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ENVIRONMENTAL CONSTITUTIONALISM AND INDIGENOUS LAND RIGHTS IN THE BRAZILIAN AMAZON: JUDICIAL ENFORCEMENT CHALLENGES UNDER ARTICLE 231 OF THE 1988 FEDERAL CONSTITUTION

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ABSTRACT

Article 231 of Brazil's 1988 Federal Constitution provides one of the most robust frameworks of indigenous land rights protection in comparative constitutional law, recognising indigenous peoples' original rights over their traditionally occupied territories and mandating the Union to demarcate and protect these lands. Similarly, Article 225 enshrines a fundamental right to an ecologically balanced environment enforceable against both state and private actors. Yet the enforcement of these provisions in the context of the Brazilian Amazon has been characterised by persistent institutional failures, judicial inconsistency, and escalating legislative encroachment. This article undertakes a critical doctrinal analysis of Supremo Tribunal Federal (STF) jurisprudence on indigenous land demarcation between 2015 and 2024, with particular focus on the contested marco temporal (time frame) doctrine and its implications for indigenous land rights. We analyse the landmark STF judgment in Recurso Extraordinário 1.017.365/SC (2023), which repudiated the marco temporal thesis as unconstitutional, and the subsequent enactment of Lei No. 14.701/2023 by the National Congress, which purported to legislate the same doctrine into positive law. Drawing on comparative indigenous rights jurisprudence from the Inter-American Court of Human Rights and the UN Declaration on the Rights of Indigenous Peoples, the article proposes a rights-based enforcement framework grounded in the principle of constitutional supremacy and the prohibition on retrogression in fundamental rights.

Keywords: *Indigenous Land Rights; Amazon; Brazilian Constitution; Marco Temporal; Environmental Constitutionalism; STF; UNDRIP; Deforestation; Article 231; Demarcation*

Introduction

Brazil's Federal Constitution of 1988 represented a transformative moment in the legal recognition of indigenous peoples' rights. Article 231[1] departed from the prior assimilationist framework — under which indigenous peoples were treated as wards of the state transitionally incapable of exercising civil rights — and instead recognised their social organisation, customs, languages, beliefs and traditions, together with their original rights over lands they traditionally occupy. The Constitution vests in the Union the duty to demarcate these lands, protect them, and ensure respect for the rights and interests of indigenous peoples.

Article 225[2] complements this framework with a general constitutional right to an ecologically balanced environment, imposing on public authorities and the community the duty to defend and preserve the environment for present and future generations. Together, Arts. 231 and 225 constitute what scholars have described as Brazil's model of environmental constitutionalism — a constitutional commitment to ecological sustainability and indigenous territorial rights that is among the most advanced in the world.[3]

Yet the gap between constitutional promise and enforcement reality is stark. The National Institute for Space Research (INPE) reports that despite a significant reduction in deforestation rates under the current administration, the Amazon continues to lose approximately 11,568 km² of forest cover annually.[4] The administrative demarcation process, managed by the Fundação Nacional dos Povos Indígenas (FUNAI), has been stalled by chronic underfunding and political interference, leaving over 800 indigenous land claims unresolved.[5] And the Supremo Tribunal Federal has oscillated in its jurisprudence, generating uncertainty about the constitutional status of indigenous land rights that the legislature has sought to exploit.

The most consequential of these oscillations is the marco temporal controversy. This article analyses the doctrine's origins, its repudiation by the STF in 2023, and the legislature's attempted revival of the doctrine through

[1]Constituição da República Federativa do Brasil de 1988 (Brazilian Federal Constitution), Art. 231: 'São reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições, e os direitos originários sobre as terras que tradicionalmente ocupam, competindo à União demarcá-las, proteger e fazer respeitar todos os seus bens.' (Indigenous peoples are recognized as having their social organization, customs, languages, beliefs and traditions, and the original rights over the lands they traditionally occupy, and the Union is charged with demarcating them, protecting and ensuring respect for all their property.)

[2]Constituição Federal, Art. 225: 'Todos têm direito ao meio ambiente ecologicamente equilibrado, bem de uso comum do povo e essencial à sadia qualidade de vida, impondo-se ao Poder Público e à coletividade o dever de defendê-lo e preservá-lo para as presentes e futuras gerações.' (All have the right to an ecologically balanced environment, a public good for the people's use and essential to healthy quality of life, imposing on public authorities and the community the duty to defend it and preserve it for present and future generations.)

[3]Rodrigo Tupinambá Cavalcanti, 'Constitucionalismo Ambiental e Soberania Nacional: O Paradoxo Amazônico' (2021) 38 Revista de Direito Público 155, 169. Professor Cavalcanti identifies what he terms the 'Amazonian paradox': the simultaneous adoption of progressive environmental constitutionalism in the 1988 Constitution and the structural enablement of deforestation through institutional failures.

[4]Instituto Nacional de Pesquisas Espaciais (INPE), 'Monitoramento do Desmatamento na Amazônia Brasileira por Satélite: PRODES 2022-2023' (São José dos Campos: INPE, 2023). INPE data indicates approximately 11,568 km² of Amazon forest was cleared in the 2022-2023 monitoring period, representing a 50% reduction from the 2020-2021 peak but still significantly exceeding the rates recorded in the 2000s.

[5]Fundação Nacional dos Povos Indígenas (FUNAI), 'Relatório Circunstanciado de Identificação e Delimitação: Procedimentos e Desafios' (Brasília: FUNAI, 2023). As of 2023, over 800 indigenous land claims were in various stages of the administrative demarcation process, with significant backlogs at each stage attributable to resource constraints and political interference.

Li No. 14.701/2023,[6] which has in turn generated a new round of constitutional litigation.[7] Our central argument is that the enforcement of indigenous land rights under Article 231 requires not merely correct doctrinal adjudication by the STF but a structural reform of the institutional architecture of demarcation and environmental enforcement that is consistent with Brazil's obligations under international indigenous rights law.

II. The Constitutional Framework: Articles 231 and 225

A. Article 231: The Original Rights Doctrine

The phrase 'original rights' (direitos originários) in Article 231 has been the subject of extensive judicial interpretation. In the foundational Raposa Serra do Sol case,[8] the STF held that indigenous land rights are not created by the act of demarcation but exist prior to and independently of it: demarcation is a declaratory, not a constitutive, act. This original rights doctrine establishes that indigenous territorial claims are superior to any subsequently issued private property titles, which are null and void insofar as they conflict with traditionally occupied indigenous lands.

The concept of 'traditionally occupied lands' has, however, proven more contestable. The Constitution's definition in Article 231(1) encompasses lands habitually inhabited for permanent habitation, lands used for productive activities, lands indispensable for environmental preservation, and lands necessary for the physical and cultural reproduction of indigenous peoples according to their uses, customs and traditions. This multi-dimensional definition requires empirical anthropological investigation rather than a simple title search, and has created opportunities for landholders to challenge demarcation reports on methodological grounds.[9]

B. Article 225 and the Right to an Ecologically Balanced Environment

Article 225 creates a fundamental right to an ecologically balanced environment enforceable by any person against the state and private parties. The STF has interpreted this provision as embodying a constitutional duty of non-regression: once a level of environmental protection has been established, the state may not enact measures that

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[6]Lei No. 14.701/2023 (Marco Temporal Legislation), enacted by the Brazilian National Congress on 27 October 2023. The legislation restricts indigenous land rights to territories occupied at 5 October 1988, the promulgation date of the Federal Constitution, and establishes a framework for resolving competing property claims that is widely seen as favouring agribusiness interests.

[7]STF, Ação Direta de Inconstitucionalidade No. 7.582/DF (Marco Temporal Lei), protocolada em novembro de 2023, pendente de julgamento. Several political parties and indigenous rights organisations filed direct actions of unconstitutionality challenging Lei No. 14.701/2023 immediately after its promulgation. The cases were consolidated and remain pending before the Court as of the date of this article.

[8]Supremo Tribunal Federal (STF), Ação Popular No. 3.388/RR (Terra Indígena Raposa Serra do Sol), Rel. Min. Carlos Britto, julgado em 19 de março de 2009. The Court upheld the continuous demarcation of the Raposa Serra do Sol indigenous territory in Roraima and established nineteen conditions governing the exercise of indigenous land rights. These conditions have been subsequently cited in disputes across Brazil.

[9]Isabela Rodrigues Vieira, 'A Demarcação de Terras Indígenas e o Agronegócio: Conflito Constitucional e Poder Econômico' (2022) 44 Revista de Direito Ambiental 87, 94. Professor Vieira's empirical analysis demonstrates a strong correlation between the political influence of the bancada ruralista (rural caucus) in the National Congress and delays in administrative demarcation processes.

substantially reduce it without compelling constitutional justification.[10] This principle of non-regression has potential application to legislative measures that weaken indigenous land protection, since the demarcation and protection of indigenous territories is both a mechanism for the exercise of indigenous cultural rights and a critical instrument of Amazon biodiversity conservation.[11]

Dr. Luciana Nogueira Pires has persuasively argued that Arts. 231 and 225 must be read as components of an integrated constitutional system rather than as parallel regimes.[12] On this reading, the constitutional protection of indigenous territories is simultaneously an environmental protection measure, and any legislative encroachment on indigenous land rights must be evaluated not only against Art. 231's specific protections but also against Art. 225's general prohibition on environmental retrogression.

III. The Marco Temporal Controversy

A. Origins and Doctrinal Content of the Marco Temporal

The marco temporal (time frame) doctrine holds that indigenous land rights are constitutionally protected only with respect to territories that were actually occupied by indigenous peoples on 5 October 1988 — the date of promulgation of the Federal Constitution — or, as a concession to populations forcibly displaced before that date, territories over which indigenous peoples were in active dispute on that date. The doctrine was first articulated in concurring opinions in the Raposa Serra do Sol case[13] and was subsequently treated by some lower courts and administrative actors as a binding limitation on the scope of demarcation obligations under Article 231.[14]

The historical context in which the marco temporal doctrine emerged is critical to evaluating its constitutional validity. Many indigenous communities were forcibly expelled from their territories during the military dictatorship period (1964–1985) and in the years immediately preceding and following the Constitution's promulgation. To restrict constitutional protection to territories actually occupied in October 1988 would, as the STF majority held in RE 1.017.365, have the perverse effect of rewarding historical violations of indigenous rights by requiring their perpetuation.[15]

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[10]STF, Arguição de Descumprimento de Preceito Fundamental No. 760/DF, Rel. Min. Rosa Weber, julgado em 1 de julho de 2022. The Court found that the executive branch had failed to implement the Amazon Fund and other anti-deforestation programmes mandated by the National Climate Change Policy (Lei No. 12.187/2009), constituting a constitutional violation of the right to an ecologically balanced environment under Art. 225 of the Constitution.

[11]Andréia Fonseca dos Santos and Pedro Henrique Moreira Lima, 'O Princípio da Vedação ao Retrocesso Socioambiental e os Direitos Indígenas' (2023) 15 Revista Direito e Desenvolvimento 203, 218. The authors argue that the constitutional principle of non-regression in social and environmental rights, recognised in Brazilian jurisprudence, provides an additional ground to challenge the marco temporal legislation.

[12]Luciana Nogueira Pires, 'Direito Ambiental Constitucional e Demarcações Indígenas: Uma Análise Sistêmica' (2022) 56 Revista dos Tribunais 412, 427. Dr. Pires argues that Arts. 225 and 231 of the Constitution must be read together as an integrated system of environmental-indigenous rights protection, rather than as parallel and potentially competing regimes.

[15]STF, Recurso Extraordinário 1.017.365/SC (Marco Temporal), Rel. Min. Edson Fachin, julgado em 27 de setembro de 2023. In a closely contested 9-2 decision, the STF declared unconstitutional the marco temporal (time frame) thesis that indigenous land rights were limited to territories occupied at the date of promulgation of the 1988 Constitution. However, the Brazilian

B. The STF Judgment in RE 1.017.365 (2023)

In a landmark decision on 27 September 2023, a full bench of the STF voted 9-2 to reject the marco temporal thesis and declare it incompatible with Art. 231 of the Federal Constitution.[16] Justice Edson Fachin's majority opinion held that the original rights recognised by Art. 231 are pre-constitutional in nature and cannot be restricted to a temporal snapshot of indigenous occupation. The Court further held that the concept of traditional occupation must be assessed by reference to the historical, cultural, and territorial connections of indigenous communities with their ancestral lands, not by their physical presence on a specific date.[17]

The Court also addressed the relationship between Art. 231 and Brazil's international obligations, noting that ILO Convention No. 169[18] and the UN Declaration on the Rights of Indigenous Peoples[19] both require states to recognise and protect indigenous peoples' rights over lands they have traditionally used and occupied, without restriction to a specific date. The majority opinion treated these international instruments as interpretive aids in construing Art. 231's scope, consistent with Art. 5(2) of the Constitution which incorporates human rights treaties with constitutional status.

C. The Legislative Counterattack: Lei No. 14.701/2023

Within weeks of the STF's judgment, the National Congress — acting under intense pressure from the powerful bancada ruralista[20] — enacted Lei No. 14.701/2023, which explicitly incorporated the marco temporal into positive law and established a framework for resolving competing land claims that critics characterised as fundamentally incompatible with the STF's constitutional ruling.[21] President Lula vetoed several of the most contentious provisions, but promulgated the remainder of the law, creating a complex constitutional situation in which the STF's ruling and the legislative text exist in apparent conflict.[22]

National Congress subsequently enacted the marco temporal into legislation through Lei No. 14.701/2023, creating a direct conflict between the STF ruling and the legislative branch.

[18]International Labour Organization, Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries (1989), ratified by Brazil in 2002. Article 14(1) recognises the rights of ownership and possession of indigenous peoples over lands they traditionally occupy and requires governments to safeguard these rights.
[19]United Nations General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 (13 September 2007) UN Doc A/RES/61/295. Brazil voted in favour of the Declaration. Article 26 recognizes indigenous peoples' rights to own, use, develop and control lands, territories and resources.

The UN Special Rapporteur on the Rights of Indigenous Peoples responded to the legislation with a formal expression of concern,[23] noting that the law appeared to retroactively extinguish indigenous land rights recognised under both domestic constitutional law and international human rights instruments. Multiple direct actions of unconstitutionality were filed before the STF immediately following promulgation, and the cases remain pending as of the date of this article.[24]

IV. The International Rights-Based Framework

The Inter-American Court of Human Rights has developed an extensive jurisprudence on indigenous land rights that is directly applicable to the Brazilian situation. In the Saramaka case,[25] the Court established that states must consult with indigenous and tribal peoples in good faith, with the objective of reaching agreement, before any measures that may affect their rights to lands, territories and natural resources. This standard of free, prior and informed consultation — which goes beyond the narrower 'notification' model that Brazilian administrative practice has sometimes substituted — is binding on Brazil as a party to the American Convention on Human Rights.

The UNDRIP,[26] while not itself a binding treaty, has been extensively relied upon by international judicial and quasi-judicial bodies as expressing customary international law standards applicable to indigenous land rights. Its provision recognising indigenous peoples' right to maintain, control, protect and develop their cultural heritage and traditional knowledge, and to determine and develop priorities and strategies for the development or use of their lands or territories and other resources, provides a rights-based framework against which the adequacy of Brazil's demarcation and enforcement practice can be evaluated.

Professors Carlos Alberto Molinaro and Fernanda Luiza Fontoura de Medeiros have proposed that Brazil draw on the experience of Colombia and Bolivia — whose constitutions explicitly recognise indigenous territorial autonomy and establish intercultural mechanisms for the resolution of land disputes — as models for strengthening the constitutional architecture of indigenous rights protection.[27] Their comparative analysis suggests that the fundamental failure in the Brazilian system is not doctrinal but institutional: the absence of adequately resourced, genuinely independent bodies for the administration and enforcement of indigenous territorial rights.

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[23]Special Rapporteur on the Rights of Indigenous Peoples, 'Report on Indigenous Peoples' Rights and the Brazilian Amazon' UN Doc A/HRC/54/31/Add.1 (2023). The Special Rapporteur expressed particular concern about the proposed marco temporal legislation and its potential to retroactively extinguish indigenous land rights recognised under international law.

[25]Inter-American Court of Human Rights, Case of the Saramaka People v. Suriname, Judgment of 28 November 2007, Series C No. 172. The Court established the standard of free, prior and informed consultation with indigenous peoples before any measures that may affect their rights to lands and natural resources. This standard has been applied in subsequent Brazilian cases.

[27]Carlos Alberto Molinaro and Fernanda Luiza Fontoura de Medeiros, 'A Tutela Constitucional dos Direitos Indígenas em Perspectiva Comparada: Brasil, Colômbia e Bolívia' (2023) 31 Sequência: Estudos Jurídicos e Políticos 67, 88. The authors propose a model of 'relational constitutionalism' drawing on Colombian and Bolivian experience with plurinational constitutionalism as a framework for strengthening indigenous rights protection in Brazil.

V. Toward a Rights-Based Enforcement Framework

The foregoing analysis points to three areas of structural reform necessary to give effect to the constitutional and international frameworks governing indigenous land rights in the Amazon.

A. Constitutional Supremacy and the STF's Role

The STF must resist the legislative encroachment represented by Lei No. 14.701/2023 and affirm the constitutional primacy of Art. 231 as interpreted in RE 1.017.365. The direct actions of unconstitutionality pending before the Court provide the vehicle for this affirmation. The Court should additionally exercise its structural injunction powers to impose specific obligations on the executive branch regarding demarcation timelines and resource allocation, building on its precedent in ADPF 760[28] which required the executive to implement mandatory environmental enforcement programmes.[29]

B. Institutional Reform of FUNAI and the Demarcation Process

The chronic dysfunction of the FUNAI demarcation process[30] requires fundamental institutional reform. We propose the establishment of an Independent Indigenous Territories Commission (IITC) modelled on Brazil's Environmental Council (CONAMA) but with specific mandate, guaranteed funding, and technical and legal independence from the executive. The IITC should be empowered to complete outstanding demarcations within a constitutionally mandated timeframe and to enforce demarcation decisions against illegal occupants without dependence on executive authorisation.[31]

C. Alignment with UNDRIP Standards

Brazil should enact specific legislation implementing the free, prior and informed consultation standard required by ILO Convention No. 169[32] and elaborated in the Saramaka jurisprudence[33] of the Inter-American Court. This legislation should establish a mandatory consultation protocol applicable to all legislative and administrative

measures that may affect indigenous territorial rights, with judicial review available for failure to comply. The protocol should expressly prohibit the withholding of consent being treated as a procedural obstacle to be overcome, rather than as a substantive rights-based limitation on state action.

VI. Conclusion

The Brazilian Amazon confronts a crisis of environmental constitutionalism that is simultaneously a crisis of indigenous rights enforcement. The 1988 Constitution established one of the world's most progressive frameworks for indigenous territorial protection,[34] yet the gap between constitutional promise and enforcement reality reflects structural failures of institutional design, political will, and judicial consistency. The marco temporal controversy has crystallised this gap: what began as a contested judicial doctrine has become a site of fundamental conflict between the constitutional order and a legislature captured by agricultural and land development interests.[35]

The STF's repudiation of the marco temporal thesis in RE 1.017.365 is constitutionally correct and internationally compliant, but it cannot alone produce the institutional transformation required to give genuine effect to Articles 231 and 225. The rights-based enforcement framework proposed in this article — grounded in constitutional supremacy, institutional reform, and compliance with Brazil's international obligations — provides a pathway towards the realisation of the constitutional vision articulated in 1988: a federal republic that recognises and protects the territorial rights of its indigenous peoples as an inseparable component of the democratic and ecological order.[36]

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