

ADPF 709 MC ReF

Protecting Indigenous Peoples' Health Rights

Country:

Brazil

Court:

Federal Supreme Court

Competent Court:

Full Court

Format of the Session:

In-person¹

Rapporteur:

Justice Luís Roberto Barroso

Decision Date:

August 5, 2020

Matter:



STRUCTURAL LITIGATION

CASE SUMMARY

A Claim of Non-Compliance with a Fundamental Precept (ADPF) concerning actions and omissions by the public authorities that jeopardize Indigenous peoples' right to their lands, health, and life, especially during the Covid-19 pandemic, by which it is requested: (i) the drafting of a health protection plan to deal with and monitor the pandemic; (ii) the guarantee of access for all Indigenous peoples (including those located on lands that have not yet been ratified) to the Indigenous health subsystem; (iii) the creation of health barriers and a health situation room to monitor the pandemic, specifically in the case of Indigenous peoples in voluntary isolation; (iv) the removal of invaders from specific lands, where the large contingent of invaders impacts the health and living conditions of Indigenous communities.

LEGAL REASONING

1. The Articulation of Indigenous Peoples of Brazil (APIB) has the legitimacy to file a direct action before the Federal Supreme Court in defense of the rights of Indigenous peoples, since the 1988 Constitution guarantees the right of such peoples to defend their own interests in court, as well as the respect for their forms of social organization (articles 231 and 232, 1988 Federal Constitution).
2. In addition, the concept of national class actions should be reconsidered so that it can be extended to entities dedicated to the defense of fundamental rights. This is the understanding that reconciles the legitimacy of such entities to bring a direct action with the constitutional jurisdiction's mission to protect these rights.
3. There are three guidelines for dealing with the provisional measures requested in the action. The *first guideline* consists of the *precautionary and preventive principle* and recommends that, in cases of doubt, the most protective perspective should be adopted in order to protect the rights to life, health, and the environment, since any damage may be difficult to reverse. In this regard, it is claimed that there is an imminent risk of mass extermination of Indigenous peoples as a result of the spread of the Covid-19 pandemic.

¹ This trial session was entirely conducted through videoconferencing (Resolution 672/2020/STF).

4. The *second guideline* refers to the need for intercultural dialogue on this issue. Indigenous peoples are more vulnerable to infectious diseases and have lower immunity and higher mortality rates than the national average. Furthermore, providing health care to Indigenous peoples requires understanding and respect for their cultural practices. For this reason, Convention 169 of the International Labour Organization (ILO), a standard within the Brazilian legal system, guarantees them the right to participate in the formulation of public policies related to health.
5. Finally, the *third guideline* also relates to dialogue between the branches of government. This is because the proper management of public health policy on Indigenous issues depends on dialogue between the Judiciary and the various authorities of the Executive Branch, which have expertise in the care of these peoples and are familiar with the public circumstances and limitations of the issue. This measure respects the principle of the separation of powers.
6. Regarding the removal of invaders present on Indigenous lands, although the measure is due, it is necessary to consider the risk of conflict and the need for police and military forces to enter such lands, which may increase the risk of conflict and contagion during the pandemic. For this reason, in the immediate term, containment and isolation of invaders from Indigenous communities or an alternative measure to avoid contact will be determined.

DECISION OF THE COURT

The Federal Supreme Court partially upheld the provisional measure and ordered: (i) the preparation of a Covid-19 response and monitoring plan for Indigenous peoples by the government, with the participation of Indigenous peoples, authorities, and civil society organizations, to be approved by the Federal Supreme Court; (ii) the extension of the services of the Indigenous Health Subsystem to Indigenous peoples living on non-approved lands and to non-village (urban) residents who do not have access to the Unified Health System (SUS); (iii) the creation of sanitary barriers and a health situation room to protect isolated Indigenous peoples; (iv) the isolation and containment of invaders on Indigenous lands (without immediate removal, due to the risk of conflict and contagion that this measure could generate during the pandemic).

ADDITIONAL NOTES

Subsequently, other decisions, provisional measures, and incidental interlocutory remedies granted by the Federal Supreme Court in the same action established: (i) the strengthening of the protection of certain Indigenous peoples under attack; (ii) the suspension of an administrative act that allowed the suppression of public services to the detriment of Indigenous peoples living in non-ratified lands; (iii) the removal of invaders from Indigenous lands.