

RE 1,017,365

Land Traditionally in Use by Indigenous Communities Will Not Be Subject to the *Marco Temporal*

Country:

Brazil

Court:

Federal Supreme Court

Competent Court:

Full Court

Format of the Session:

In-Person

Rapporteur:

Justice Edson Fachin

Decision Date:

September 27, 2023

Matter:



CASE SUMMARY

An Extraordinary Appeal (RE) which deals with the interpretation of the constitutional rules governing the primordial right of Indigenous peoples to the lands they traditionally occupy, when the area of traditional Indigenous occupation partially coincides with a biological reserve and with an area occupied by private individuals. The issues under discussion include (i) the applicability of the *Marco Temporal* thesis, according to which Indigenous peoples only have the right to the lands they occupy at the time of the promulgation of the 1988 Constitution, even if the community has been forcibly displaced and prevented from returning; (ii) the procedure to be followed by the federal government in demarcating these lands, and the possibility of revision in the event of error; (iii) the right to prior compensation from third parties in good faith, with just title, if there was no Indigenous occupation at the time of the promulgation of the Constitution; (iv) the compatibility between traditional Indigenous occupation and environmental preservation; (v) the right of Indigenous peoples to participate in processes in which their interests are discussed, without preventing the concurrent participation of the National Indigenous People Foundation (FUNAI).

LEGAL REASONING

1. The rights of Indigenous peoples to the lands they traditionally occupy are original rights. Therefore, they preexist and are opposed to any other right or encumbrance. They are also inalienable, unavailable and imprescriptible. In this sense, the procedure for demarcating these lands is merely declaratory in nature and does not serve to constitute the rights mentioned, but only to guarantee them. Moreover, it is also a fundamental right, which cannot be suppressed, under penalty of violating an entrenchment clause (article 231, Federal Constitution of 1988).

2. Indigenous possession differs from possession under civil law, the latter being of an economic and commercial nature. This is because Indigenous possession is exercised according to the culture, customs and worldview of the Indigenous people, as a

condition for their own subsistence as people, covering the areas they inhabit on a permanent basis, those used for their productive activities, those essential for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction.

3. Under these conditions, the absence of an Indigenous community from a given area of traditional occupation at the time of the promulgation of the 1988 Federal Constitution does not exclude their right to it, if it is proved that the community was removed against its will and was unable to return. Traditionality and the facts surrounding the departure from the territory must be proven by means of an anthropological report, in the course of the demarcation process.

4. It is possible to resize a demarcation if it can be demonstrated that it does not respect the limits of traditional occupation as provided for in the Constitution, which must also be the subject of an anthropological report.

5. In the case of Indigenous lands that were unoccupied at the time of the promulgation of the Constitution and that have been transferred to third parties in good faith and with just title, it is necessary to reconcile the rights of these third parties with the rights of the Indigenous peoples, by guaranteeing the former the right to retain the area until they have been previously compensated for their loss. This compensation includes the value of the bare land if there is no possibility of private individuals being resettled.

6. There is no conflict between Indigenous occupation and the protection of the environment, since the typical way of life of these peoples, in accordance with their customs and traditions, ends up giving rise to the protection of the environmental resources necessary for their subsistence (through hunting, fishing and cultivation), as well as for their spiritual and cultural activities.

7. Finally, Indigenous peoples have the right to participate in legal proceedings that concern their interests, regardless of the participation of the National Indigenous People Foundation (FUNAI), both because the Federal Constitution expressly guarantees this and because it guarantees respect for their own social organizations and way of living and acting (articles 231 and 232, Federal Constitution of 1988).

DECISION OF THE COURT

The Federal Supreme Court (STF) rejected the *Marco Temporal* thesis and concluded that the possession of Indigenous peoples over the lands they traditionally occupy is an original right of these peoples, whose traditional occupation must be considered in accordance with the parameters expressly provided for in the constitutional text (paragraphs 1 and 2, article 231 of the Federal Constitution of 1988).

ADDITIONAL NOTES

Topic: "Definition of the legal-constitutional status of the ownership of traditional Indigenous lands, in the light of the provisions of article 231 of the constitutional text" (Topic 1,031).

Rule Statement: "I – Demarcation consists of a declaratory procedure of the original territorial right to possession of lands traditionally occupied by an Indigenous community;

II – Traditional Indigenous possession is distinct from civil possession, consisting of the occupation of lands permanently inhabited by Indigenous people, those used for their productive activities, those essential for the preservation of the environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions, under the terms of paragraph 1, article 231 of the constitutional text;

III – Constitutional protection of the original rights to the lands Indigenous peoples traditionally occupy does not depend on the existence of the *Marco Temporal* on October 5, 1988 or on the configuration of a persistent dispossession, such as a physical conflict or a persistent judicial controversy at the time of the promulgation of the Constitution;

IV – In the case of traditional Indigenous occupation or persistent dispossession contemporary to the promulgation of the Federal Constitution, the compensation regime relating to useful and necessary improvements, provided for in the paragraph 6, article 231 of the Federal Constitution 1988, shall apply;

V – In the absence of traditional Indigenous occupation or persistent dispossession on the date of the promulgation of the Constitution, the perfect legal acts and transactions and the *res judicata* relating to the just title or possession in good faith of lands traditionally occupied by Indigenous people are valid and effective, producing all their effects, with the individual having the right to fair and prior compensation for necessary and useful improvements from the Federal Government. When the resettlement of the individuals is unfeasible, they will be entitled to compensation from the Federal Government (with the right of recourse against the federative entity that titled the area) corresponding to the value of the bare land, paid in cash or in agrarian debt bonds, if it is in the interest of the beneficiary, and processed in separate proceedings from the demarcation procedure, with immediate payment of the undisputed portion, guaranteeing the right of retention until the undisputed value is paid, allowing self-composition and the regime of paragraph 6, article 37 of the Federal Constitution of 1988;

VI – Compensation is not possible in cases that have already been settled, arising from Indigenous lands that have already been recognized and declared in a demarcation process, with the exception of cases that are before the courts and in progress;

VII – It is the Federal Government's duty to carry out the demarcation procedure for Indigenous lands, and the formation of reserved areas is only permitted in the event of the absolute impossibility of realizing the constitutional demarcation order. In any case, the Indigenous community must be heard and, if necessary, self-composition must be sought between the respective federal entities in order to identify the lands needed to form the reserved areas, always bearing in mind the pursuit of the public interest and social peace, as well as proportional compensation for the Indigenous communities (article 16,4 of the 169 Convention, ILO);

VIII – The initiation of a procedure for resizing Indigenous land is not prohibited in the event of non-compliance with the elements contained in article 231 of the Federal Constitution, by means of a request for review of the demarcation process submitted within five years of the previous demarcation, and it is necessary to prove a serious and irremediable error in the conduct of the administrative process or in the definition of the limits of the Indigenous land, except for ongoing legal actions and requests for review already initiated up to the date of conclusion of this judgment;

IX – The anthropological report carried out under the terms of the Decree 1,775/1996 is one of the fundamental elements for demonstrating the traditional nature of the occupation of a given Indigenous community, in accordance with its uses, customs and traditions, in the form of the normative instrument mentioned;

X – The lands traditionally occupied by the Indigenous peoples are the permanent property of the community, and the Indigenous peoples have the exclusive use of the riches of the soil, rivers and lakes that exist there;

XI – The lands traditionally occupied by Indigenous people, as public lands, are inalienable, unavailable, and the rights over them are imprescriptible;

XII – The traditional occupation of Indigenous lands is compatible with the constitutional protection of the environment, and the exercise of the traditional activities of Indigenous peoples is guaranteed;

XIII – The Indigenous peoples have civil and legal capacity and are legitimate parties in the processes in which their interests are discussed, without injury to it, in accordance with the law, to the concurrent legitimacy of FUNAI and the intervention of the Federal Prosecution Service in its law enforcement duty.”

