Fux, Rosa Weber and Cristiano Zanin. The arguments against the time framework thesis — therefore favorable to the theory of indigeneity — relate the right to possess land to the right to existence of indigenous peoples, which can be observed throughout the country's history. The majority of Justices pointed out that the colonization process of the national territory represented a forced migration of the indigenous people who occupied the lands before the arrival of the Portuguese people to Brazil. Therefore, the traditionally occupied lands would not be the property of others or even vacant lands of the state.

The Justices also highlighted that the 1988 Constitution gives special protection to the indigenous way of being, which is closely related to the traditional occupation of lands, following Convention 169/ILO. Thus, the new normative paradigm of the 1988 Constitution opposes the discourses of civilizational assimilation that require the acculturation of indigenous people for their integration into Brazilian society. Justices such as Edson Fachin and Alexandre de Moraes used cases from the IHR Court and mentioned other Latin American constitutions to support their votes.

To overrule the case of the Raposa Serra do Sol Indigenous Land, the Justices argued that the STF itself did not admit that ruling as automatically binding on judicial and executive authorities. They also argued that the court was proposing to review a subject that, after so long, had become widely discussed by civil society, jurisprudence and doctrine. According to this argument, the need to review the case was justified insofar as the social pacification intended in the case of the Raposa Serra do Sol Indigenous Land was not achieved.

The indigeneity thesis adopted by the STF appears to be the normatively appropriate thesis for the 1988 Constitution. As Maira Pankararu argues, international, national, and constitutional legislation, as also historical elements, demonstrate that the recognition of lands occupied by indigenous people is a formal administrative act that does not depend on political will or conviction. This is not a matter of administrative discretionary decision.³² In other words,

³⁰ To have an overview of the case in a synthetic way, see: <https://apiboficial.org/marco-temporal/?lang=en>

³¹ Supremo Tribunal Federal. *STF overturns thesis on the time framework for the demarcation of indigenous lands*. <https://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=514552&ori=1>

³² Ankararu, M. de O. (2023). *“Our history does not begin in 1988”: the rights of indigenous peoples in the light of transitional justice* (p. 55-60). Master's Dissertation in Law). Faculty of Law, University of Brasília, Postgraduate Program in Law. Brasília.

demarcation is based on traditional occupation criteria that cannot be relaxed.³³ This position represents the constitutional respect for the right of original peoples to occupy their lands and to live in and exercise their way of being in the world. The right to land radiates to human dignity, the right to life, health, and culture, among many others.

Despite the significant hermeneutical advance represented by the correct decision on the case, the Brazilian National Congress has discussed legislative bills in an attempt to override the indigeneity thesis.

3. The backlash of the Brazilian National Congress on the judgment of the Federal Supreme Court

In 2018, the IRH Commission had already mapped approximately one hundred bills that sought to restrict indigenous rights, especially those linked to land demarcation.³⁴ Marlise Mirta Rosa presented a case study that analyzed legislative measures against indigenous peoples, finding that the majority of these bills directly attack the right to property of these communities.³⁵ Teles Junior carried out a comprehensive mapping of all measures in progress between 2011 and 2018, and found a strong inclination of the Brazilian Congress towards agribusiness and to the detriment of indigenous peoples.³⁶

For the Indigenous Missionary Council, the National Congress always maintained some indication of an anti-indigenous formation, but it was with the inauguration of former President Michel Temer term that the situation began to intensify.³⁷ This can be explained by the change in the parliamentary configuration, which from then on has an exponential extension of the bench of parliamentarians representing agribusiness.³⁸ Currently, the legislative branch maintains substantial attacks against indigenous rights. Bill No. 2.903 of 2023,³⁹ approved by the Federal Senate in the same week that the STF judgment was handed down is a mixture of setbacks and the attempt to resurrect the time framework thesis.

The bill was forwarded to President Lula for approval, who partially vetoed it (Veto No. 30 of 2023),⁴⁰ aiming at halting the central provisions for establishing the time framework in Brazil. The veto followed the recommendations drawn up in a Technical Note by the Ministry of

https://sucupira.capes.gov.br/sucupira/public/consultas/coleta/trabalhoConclusao/viewtrabalhoConclusao.jsf?popup=true&id_trabalho=13787208 .

³³ Souza Filho, CFM de. (2013). *Indigenous peoples and Brazilian law*. In CFM de Souza Filho & RC Bergold (Eds.), *The rights of indigenous peoples in Brazil: challenges in the 21st century* (pp. 13-32). Curitiba: Letra do Direito.

³⁴ Inter-American Commission on Human Rights. (2021). *Situation of human rights in Brazil* (OAS. Official documents, p. 30).

³⁵ Rosa, M. M. (2016). *The centrality of the territorial issue in legislative offensives against indigenous peoples*. *Studies Society and Agriculture*, 24(1), p. 183-208.

³⁶ Teles Junior, A. (2018). *The contemporary indigenous genocide in Brazil and the speech of the ruralist group in the National Congress* (p. 149-157). Master's Dissertation in Law. Faculty of Law, Postgraduate Program in Agrarian Law, Federal University of Goiás. Goiânia. <https://repositorio.bc.ufg.br/teseserver/api/core/bitstreams/105e17ff-91bf-4f20-9e93-81ffbcfoe43a/content>

³⁷ Indigenous Missionary Council. (2018). *Anti-Indigenous Congress: The parliamentarians who most acted against the rights of indigenous peoples*. Brasília: CIMI. Recovered from <https://cimi.org.br/wp-content/uploads/2018/09/congresso-anti-indigena.pdf>.

³⁸ Folha de S. Paulo. (2023). *Ruralist bench grows in the Senate and tries to approve PL for pesticides and time framework*. https://www1.folha.uol.com.br/ambiente/2023/06/bancada-ruralista-cresce-no-senado-e-tenta-aprovar-pl-dos-agrotoxicos-e-marco-temporal.shtml#:~:text=Driven%20by%20extrema%20right%2C%20a,27%20da%20started%20in%202015Ny4xNjkzNDM1OTQz*gaCW3ZH25XMK*MTcwNTY2NzYwNi4oMi4xLjE3MDU2NjkoOTguMC4wLjA.

³⁹ <https://legis.senado.leg.br/sdleg-getter/documento?dm=9487531&ts=1703791116242&disposition=inline>.

⁴⁰

<https://legis.senado.leg.br/sdleg-getter/documento?dm=9487531&ts=1703791116242&disposition=inline>.

Indigenous Peoples.⁴¹ However, the partial vetoes were overturned by an absolute majority of parliamentarians — 55 senators and 321 deputies. The bill was enacted and published in the form of Law No. 14.701 of 2023,⁴² which is already in force in the country.

Considering the STF's ruling described in the previous section, the act in question can now be seen as presumably unconstitutional. As the STF has already ruled on the issue and established the indigeneity thesis in the same period in which the act was approved, there are no reasons for this interpretation to be changed in court. Given this scenario, it is possible that the STF will again be provoked to decide on the conflict between the legislative and executive powers.

Considering the sphere of strategic litigation to overcome the situation inaugurated by the National Congress, the first path would be to file a direct action of unconstitutionality (a form of concentrated control of constitutionality) to question the approved act. This approach seeks a direct pronouncement from the STF on the constitutionality of the rule, establishing a new binding precedent. A more immediate option for resolving specific cases would be to use the *reclamação* lawsuit. The mechanism allows judicial or administrative acts that contradict binding decisions of the STF to be questioned, being a tool to ensure compliance with the court's decisions and avoid misinterpretations or deviations in the lower courts.

4. Final considerations

The recognition of the indigeneity thesis by the Federal Supreme Court represented a new paradigm in the struggle to protect the rights of indigenous populations. However, the current legislative backlash reintroduces a chapter of legal uncertainty for indigenous populations with the consecration of the time framework thesis in the infra-constitutional sphere. The thesis resurfaces as a threat to rights, creating an environment of uncertainty about the continued protection of indigenous territories.

Ailton Krenak, an indigenous and notable intellectual, whose participation in the 1987-1988 Constituent Assembly was marked by the symbolism of painting his face black with genipap dye, as a way of expressing mourning for the setback experienced by the rights of indigenous peoples, anticipated his vision of the current threats in his series of books.⁴³ He reiterates that indigenous peoples are facing the end (or several ends) of the world. Krenak highlights that traditional forms of life seek to resist the onslaught but are subject to progressive decimation.

The current chapter in Brazilian history, as observed by Krenak, points to yet another weakening of resistance. The persistence of the backlash at indigeneity theory by the legislators intensifies the challenges faced in the fight for the preservation of indigenous rights, with threats and setbacks that affect not only indigenous communities but also the country's cultural and environmental diversity. Possible strategies to question this legislative stance and seek the protection of indigenous rights involve, again, the judicial branch and the STF. According to what was presented, there are possible ways to combat legislative setbacks to reaffirm the commitment to protecting rights and diversity in Brazil. These paths will not be followed without frictions between the branches of power.

⁴¹<https://www.gov.br/povosindigenas/pt-br/assuntos/notas-oficiais/2023/08/nota-tecnica-sobre-o-projeto-de-lei-2-903-2023>.

⁴² https://www.planalto.gov.br/ccivil_03/ato2023-2026/2023/lei/L14701.htm#promulgacao.

⁴³ Krenak, A. (2019). *Ideas to postpone the end of the world*. São Paulo: Companhia das Letras. Krenak, A. (2020). *Life is not useful*. São Paulo: Companhia das Letras. Krenak, A. (2020). *Tomorrow is not for sale*. São Paulo: Companhia das Letras. Krenak, A., & Carelli, R. (2023). *Ancestral future*. São Paulo: Companhia das Letras.