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# Indigenous Peoples' Rights in Brazil: A Conceptual Framework on Indigenous Constitutional Law

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*The recognition of indigenous peoples as subjects of rights by the 1988 Brazilian constitutional as well as the development of International Law opened the way for establishing, at least in a theoretical perspective, an "essential core of rights" of indigenous peoples, surpassing the historical integrationism. However, these norms vary significantly with a reality marked by the permanence of integrationist practices, asserted by the state, as is the case of "timeframe thesis". Therefore, the aim of this paper is to critically analyse, landed on the fields of constitutional theory and legal sociology, the essential core of indigenous peoples' rights in Brazil, pointing to the current issues that hinder or hamper its enforcement.*

**Keywords:** *Indigenous peoples' rights; Brazil; Indigenous Constitutional Law; Human rights.*

## Introduction

The second half of the 20th century, as stated by the Italian jurist Norberto Bobbio, can be labelled as the "*age of rights*". The gradual and recent undertaking of political openness towards *new rights* and *new subjects of rights* – boosted by this new sociopolitical context – enables to theoretically conceive the birth of a "paradigm of diversity", or even an "era of diversity". Indigenous peoples of different nationalities are at the heart of this broad process. As integral parts of a certain "national communion", but which seeks to assert its own sociocultural heterogeneity, indigenous peoples have politically mobilised themselves in order to legally trigger their claims towards multiculturalism and interculturality.

The recent acquisitive evolutions of contemporary constitutionalism in Latin America, as well as in International Human Rights Law – both being fruitful contributions to the "common heritage of democratic constitutionalism" – impose, at least formally, a new legal reality for indigenous peoples, marked by *multiculturalism* and *interculturality*, which implies the formal overcoming of the

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historical integrationism engraved in legal and political practices in all the Americas. The recognition of indigenous rights by the 1988 Constitution, international treaties and conventions brings about the structuring of an "*essential core of indigenous rights*", conceived as a block of constitutionality and conventionality, and is based on the urgencies and sociocultural needs of these peoples.

This reality, however, coexists with several contradictions and paradoxes from the point of view of its enforcement. This is because the affirmation of indigenous rights in Brazil inexorably pervades the "indigenous question", that is, the indigenous' claim for the right to land. Indeed, the judicial thesis of "*marco temporal*" [timeframe thesis], created by the Federal Supreme Court in the *Raposa/Serra do Sol* case in 2009, which, briefly, prevents the guarantee of the right to land of indigenous peoples who were not living there on the date of the 1988 Constitution enactment, came to be instrumentalised both by the Judicial Branch, as well as by other branches to prevent the enforcement of the constitutional right to land of indigenous peoples. Ever since, the thesis is one of the "hot topics" involving indigenous peoples rights in the country.

In this regard, this article aims to analyse the rights of indigenous peoples in Brazil, focusing on the theoretical construction of the "essential core of rights" in the paradigm of diversity, and the legal-political practices that subvert this normative order and represent, in practical terms, the remaining of *historical integrationism* – the case of "*marco temporal*" thesis. The analysis is grounded on the fields of constitutional theory and legal sociology, in a structural-functional perspective, bringing together elements of political theory. Therefore, the article is divided into three parts:

I. The essential core of rights;
II. The paradigm of diversity and the formal overcoming of historical integrationism;
III. The "*marco temporal*" thesis and the integrationist remnant.

## The Essential Core of Rights

The 1970s and 1980s witnessed the gradual process of political and cultural engagement of indigenous peoples, within the framework of political "empowerment"[1] in Latin America. This is the result of the broader process or "politicisation of culture"[2], as it has greatly triggered this topic within political arena and legal norms[3]. By redefining the concepts of "culture"[4], "ethnicity", and "indigenism", indigenous peoples have considered themselves as political subjects

[1]For an analysis of the process of "political empowerment" of indigenous peoples in Brazil, see Sousa Filho (2003).
[2]Benhabib (2006).
[3]Bhabha (2013).
[4]Cunha (2009).

and subjects of fundamental rights, in order to found a "new indigenism"[5]. This was deemed as the "rebirth of indigenous peoples towards law", whether from a domestic law point of view – in several Latin American countries –, or even from an international law point of view – especially within International Human Rights Law.

Indeed, the 1988 Constitution, as a catalysis for the large and detailed process of indigenous rights constitutionalisation in Brazil, has coined these rights in a new grammar of legal reading, linked to other constitutional principles and fundamental rights, along with the opening clause that provides for the dialogue with International Human Rights Law. The document made room for surpassing, at least theoretically, the historical integrationist approach in force since the beginning of the 20th century – with the creation of the National Indian Protection Service, current "FUNAI" – based on the recognition of its cultural and specific cosmovisions. The legal provisions of the indigenous issues within the scope of this new approach – in a new "legal form" – concerns the need for the state and institutional policy to respond to demands for recognition[6], especially when it comes to cultural diversity within the nation-state[7].

In this context, the 1988 Constitution has become a sort of "symbol" for the indigenist movement and indigenous peoples. It was the outcome of political engagement by both indigenous peoples and indigenous institutions during the National Constituent Assembly (1987-1988). The military dictatorship, the preceding period (1964-1985), was responsible for systematic violations of fundamental rights and indigenous peoples' rights in Brazil, including the commitment of state crimes – such as the genocide of the Waimiri-Atroari people, in Amazonas[8], the genocide of the Avá-Canoeiro in Araguaia and the successive massacres of the Cinta Larga in Mato Grosso[9], the bombing of tribes by the Armed Forces using Napalm[10], in addition to enslavement, the creation of clandestine prisons, the prohibition of speaking their own language (one of the elements of ethnocide), the establishment of arbitrary criteria for "indigeneity", attempts at "emancipation" of indigenous peoples, negative certificates of the existence of these peoples for the illegal licensing of economic activities on their lands[11]. In this length, the possibility of redrawing the legal and political order mobilised the interests and political will of these peoples and the institutions that politically support them.

At the international landscape, the political moment was also favourable for the recognition of cultural diversity and indigenous peoples' rights, especially within the scope of the UN Commission on Human Rights, which created the

[5]To understand the concept of *indigenism* and its political repercussions, see: Ramos (1998); Niezen (2003).
[6]On the concept of recognition, see: Honneth (1996).
[7]If until then diversity was a problem that was beyond the nation-state, in the sense of the different peoples that configure the political dynamics of other countries, from then on diversity becomes an internal problem See Laraia (2001).
[8]Comitê Estadual da Verdade do Amazonas (2012) at 158.
[9]Brasil (2014) at 201.
[10]São Paulo (2015) at 3233.
[11]Fernandes (2015) at 145-146.

*Working Group on Indigenous Populations* in 1982. This engagement, fostered by indigenous leaders themselves, resulted in the revision of international legally-binding documents, such as the International Labour Organisation (ILO) *Convention on the Rights of Indigenous and Tribal Peoples n. 107* (1957), a document with an integrationist nature and bias[12]. In 1989, the works of the mentioned Group provided the enactment of ILO Convention n. 169, which revised the legal approach towards indigenous peoples' rights, whereby new rights were enshrined – as is the case of the *right to prior consultation*[13]. This has reinvented International Law for indigenous peoples, dimensioned in a new legal grammar[14].

The normative evolutions regarding indigenous peoples' rights are landed on what Norberto Bobbio[15] called as the "era of rights", and evinces the flourishing of their renaissance towards law[16], triggering the basis for indigenous policies in Brazil. In theoretical terms, an attuned analysis of this normativity enables to construct an "*essential core of rights*", which steers as a set of constitutional and international rights that conform one rigid block on the control of constitutionality and conventionality, and refer to the main urgencies and sociocultural need of these peoples in their daily lives. The nucleus consists of current specific and general rights recognised by the Brazilian state, and as it is delimited to the constitutional and international scope, it is composed of fundamental and human rights. Therefore, it asserts the degree of fundamentality[17] of these rights, based on the normative finding that fundamental rights are not only provided for in the article 5 of the Constitution[18] – as stated for in the Article 5, 2.

The core is made up of three pillars. The first one relates to the *territorial and environmental rights*, and it confirms a unit insofar as land and environmental protection as intimately related for indigenous peoples, being land the basis for sustainable development of their own communities. Secondly, the *right to self-determination* – or, as Rodolfo Stavenhagen states, *ethnodevelopment*[19]– which infers on the capacity for self-management and self-government of their peoples and communities. The third one, the *cultural rights*, that enshrines the cultural autonomy, epistemologies, cultural heritage and establish the legal protection for their cultural assets.

*Territorial rights* were historically at the heart of the "indigenous question", and still is an open wound regarding indigenous peoples claims. From a constitutional point of view, the right to land, and the right to an ecologically balanced environment, are both provided respectively in Articles 231, § 1 and 225

[12]Anaya (2010) at 118.
[13]"Article 6º, 1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly".
[14]Stavenhagen (2010).
[15]Bobbio (2004).
[16]Souza Filho (1998).
[17]For further analysis see Ferrajolli (2011).
[18]Canotilho (2012).
[19]Stavenhagen (1985).

of its text[20]. The Article 231 stresses that indigenous traditionally occupied lands are the ones permanently inhabited, as well as those used for their productive activities, those essential for the preservation of environmental resources – which demonstrates their intrinsic relationship with the *right to environment* –, and those lands used for their physical and cultural reproduction. In this length, the article 225 points out that "everyone" has the right to an ecologically balanced environment, deemed as a common good for the people, by which it is part of the dynamics of intergenerational protection. From the outlook of International Law[21], *ILO Convention 169* coins several references to the right to land. It states the need for governments to adopt measures in cooperation with indigenous peoples to protect and preserve the environment and indigenous territories (art. 7, 4), along with establishing a specific section of the Convention only to address on "indigenous lands", pointing out that this concept should be broadly understood as "territory", which encompasses the entirety of the habitat occupied by indigenous peoples, that they use in some way. Among other points, it recognises the *right of possession* and *property*[22] for indigenous peoples (art. 14, 1), determines the protection of natural resources existing in their lands (art. 15, 1), in addition to preventing indigenous peoples from being transferred of the lands they occupy – the latter can only be carried out with the express consent of the communities (16, 1). Still in International Law, the *2007 International Declaration on the Rights of Indigenous Peoples* also highlights that indigenous peoples have the right to lands, territories and resources that they traditionally own and occupy or that they have used and acquired (26,1), as well as the control of their lands, territories and resources (26,2), the need for the State to ensure this right through demarcation (26, 3), and points out that indigenous peoples will not be forcibly removed from their lands (article 10); additionally, it also recognises that indigenous peoples have the right to conservation and protection of the environment and the productive capacity of their lands, territories and resources (art. 29, 1). The recent *American Declaration on the Rights of Indigenous Peoples*, enacted in 2016, also emphasises the protection of territorial rights related to the right to a balanced environment in several articles[23]. Territorial and environmental rights are also related to the right to food, water, among others, that guarantee the lives of these peoples in their respective territories.

The *right to self-determination* of indigenous peoples is not expressly provided for in the chapter dealing with indigenous rights in the Federal Constitution. However, one of the fundamental principles of the country's international relations (Article 4, item III) is "self-determination of peoples", which, in an extensive interpretation, can be conceived as a device that also concerns indigenous peoples[24]. International treaties are more vehement regarding the provision of this right and also its content. The *International Declaration on the Rights of*

[20]For a better understanding of the legal dogmatics on the right to land of indigenous peoples, see Barbosa (2001).
[21]For a further understanding of indigenous peoples' land rights at the international level, see Gilbert (2013).
[22]In Brazilian legislation, however, only the right to possession is recognised.
[23]Emphasis on these matters is given in articles VI, XIX 2 and 3, and article XXV.
[24]For details see Barbosa (2011).

*Indigenous Peoples* points out in Article 3 that indigenous peoples have the right to self-determination, which is embodied in the ability to freely determine their political condition and freely pursue their economic, social and cultural development. Article 4 outlines that the exercise of the right to self-determination includes *autonomy* or *self-government* in matters related to its internal and local affairs, as well as the way to dispose of the means to finance its autonomous functions. According to the declaration, the right to self-determination also includes the ability to maintain and strengthen one's own political, legal, economic, social and cultural institutions, while retaining the right to fully participate in political, economic and social life (art. 5). The declaration also proposes a guarantee of access to means of communication (art. 16); political and social participation (art. 18); political cooperation (art. 19), and recognition of their political strategies development (art. 23). *ILO Convention 169*, despite not expressly recognizing the right to self-determination, make reference to two essential aspects interwoven: the right to prior consultation, recognised by article 6, 1, "a", and the respect to the customary right of indigenous peoples, recognised in art. 8, 1 of this instrument. Likewise, the *American Declaration on the Rights of Indigenous Peoples* also provides for the right to self-determination and the pursuit of indigenous free development (art. III and XXIV). All these normative aspects comprise this pillar related to the self-determination of indigenous peoples.

The *cultural rights* of indigenous peoples are recognised in the Constitution in several articles. The article 231 employs the recognition of indigenous social organisation, customs, languages, beliefs and traditions. Therefore, the Constitution ensures bilingual education for indigenous communities (art. 210, § 2), and determines that the State must protect the manifestations of indigenous cultures (art. 215, § 1). At the international level, there are several normative instruments that guarantee the right to diversity (*1972 Convention for the Protection of the World Cultural and Natural Heritage*; *2001 Universal Declaration on Cultural Diversity*; *2003 Convention on the Safeguarding of the Intangible Cultural Heritage*; and *Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005*). *ILO Convention 169* recognises in several articles the cultural rights of indigenous peoples. The articles 5, "a" and "b" are the ones that most eloquently emphasises it, by determining that social, cultural, and religious values and practices must be recognised and protected, as well as the integrity of indigenous values, practices and institutions. The *International Declaration on the Rights of Indigenous Peoples* is more emphatic in this regard and provides for the right to identity (Article 33), the protection of cultural heritage (Article 31), respect for traditions and customs, and the prohibition of discrimination (article 9, 11 and 12). The *American Declaration on the Rights of Indigenous Peoples* also recognises in a specific article (art. XXVIII) the protection of cultural heritage and intellectual property.

The pillars, as noted, are synergically interwoven as there is an evident interdependence between them, in which the violation of one right implies, in many cases, the violation of others. This is basically the idea that surrounds the conception of indigenous peoples "core of rights"– of an "*essential core*" – which

raises from the relation of reciprocal interdependence between these rights and lead up to the need to conceive them in an integraded way. In this regard, there is a need to conceive these rights in a *complex* way and to build intersectoral and intersectional constitutional policies that operate in the sense of giving meaning and value to these rights that make up this notion.

## The Paradigm of Diversity and the Formal Overcoming of Historical Intergrationism

James Tully[25] leads off his book "*Strange multiplicity: constitutionalism in the age of diversity*" posing one central question, in epistemological and political terms: "[...] can a modern Constitution recognise and accommodate cultural diversity?". This was a central issue for constitutionalism since the mid-1970s, in which cultural movements came into sight, giving rise to the "age of diversity" – based on a new paradigm, the "cultural paradigm", as Alain Touraine[26] states. According to James Tully, the "age of cultural diversity" is marked by new of demands for *interculturality*, which transforms the way in which constitutionalism, human and fundamental rights are effectively conceived. In fact, space was opened for the recognition of new subjects of rights and new rights, which converge for increasing the sense of legality and constitutionality towards collective and individual freedom.

Tully's question must be answered in the affirmative sense, taking into consideration the state of the art of contemporary constitutionalism. Indeed, the contemporary political moment is characterised by the rebirth of identity and cultural movements – Ghai Yash[27] calls it "the rise of ethnic consciousness" – that were triggered withing political and legal territories, and the demands for the recognition of *diversity*[28] were integrated into the "common heritage of democratic constitutionalism"[29]. As Tully and Yash rightly point out, this process give rise to several causes and questions about the limits of the modern nation-state, which can be read – at least from the point of view of political pluralism – as the basis of a series of ethnic injustices and epistemicide. Following Boaventura de Sousa Santos' thought, the process of building modernity downgraded the "epistemologies of the south" – the ways of knowing and being in the world that did not agree with the ideals of a western modern national society[30]. This is why Tully[31] specify that "a just form of constitution must begin with the full mutual recognition of the different cultures of its citizens".

In the same light, Andrew Arato and Jean Cohen suggest that the modern consensus on "cultural unification" lost its meaning with the birth of cultural movements at the end of the 20th century. The authors underline that this process

[25]Tully (1995) at 5.
[26]Touraine (2005).
[27]Yash (2008).
[28]Tully (1995) at 8; Polanco (2006).
[29]Onida (2008).
[30]For details see *Santos &* Meneses (2010).
[31]Tully (1995) at 8.

is endorsed by the failures of the nation-state to cope with "pluralism", and the self-determination of ethnic minorities within each state. It demonstrates several problems and challenges for state sovereignty, as it also redesigns the political and legal models shaped throughout modernity. Economic, cultural, political and legal globalisation, allied to intensive cultural interchanges and new political arrangements – such as the new and "brand new" social movements – carry out the restructuring of modern state and nation, in favor of the democratisation, recognition of cultural and ethnic pluralism within each state and society, including the promotion of cultural diversity through constitutional policies in order to expand – and not limit – freedom and equality in democratic constitutionalism[32].

This has fostered the redraw of modern constitutionalism foundations. Modern constitutionalism was born in the 18th century, right after the French and American revolutions, as a new ideal and essentially normative political form, which represents a specific form of "legalisation of political rule"[33], triggering the separation of powers and liberal rights[34]. The epistemological and political basis of constitutionalism have been updated at first shortly after the Industrial Revolution, paving the way for the recognition of "social rights". Secondly, soon after the Second World War, the assertion of International Human Rights systems and the emergence of welfare state in Europe, stirred up the internationalisation of constitutionalism as a universal ideal[35], specifying new principles of coexistence, respect and dialogue among different peoples. As outlined by the French jurist Dominique Rousseau[36], a forgotten dimension of constitutional theory and constitutionalism has been inflated ever since, that is, the *utopian* dimension. For Rousseau, utopia is a constitutive impetus of modern constitutionalism – as well as the mentioned separation of powers and guarantee of rights –, being it the catalysis element that allows to dimension the recognition of new rights.

In this context, the "paradigm of diversity" is moulded. This new paradigm emerged in the mid-1970s onwards, changing social, political and legal dynamics since then. In what concerns indigenous peoples, this phenomenon enabled the assertion of their demands into legal grammar. As several authors point out – perhaps Stuart Hall[37] is the most emphatic – the recognition of new identities did not occur consensually in all society. Indeed, several groups have also disproved it, claiming a static and "pure" perspective of cultural identity and religiosity, subverting the logics of the diversity paradigm[38].

However, this new paradigm has widely brough about innovative political and legal measures regarding indigenous peoples, especially in what it comes to indigenous rights. The 1988 Constitution, insofar as it is a result of this process,

[32]Arato, Cohen & Busekist (2018).
[33]Grimm (2016) at 4.
[34]Canotilho (2012).
[35]Ackerman (1997).
[36]Rousseau (2014).
[37]Hall (2010).
[38]In Brazil, perhaps the most emblematic case is the recent rise of "evangelicals" in Brazilian institutional politics. This is a group that, allied with the "ruralists" in the National Congress and other instances of power, operates in the sense of belittling and delegitimizing indigenous agendas.

was responsible for overcoming the historical integrationism that marked indigenous policies in Brazil, and all over the Americas. Integrationism, in indigenous policies, can be conceived as a governmental action that seeks to integrate indigenous peoples into the "national community" – into que way of life mostly shares by one state population –, which, in Brazil, reflects the dynamics of a non-indigenous society – and largely deny their very cultural and political autonomy. As Raquel Fajardo underlines, integrationist policies differ from assimilationist policies. According to her, assimilationism, carried out in several parts of the American continent during the first decades of post-colonisation, consist in assimilate indigenous peoples into "national community" values, without, however, taking into consideration their own cultural expressions. While integrationism give leave to the reproduction of their culture and cosmovisions, but without directly hindering the dynamics of dominant relations of national culture[39].

Integrationism has marked indigenist policy since the creation of the *Indigenous Protection Service* in 1910. Influenced by positivism and evolutionist bias – social evolutionism – prevailing at that time, the integrationist policy aimed to gradually integrate indigenous peoples into national society. This "will to integrate" was consistent with a broad interest – still alive – landed on political and economic aspects, that sought to make indigenous peoples to lose interest in remaining in their lands – which would open the space for selling them or even use it to agro-industrial purposes[40]. The Statute of Indigenous People (Law n. 6,001, enacted in 1973), states in its first article that "this law regulates the legal status of indigenous communities, with the purpose of preserving their culture and progressively and harmoniously integrate them into the national communion". For several jurists, constitutionalists and environmentalists, the mentioned article has been revoked by the promulgation of the 1988 Constitution, as the latter recognises cultural pluralism within the scope of a new perspective for its governance.

Since integrationism is profoundly related to "liberal" multiculturalism, whereby different cultures coexist under the fragile sign of "tolerance", it then roughly prevents the development of intercultural dialogue between cultures and mutual learning, as well as the hybridisation of culture[41]. The 1988 Constitution, in the other hand, despite being the result of a multicultural cycle of new constitutions in Latin America – as stated by Raquel Fajardo – makes room for a sort of multiculturalism that is not merely "liberal". Actually, it paves the way for interculturality and fruitful intercultural dialogues – although not expressively provided in the Constitution – as it happens in the most recent constitutions of Ecuador (2008) and Bolivia (2009).

It becomes evident, therefore, that from a theoretical point of view, the historical integrationism has been surpassed, particularly in the field of indigenous policies in Brazil. This surpassing is upheld by the 1988 Constitution and the other legislative directives that emerged from it. In this regard, the trackway to the

[39]Fajardo (2009).
[40]Cunha (2012).
[41]For an analysis of criticisms of multiculturalism see Dulce (2014); Zizek (2008).

possibility of harmonious coexistence of different peoples and different nations in Brazil, which implies dialogue as a strategic mechanism to solve conflicts and avoid violence, and claim peaceful, dialogic and productive coexistence between different epistemologies.

## The Timeframe Thesis and the Remaining Integrationist Practices

Despite the formal surpassing of the historical integrationism, driven by the 1988 Constitution, it is certain, however, that numerous integrationist practices still mark indigenous policies in the country. One of these practices if the "timeframe thesis" [*tese do marco legal*], put into practice by the Supreme Court during the judgement of the leading case "Raposa/Serra do Sol". This case springs from a popular action filled in 2005 by former Senator Augusto Afonso Botelho Neto (PT/RR) against the Union – in the aftermath of the administrative recognition of the indigenous land "Raposa/Serra do Sol", by the President Luís Inácio Lula da Silva, in 2009 – with the aim of declaring its nullity and unconstitutionality. This judicial action spread the political and legal discussions around the demarcation of indigenous lands within judicial arena.

The trial process initiated in 27.08.2008. The case Rapporteur, Judge Carlos Britto, cast his vote, dismissing the popular action, making the Raposa/Serra do Sol land as indigenous in its entirety, and on a continuous basis. In his vote, Britto innovated by establishing a regulatory framework related to demarcation process, namely: 1) "timeframe thesis"; 2) landmark of the occupation's traditionality; 3) landmark of the concrete land coverage and the practical purpose of the traditional occupation; and, 4) landmark of the land-wide concept of the so-called "principle of proportionality"[42].

Shortly after the rapporteur's vote, the judge Carlos Alberto Menezes Direito asked for views of the process. The trial was resumed in December 2008, with the offering of a partially dissenting opinion by Minister Menezes Direito. In the words of Erica Magami Yamada and Luis Fernando Villares, "aware that a vote against the continued demarcation of the Indigenous Land would not be well received by the majority of the Plenary, which would put him in an uncomfortable position, this minister established 19 conditions – or caveats – to demarcations"[43]. These 19 caveats were added to the four milestones established in the rapporteur's vote as a set of measures to be observed during the demarcation process as for the characterisation of a land as "indigenous land". Among these, the most controversial and which generated the greatest political and legal repercussions was the "timeframe thesis". According to this criterion, *indigenous peoples would not have the right to their lands if they were not living there on the date of promulgation of the 1988 Constitution*. This parameter is not based on any constitutional provision or even on international instruments for the protection of

[42]Supremo Tribunal Federal (2009) at 295-308.
[43]Yamada & Villares (2010) at 145. [my translation from the Portuguese].

human rights, being it, therefore, an *extrajuridical* and *extralegal* criterion, created in in order to set up a *restrictive interpretation* of indigenous peoples' rights[44].

In the aftermath, the judge Justice Menezes Dias voted in favor of the constitutionality of indigenous land demarcation. The judges Carmen Lúcia, Ricardo Lewandowski, Eros Grau, Joaquim Barbosa and Cezar Pelluso also voted in favour of the constitutionality of indigenous land demarcation, with a new request for views made by the judge Justice Marco Aurélio de Mello. The judgment returned on 18.04.2009, in which the judge Justice Marco Aurélio de Mello addressed his dissenting opinion, for the unconstitutionality of the demarcation of the land. On the same date, the judge Cesar de Mello cast his vote in favor of the demarcation, and due to the interruption of the session, the judge Gilmar Mendes, the former President of the Federal Supreme Court, cast his vote accompanying the rapporteur, with the reservation addings made by the judges Carlos Britto and Menezes Direito.

The action was, therefore, judged partially valid, and the judges Joaquim Barbosa and Marco Aurélio were defeated, the first for deeming it totally unfounded – including the reservations and the timeframe thesis –, and the second for judging it totally proceeding[45]. The constitutionality of the continuous demarcation of the Raposa/Serra do Sol indigenous land was then declared and the constitutionality of the administrative-demarcation procedure was affirmed. The mentioned *safeguarding measures*[46] and regulatory marks were justified on the decision for the "superlative historical-cultural importance of the cause".

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[44]Cunha & Barbosa (2018).

[45]Supremo Tribunal Federal (2009) at 241.

[46]Safeguarding measures: "(I) the usufruct of the riches of the soil, rivers and lakes existing in indigenous lands (art. 231, § 2, of the Federal Constitution) can be relativised whenever there is, as provided in art. 231, § 6, of the Constitution, relevant public interest of the Union, in the form of a supplementary law; (II) the usufruct by the indigenous peoples does not cover the use of water resources and energy potential, which will always depend on authorisation from the National Congress; (III) the usufruct by the indigenous peoples does not cover the research and mining of mineral wealth, which will always depend on authorisation from the National Congress, assuring them the participation in the results of the mining, in the form of the law; (IV) the usufruct by the indigenous peoples does not cover prospecting or sparking, and, if applicable, permission must be obtained for prospecting; (V) the usufruct by the indigenous peoples does not supersede the interest of the national defense policy; the installation of bases, units and military posts and other military interventions, the strategic expansion of the road network, the exploration of energy alternatives of a strategic nature and the safeguarding of riches of a strategic nature, at the discretion of the competent bodies (Ministry of Defence and Council of National Defence), will be implemented regardless of consultation with the indigenous communities involved or with FUNAI; (VI) the performance of the Armed Forces and the Federal Police in indigenous areas, within the scope of their attributions, is assured and will take place regardless of consultation with the indigenous communities involved or with FUNAI; (VII) the usufruct of the Indians does not prevent the installation, by the Federal Union, of public equipment, communication networks, roads and transport routes, in addition to the constructions necessary for the provision of public services by the Union, especially those of health and education; (VIII) the usufruct of the Indians in the area affected by conservation units is under the responsibility of the Chico Mendes Institute for Biodiversity Conservation; (IX) the Chico Mendes Institute for Biodiversity Conservation will be responsible for managing the area of the conservation unit also affected by the indigenous land with the participation of the indigenous communities, which must be heard, taking into account the uses, traditions and customs of the indigenous people, being able to count on FUNAI consultancy; (X) the

In this regard, despite the Supreme Court has ruled the case by granting the constitutionality of the indigenous land demarcation, it has also established another issue at stake, which is related to the timeframe thesis and the mentioned safeguarding measures. Hence, the decision fostered legal and political discussions concerning the constitutionality of these judicial innovations, insofar as they are not covered by current law. For several specialists – jurists and anthropologists – and indigenous institutions, there are several unconstitutionalities in some provisions, which boost legal uncertainty for a large part of indigenous peoples who still claim for the demarcation procedure – or even those still under analysis.

According to Luis Fernando Villares and Erica Magami Yamada, the safeguard measures can be described as follows: "some are interpretations or repetitions of the constitutional and legal text (numbers 1, 2, 3, 4, 14, 15, 16, 18), others, contrary commands to those already established in convention 169 of the International Labour Organisation (ILO), (5, 6, 7)", and additionally, there is "the creation of normative statements by exceptions 11, 12, 13, 17, and 19"[47].

In the aftermath, a motion was filled by the Federal Public Ministry, aiming at clarifying the content of the decision. In response, the Supreme Court determined that the effects of this decision would be restricted to the case *Raposa/Serra do Sol*. However, the Supreme Court itself has already issued the timeframe thesis in at least other two cases[48], and the judicial discussion about the possibility to issue

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transit of non-indigenous visitors and researchers must be allowed in the area affected by the conservation unit at the times and conditions stipulated by the Chico Mendes Institute for Biodiversity Conservation; (XI) the entry, transit and permanence of non-indigenous people in the rest of the area of the indigenous land must be admitted, subject to the conditions established by FUNAI; (XII) the entry, transit and stay of non-indigenous people cannot be subject to the collection of any tariffs or amounts of any nature by the indigenous communities; (XIII) the charging of tariffs or amounts of any nature may not apply or be required in exchange for the use of roads, public equipment, energy transmission lines or any other equipment and facilities placed at the service of the public, which have been excluded expressly of approval, or not; (XIV) indigenous lands cannot be leased or subject to any act or legal transaction that restricts the full exercise of usufruct and direct possession by the indigenous community or by the Indians (art. 231, paragraph 2, Federal Constitution, c/c article 18, caput, Law nº 6.001/1973); (XV) it is forbidden, in indigenous lands, for any person outside the tribal groups or indigenous communities, to practice hunting, fishing or fruit gathering, as well as agricultural or extractive activities (art. 231, § 2, Federal Constitution, c/c article 18, § 1, Law nº 6.001/1973); (XVI) lands under occupation and possession of indigenous groups and communities, the exclusive use of natural wealth and existing utilities in occupied lands, subject to the provisions of arts. 49, XVI, and 231, paragraph 3, of CR/88, as well as indigenous income (art. 43 of Law No. 6,001/1973), enjoy full tax immunity, not charging any taxes, fees or contributions on one or the other; (XVII) the expansion of the already demarcated indigenous land is prohibited; (XVIII) the rights of the Indians related to their lands are imprescriptible and these are inalienable and unavailable (art. 231, § 4, CR/88); and (XIX) the participation of federal entities in the administrative procedure for the demarcation of indigenous lands, embedded in their territories, is ensured, observing the stage in which the procedure is found (Supremo Tribunal Federal (2009) at 416-418). [My translation from the original in Portuguese].

[47]Yamada & Villares (2010) at 147), my translation from the original in portuguese. For a critique of the safeguard measures, see: Miras (2009) and, Kayser (2010).

[48]"It [the timeframe thesis] justified the annulment of the recognition ordinances of the Limão Verde Indigenous Lands, of the Poro Terena Guyaroké, of the Guarani-Kaiowá people, both in Mato Grosso do Sul, and Porquinhos do Povo Canela Apanyekrá, in Maranhão, for the Second Panel of

this thesis continues on the Supreme Court's agenda[49].

Additionally, the decision also paves the way for the application of the safeguarding measures, and the timeframe thesis, by federal and state judges in cases involving the demarcation of indigenous lands all over the national territory. Three "legal opinions" issued by the Attorney General's Office also restress the "obligation" of the Federal Public Administration to "effectively comply, in all processes of demarcation of indigenous lands, with the conditions established in the decision of the Federal Supreme Court in PET 3.388/RR". The last Opinion, still in force – but with its effects suspended due to a lawsuit of the Federal Public Ministry[50] –, dated July 19, 2017, justifies the measure with the argument that the safeguards "have been reaffirmed in several other judgments of the Federal Supreme Court itself, making the undoubted consolidation and normative stabilisation of institutional safeguards"[51]. This opinion, by obliging Federal Public Administration bodies to enforce the timeframe and institutional safeguards, appears to be an even more harmful manoeuvre against indigenous peoples' lands. This is because the Federal Public Administration is in charge of demarcating indigenous lands.

Within the scope of Legislative branch, there are several bills proposing to turn into "legally binding" the timeframe thesis, such as: PL 490/2007; PL 1.216/2015; PL 1.218/2015; and PL 7.813/2017. The PL 490/2007, inter alia, does not even accept the exception of dispossession[52] – as occurred during the military dictatorship. These proposals are controversial given that the National Parliament has several benches – and in this scenario the most preeminent one is the "ox bench" [*bancada do boi*], which gathers the country's landowners and agrobusiness owners – who are openly opposed to any demarcation of indigenous lands.

The consequences of the Supreme Court's decision, thus, is added to the already conflicting relations between state and indigenous peoples – something that marks Brazilian history. In strictly legal terms, there is a wider conflict regarding the meaning of "constitution", when it comes to the historical meaning attributed to the devices that manage indigenous peoples' rights, which is attested in the Federal Supreme Court *par excellence* – particularly in the seat of the constitutional review.

It is remarkable, therefore, that the use of the timeframe thesis turns it difficult to assert the rights of indigenous peoples to their lands based on a restrictive interpretation. First, because there is no legal basis for sustaining that thesis. Second, due to the fact that the thesis does not take into account the dispossession that occurred and intensified during the military dictatorship – through the "march to the west". In this length, the symbolic and empirical violation of the indigenous right to land, out turned by the application of this thesis, even as the safeguarding

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the Federal Supreme Court in 2014 and 2015", Fernandes (2018) at 140 [my translation from the original in Portuguese].

[49]This is the case of the "*Recurso Extraordinário (RE) n. 1.017.315*", filled by the "Instituto do Meio Ambiente de Santa Catarina" against FUNAI.

[50]As it is the case of the "*Ação Civil Pública n. 1002351-95.2018.4.01.3600*", filed by the Federal Public Ministry against the Union and FUNAI.

[51]Advocacia Geral da União (2017).

[52]Cunha (2018).

measures, represent a violation not only of the right to land, but to the "essential core of rights", as explained above. This is because the pillars that conform the essential core of indigenous core of rights should not be interpreted in a separate watertight way, since the enjoyment of a specific right directly or indirectly imply on the enjoyment of others.

In this context, the timeframe thesis can be conceived as the continuity – through alternative means – of the historical integrationism. This is a political will that, by denying the right to land of indigenous peoples, incites their integration into the "national community" as the only alternative way, other than effectively recognizing their lands and territories, cultural practices and self-determination. When the state, whether by the means of Executive, Legislative or Judiciary, denies the original right to indigenous lands – controversy provided by the Constitution – via a hermeneutic strategy that restricts indigenous rights, it perpetuates illegitimate relations of domination, exclusion and oppression towards indigenous peoples, giving floor to a systematic violation of indigenous territorial, cultural, political and environmental rights[53]. This can also be described and analysed as the permanence of a *symbolic violent relation*, as well defined by Pierre Bourdieu[54], inscribed in a pragmatics of violence.

However, there is no reason to carry out a restrictive interpretation of indigenous peoples' rights other than a political will – disguised with supposedly legal elements – to retain them under an integrationist paradigm. It is evident that the rise of the diversity paradigm in Brazil is not easily assimilated by institutions, that continue to pose threats to the enforcement of indigenous rights and ways of living. The "essential core of rights" is, thus, carved in this dismantling context, marked by the use of new methodologies, which demonstrate the still in curse need to categorically affirm the rights of indigenous peoples and their emancipatory dimension.

## Conclusions

The essential core of rights, granted in recent decades, represent an immensurable achievement for indigenous peoples in Brazil. This represents the possibility, at least theoretically, of coexistence in harmony between these peoples, whether with the cultural aspects that mark their identity, or with the other aspects that are directly related to their existence – land, environment, political self-organisation, and culture. This conquest also represents, at a symbolic level, the possibility of emancipating indigenous peoples from the yoke of integrationism, which has historically not taken seriously their cultural specificities, and did not consider their culture as a constitutive element of Brazilian cultural identity.

The timeframe thesis, however, stands as a concrete impediment to the construction of an intercultural state in Brazil, and to the steadiness of diversity

[53]For further details on a critical view of the time frame, consult the following collection: Cunha & Barbosa (2018).
[54]Bourdieu (1989).

paradigm, since it is a restrictive interpretation of the indigenous territorial rights, and violates not only the right to land – the access to indigenous traditionally occupied lands –, but the whole "essential core of rights", which have a great connection. It also demonstrates that agrarian conflicts remain in force in the country, as well as a distorted view towards indigenous culture and the role of land in the cosmovision of indigenous peoples. Likewise, it indicates that the mechanisms of violence filed by the state against indigenous peoples have changed outfit, but still last – having adopted a "judicial discourse".

Despite the fact that Federal Supreme Court has signalled a turning point in the interpretation of the timeframe thesis, by taking a contrary standpoint in ADI 3239 and ACO 304, both judged in 2017, there still remain several uncertainties over its application and repercussions it could cause – especially on the part of the Federal and State Courts – as well as the instrumentalisation by Federal Executive power, and its "legislation" by the Legislative branch.

The Brazilian political cartography that was designed with the timeframe thesis represent a threat to the essential core of rights, as well as to the construction of an intercultural or multicultural state, that respects the rights of ethnic minorities, under the prism of cultural diversity protection and promotion. By way of a possible conclusion, it should be pointed out that the essential core of rights – due to the fact that they constitute fundamental rights in Brazilian constitutional system – must be enforced by all constitutional institutions and Brazilian citizens. The enforcement of these rights is nor, therefore, the mere and exclusive interest of indigenous peoples, but it is an issue that pertains to all Brazilian, an issue that pertains to environmental protection, an issue pertaining humanity.

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