

Recognizing and Reclaiming Indigenous Peoples' Constitutional Land Rights in Brazil

Challenges and Opportunities

FERNANDA FRIZZO BRAGATO AND JOCELYN GETGEN
KESTENBAUM

Introduction

Today, some 1.7 million Indigenous Peoples, belonging to 305 tribes (*povos*), and speaking 274 different languages, have broad national and international legal protections in Brazil (United Nations, 2014).¹ According to Brazil's international and domestic legal obligations, Indigenous Peoples are descendants of peoples that pre-existed invasion and colonization in their territory; that fully or partially preserved their social, political, cultural, legal, or other institutions; that self-identify as Indigenous; and that are recognized by their communities as members (following the Cobo definition of Indigenous Peoples).²

In addition to being subjects of nationally and internationally recognized human rights, equally and without discrimination, Indigenous Peoples in Brazil are entitled to certain collective rights based on the right to conserve and maintain their own territories, cultures, traditions, and customs. These rights include: the right to occupy their traditional

¹ In the 2022 Census, the Brazilian Institute of Geography and Statistics (IBGE) found the Indigenous population had reached 1.693 million people, which represents 0.83 percent of the total population. The 2010 Census counted 896,917 Indigenous Peoples in the country. The increase in the Indigenous population was 88.82 percent in twelve years, while the growth of the total population in the same period was 6.5 percent. FUNAI (2023), <https://abre.ai/funainotice>.

² This definition also coincides with Article 1 (b) of International Labour Organization (ILO) Indigenous and Tribal Peoples Convention No. 169, 1989, ratified by the Brazilian State on April 19, 2004, through Decree 5,051.

lands;³ the right to self-determination;⁴ and the right to free, prior, and informed consultation⁵ or consent, on measures that may affect their territories or ways of life.⁶

The 1988 Constitution represents the first and most powerful recognition of Indigenous Peoples' territorial and cultural rights in Brazil's history. Since its enactment, Indigenous Peoples not only have had the right to occupy their traditional lands, but also have had the right to the exclusive use and enjoyment in ways consistent with their traditional and distinct ways of life.⁷ Additionally, the state generally is prohibited from removing Indigenous Peoples from their traditional lands and must seek Congressional authorization before extracting resources or carrying out any infrastructure projects on Indigenous lands.⁸ In all cases, Indigenous communities must be consulted in good faith with the aim of obtaining consent when state or private actions may affect their rights, including and especially land rights.

Before 1988, Brazil's official policies toward Indigenous Peoples aimed to integrate and assimilate Indigenous communities into what the legislation called "national communion,"⁹ representing an erasure of many groups' distinct cultures and practices. While the post-1988 constitutional provisions included broader legal protections for Indigenous Peoples, as Benatti et al. (2015) emphasizes, Brazil has consistently failed to implement and enforce these rights in practice – an experience shared across most of the chapters in this book. Recent power shifts have led to Brazil partially reversing the trend toward dismantling Indigenous Peoples' rights. However, Brazil's executive and judicial branches have intentionally curtailed many of these constitutional guarantees, or have impeded the full enjoyment of these rights in recent years. Brazil's

³ 1988 Brazilian Constitution Article 231, § 1; United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), Article 26; ILO No. 169, Article 13 and 14; Organization of American States (OAS), Declaration on the Rights of Indigenous Peoples, Article XXV, 2.

⁴ UNDRIP, Article 3; OAS Declaration Article III and XXI.

⁵ ILO 169, Article 6; 1988 Brazilian Constitution Article 231, § 3°.

⁶ ILO 169, Article 6, 2; UNDRIP, Articles 19 and 32, 2; OAS Declaration, Articles XXIII, 2, XXVIII, 3, and XXIX, 4.

⁷ Brazilian Constitution Article 231, § 2°.

⁸ Brazilian Constitution Article 231, § 3° and 5°.

⁹ For example, Article 1 of Brazilian Law 6.001 / 1973 (Indian Statute) states, "This Law regulates the legal status of Indians and indigenous communities, with the purpose of preserving their culture and integrating them progressively and harmoniously into national communion." See www.planalto.gov.br/ccivil_03/Leis/L6001.htm.

legislative branch has attempted several times to pass legislation to restrict rights guaranteed under the 1988 Constitution (de Souza Filho, 1992). Indeed, from 2011 to 2022, the emancipatory potential of Indigenous Peoples' rights was threatened by legal, political, economic, and social restraints rooted in the country's deeply embedded colonial structures, especially within those Brazilian institutions charged with realizing Indigenous rights (Beltrão & Oliveira, 2014).

This chapter analyzes the achievements of 1988: successes resulting from an intense process of political mobilization by Indigenous Peoples and their civil society allies, combined with a theoretical shift away from colonialist conceptions of the inferiority of Indigenous epistemologies and worldviews. This chapter next examines barriers that Indigenous Peoples face in enforcing their constitutional and international human rights, as well as the opportunities created since the change in government in January 2023. It concludes by proposing recommendations to advance the implementation and full realization of Indigenous land rights in Brazil.

Pre-1988: Dispossession and Recognition

Pre-contact, Latin America's Indigenous populations had varied land tenure regimes: from extensive bureaucratic and agriculturally advanced societies, such as the Inca and Aztec empires, to more loosely structured kinship communities, such as those in the Amazon region (Angeles & Elizalde, 2017). In 1500, Portuguese conquerors wrote a letter to the king upon arriving in what is today Brazil, reporting from a distorted Western perspective on the existence of naked, vigorous, brown (*pardo*) men with whom they were unable to establish any communication (Carta de Pêro Vaz de Caminha, 1500). From their political and economic points of view, European travelers often misunderstood and mischaracterized the sophistication of Indigenous Peoples' relationship to their lands, describing them as destitute and decentralized, without formal legal systems, currency, or ways of accumulating wealth. What they did have was "a chief for every hut" and nature to provide everything they needed (Staden, 1930).

In addition to the partiality of colonizers' reports, the scarcity of archaeological remains in tropical areas prevents firmer conclusions about Indigenous ways of life in Brazil before colonial violence and dispossession. Some archaeologists have argued that Brazil's Indigenous Peoples lacked political institutions and central authority, a view that has been challenged, with the documented existence of organized political

institutions, such as chiefdoms (Fausto, 2000). For many Indigenous Peoples in the Brazilian Amazon, land tenure was adapted for survival as they fled violent conquest and colonization and, consequently, assimilated practices or peoples from other traditional groups while retaining certain practices from their pre-contact societies (Le Tourneau, 2015).

On contact, an estimated 3.6 million Indigenous Peoples were living in a system of collective land ownership. Colonial settlers accelerated the decimation of the Indigenous population through war, extermination, and enslavement, as well as diseases, such as smallpox, measles, and tuberculosis (Pacheco de Oliveira, 2006). Indigenous Peoples inhabiting Brazil were never recognized as sovereign nations; throughout the colonial period, the official policy was either to integrate “friendly” Indigenous Peoples (i.e., those who did not openly resist colonial violence) into settler colonial society through marriage, religious conversion, and domestic servitude, or to kill or enslave Indigenous Peoples considered to be “enemies” (Perrone-Moisés, 1992).

Until the 1988 Constitution, Brazilian legislation did not consider Indigenous Peoples as legal subjects with full capacity to bear rights and responsibilities of citizenship – even though prior laws had granted Indigenous Peoples the right to occupy their traditional lands (Mendes Junior, 1921). As early as 1680, the Portuguese Crown guaranteed Indigenous Peoples the right to lands they occupied by granting title acknowledging occupation as an inherited right (supported by the Brazilian legal theory of *indigenato*) (Calafate, 2018). In 1845, Royal Decree 426 established guidelines for converting Indigenous Peoples to the Catholic religion; at the same time, it mentioned the possibility of the non-removal of Indigenous Peoples who wished to remain on their lands under certain requirements (Calafate, 2018). After independence from the Crown, settlers illegally claimed large swaths of Indigenous lands, converting them into private property through registration and retitling, despite Decree 1318 of 1854, which exempted Indigenous Peoples from requiring title to their lands (Calafate, 2018).

In 1918, the Brazilian central government established the Indian Protection Service (SPI), the agency charged with assimilating and “civilizing” Indigenous Peoples into national society under “tutelage.” The SPI also allocated and managed Indigenous lands, creating reservations¹⁰ in

¹⁰ The idea of demarcation of Indigenous lands by the Union came with the creation of SPI, which demarcated about fifty-four Indigenous reserves in small areas, totaling less than 300 thousand hectares (Curi, 2010).

which the state founded schools to teach Indigenous children Portuguese and other Western subjects, while forbidding Indigenous languages. Over time, many Indigenous traditional leadership structures lost power and many communities suffered complete destruction as peoples (Brand, 1997).¹¹

The SPI survived four different constitutions (1934, 1937, 1946, and 1967). Despite nearly all of them recognizing Indigenous Peoples' occupancy rights over their inhabited lands, the harmful practices of "civilization" and assimilation of Indigenous Peoples into Brazilian society guided official government policies and practices until 1988 (Almeida, 2018). The SPI was responsible for "reserve" lands, requiring the federal states to title them. The SPI aimed at preparing and training the Natives to be small farmers capable of supporting themselves (Lima, 1992). Consequently, protecting Indigenous Peoples' lives, culture, and lands was never a genuine concern of Brazilian society and government.

During the Brazilian dictatorship (from 1964 to 1985), the SPI was charged with corruption and the mistreatment of Indigenous Peoples, and was replaced by the National Indian Foundation (FUNAI). In 1973, the Brazilian state enacted the "Indian Statute" (Law 6.001), granting broader protections to Indigenous lands¹² – for example, the right to have Indigenous lands demarcated by Federal Union, according to tribal uses, customs, and traditions, and correspondent to the space where they lived or carried out activities essential to their subsistence or economic activities (Becker & Rocha, 2017). However, the law maintained the flawed logic of Indigenous Peoples' inferiority, classifying individuals according to their level of integration into the national society, which impacted the civil and political rights they were able to enjoy.

Brazilian governments have never properly enforced any land rights in practice, with systematic violations leading to the expropriation of huge portions of Indigenous lands, illegal land transfers, and land registrations to private individuals (Calafate, 2018).

¹¹ From 1900 to 1957, Brazilian anthropologist Darcy Ribeiro found that eighty-seven Indigenous Peoples were extinguished in the country, representing 50 percent of the ethnic groups that were still isolated, extinguished after the first contact, and 67 percent of the ethnic groups in permanent contact with the national society (Ribeiro, 1986).

¹² Notably, however, Brazilian law has never granted to Indigenous communities an absolute ownership to land (i.e., fee simple title) all Indigenous territories are property of the Federal Union of Brazil, according to Article 20 of the 1988 Brazilian Constitution.

Birth of the Brazilian Indigenous Rights Movement

Until the 1960s, many of Brazil's Indigenous Peoples lived in isolation from each other, largely unaware of their shared oppression or rights struggles (Lacerda, 2018; Barbosa & Fagundes, 2018). Under military dictatorships, the Brazilian government became more concerned with Indigenous rights due to international pressure following widespread impacts, including violence, and from major infrastructure projects such as dams and highways (Demetrio & Kozicki, 2019). To avoid losing development project funding, especially in the Amazon, the Brazilian government not only ratified ILO Convention No. 107 in 1966, but also introduced broader protections of Indigenous lands in the 1967 Constitution and national legislation.¹³

Considered a turning point for Indigenous rights in Brazil, the 1971 Symposium on Interethnic Friction in South America, held at the University of the West Indies in Barbados and sponsored by the World Council of Churches, culminated in the Barbados Declaration (Becker & Rocha, 2017). Offering a critique of the colonial treatment of Indigenous Peoples and a way forward toward self-determination, the declaration highlighted the shared responsibilities between the state, the religious missions, and academy, for the "liberation" of Latin America's Indigenous Peoples (Barbosa & Fagundes, 2018). The Barbados Declaration¹⁴ had a profound impact by pointing out that social scientists, religious missions, and the state must establish new relationships with Indigenous Peoples founded on respect for their worldviews and autonomy (Lacerda, 2018).

The Barbados Declaration also criticized religious institutions, transforming Indigenous-Catholic Church relations. In 1972, Catholic missionaries in Brazil created the Indigenous Missionary Council (CIMI)¹⁵ to defend Indigenous groups in their struggles for land and self-determination (Barbosa & Fagundes, 2018) without interfering with their customs and beliefs (Lopes, 2014). At its First General Indigenous Assembly in 1975, the CIMI members drafted a final document stating they sought "by all means to return to Indigenous Peoples the right to be subjects, authors and recipients of their growth" (as cited in Barbosa &

¹³ Brazil Const. 1967, Article 86; Indian Statute of 1973.

¹⁴ In 1977, this time with the participation of Indigenous Peoples, there was a second meeting in Barbados that boosted their participation in the UN system.

¹⁵ See <https://cimi.org.br>.

Fagundes, 2018). In this spirit, the CIMI began to support the organization of Indigenous Assemblies throughout the country, providing Indigenous activists with transportation, lodging, and food. The first Assembly of Indigenous Chiefs took place on April 19, 1975, in the city of Diamantino, in the state of Mato Grosso (Lacerda, 2018).

At the same time, civil society began to organize in support of Indigenous rights. For example, in 1974, the Ecumenical Documentation and Information Center (CEDI) was created, promoting the publication of journalistic information on Brazil's Indigenous populations. In 1977, the National Indian Support Association (ANAI) was created in the city of Porto Alegre. In 1978, journalists, anthropologists, and jurists founded the Pro-Indian Commission (CPI), which became one of the most important avenues for visibility of Indigenous leadership and advocacy during the 1988 Constituent Assembly (Barbosa & Fagundes, 2018).¹⁶

This process of Indigenous empowerment culminated in 1980 with the creation of the Union of Indigenous Nations (UNI), which played a central role in Indigenous advocacy in the Constitutional Assembly (Verdum, 2009) and, consequently, in the recognition of Indigenous rights in the 1988 Brazilian Constitution (Barbosa & Fagundes, 2018).

Indigenous Participation in the 1988 Constituent Assembly

The year 1985 marked the end of a decades-long brutal military dictatorship. When José Sarney assumed the Presidency, he proposed to convene a Constituent Assembly to the National Congress. The newly elected parliamentarians began to work on drafting a new constitution on February 1, 1987 (Oliveira, 1993).

The National Constituent Assembly offered an opportunity to bring Indigenous claims to the political debate and to gain important rights to redress colonial violence (Carvalho, 2000). Actively participating in the drafting of the 1988 Constitution, Indigenous leaders in Brazil mobilized, acquired voice and power, and countered powerful interests that opposed their demands (Verdum, 2009). After two unsuccessful attempts to participate directly in drafting the new constitution, the UNI mobilized

¹⁶ Other organizations that promoted discussions and advocacy for the Indigenous cause were the Institute of Socioeconomic Studies (INESC), the Brazilian Association of Anthropology (ABA), which was heavily involved in the issue of "Indianness criteria" adopted by the military regime, and the Order of Lawyers from Brazil, Rio de Janeiro Section (OAB / RJ), who, in 1985, defended "indigenous representation in a special character" at the National Constituent Assembly.

Indigenous communities to refer the agenda to Congress and pressure parliamentarians to include their demands (Lacerda, 2018). Their agenda was put forward through establishing a minimum program for Indigenous rights in the Constituent Assembly, supported mainly by the CIMI, INESC, CEDI, and the Pro-Indian Commission of São Paulo (Fernandes, 2016). This program was launched in 1986 as a manifesto signed by twenty-nine organizations, and included the following claims: (1) recognition of Indigenous Peoples' territorial rights; (2) demarcation and guarantee of Indigenous lands; (3) Indigenous Peoples' exclusive enjoyment of the natural resources existing in the soil and subsoil of their territories; (4) resettlement, under decent and fair conditions, of non-Indigenous settlers on Indigenous lands; and (5) recognition of and respect for the social and cultural organizations of Indigenous Peoples. Given the absence of Indigenous parliamentarians in the National Constituent Assembly, the Indigenous movement addressed their demands in two ways: through proposals for popular amendments and by mobilizing the Indigenous movement and laws protecting Indigenous rights via subcommittees and the plenary of the National Constituent Assembly (Barbosa & Fagundes, 2018).

The most critical moment of the constitutional drafting negotiations was the vote on the chapter entitled "On Indigenous Peoples" when Indigenous delegations from various regions of the country camped out in Brasília for three weeks of intense advocacy. Contentious recommendations during this period argued for continuing the guardianship regime, restricting land rights to present occupation, and denying constitutional protections to assimilated Indigenous Peoples. Strong and persistent pressure from Indigenous delegations resulted in the withdrawal of these recommendations (Lacerda, 2018).

Indigenous Constitutional Rights and Post-1988 Advancements

Article 231 of the 1988 Constitution protects Indigenous land rights, and specifically ensures original, inalienable, and irrevocable rights over the lands that Indigenous Peoples traditionally occupy, permanent possession of traditional lands, and the exclusive use of natural resources found on their territories (Cavalcante, 2016). The constitution defines "traditionally occupied lands" as those that Indigenous Peoples permanently inhabit, use for "productive activities,"¹⁷ and are essential to preserving

¹⁷ "Productive activities" can mean hunting, fishing, collecting fruits and seeds, small plantations [*roças*], handicrafts, etc.

environmental resources necessary for their wellbeing and physical and cultural reproduction.¹⁸ These lands are then designated for Indigenous Peoples' permanent possession, exclusive use, and full enjoyment of their mineral and natural resource wealth.¹⁹ Further, Brazil's National Congress must authorize any removal of Indigenous Peoples from their lands in the event of a natural disaster or epidemic that endangers their population, or when it is in the national interest.²⁰

Communities have autonomy to govern their lands and resolve internal issues, but Brazilian legislation regulates important aspects of relations between them and non-Indigenous society. For example, given Indigenous Peoples' constitutional *original* land rights, any non-Indigenous settler occupation, economic exploitation, or possession of these lands would be considered illegal and invalid under law.²¹ Further, FUNAI collaborates with Indigenous Peoples on various activities, such as supporting their development and exercising police power in their defense, but no longer performs any guardianship function.²²

Demarcation

Scholars argue that the acknowledgement of original rights to traditionally occupied Indigenous lands in Article 231 of the constitution neither grants nor bestows such rights, but rather recognizes the preexisting rights of Indigenous Peoples that precede the Brazilian state (Calafate, 2018). Demarcating these lands is an obligation of the Federal Union. Demarcation consists of an administrative legal process for recognizing lands as Indigenous traditional territories under Decree 1.775, which includes: (1) identification; (2) delimitation; (3) contestation by third parties; (4) demarcation; (5) ratification; (6) issuance of presidential

¹⁸ Brazil Constitution, Article 231(1).

¹⁹ Brazil Constitution, Article 231(2). Despite these protections, the constitution also permits a carveout for the Federal Union to extract resources under certain circumstances. See Article 231(3). Although no implementing legislation currently exists to permit and regulate mining or other natural resource extraction on Indigenous lands, bills are pending before the National Congress to effectuate this carveout provision under the constitution. See Bill 191/2020.

²⁰ Brazil Const., Article 231 (5).

²¹ Constituição da República Federativa do Brasil. See www.planalto.gov.br/ccivil_03/constituicao/constituicaocompilado.htm.

²² For more information, see FUNAI (2023), www.gov.br/funai.

Table 3.1 Indigenous lands demarcated since 1988 (Source: <https://pib.socioambiental.org>)

President	Period	Number	Size (hectares)
Luiz Inacio Lula da Silva	Jan 2023	6	615,237
Jair Messias Bolsonaro	Jan 2019 to Dec 2022	0	0
Michel Temer	May 2016 to Dec 2018	1	19,216
Dilma Rousseff	Jan 2015 to May 2016	10	1,243,549
Dilma Rousseff	Jan 2011 to Dec 2014	11	2,025,406
Luiz Inacio Lula da Silva	Jan 2007 to Dec 2010	21	7,726,053
Luiz Inacio Lula da Silva	Jan 2003 to Dec 2006	66	11,059,713
Fernando Henrique Cardoso	Jan 1999 to Dec 2002	31	9,699,936
Fernando Henrique Cardoso	Jan 1995 to Dec 1998	114	31,526,966
Itamar Franco	Oct 1992 to Dec 1994	16	5,432,437
Fernando Collor	Mar 1990 to Sep 1992	112	26,405,219
José Sarney	Apr 1985 to Mar 1990	67	14,370,486

decree; and (7) registration (Curi, 2010).²³ This administrative process usually begins from an Indigenous community's request, and is carried out by FUNAI, resulting in a title for exclusive use and enjoyment for one or more different Indigenous ethnicities and ownership to the Federal Union (Brazil).

Since the adoption of the 1988 Constitution, the federal government, with the exception of the Bolsonaro administration, has completed the demarcation process for significant amounts of Indigenous lands (see Table 3.1) (Baines, 2014).²⁴

Territorial and Environmental Management Plans (PGTAs)

In 2012, based on the demand and participation of several Indigenous organizations, Brazil issued an Executive Order (Decree 7747/2012) to create the National Policy for Territorial and Environmental Management of Indigenous Lands (PNGATI). This decree sets forth

²³ While Article 67 of the Constitutional Transitional Provisions Act of the 1988 Federal Constitution required demarcation of Indigenous lands within five years of the promulgation of the constitution, the Brazilian government has not concluded all demarcation processes.

²⁴ Brazil's territorial extension is 851,196,500 hectares (8,511,965 km²), and Indigenous lands comprise 113,185,694 hectares (1,131,857 km²) or 13.3 percent of the country's estate.

the creation of Territorial and Environmental Management Plans for Indigenous Lands (PGTAs), to be carried out by Indigenous communities with technical and financial support from the government. The PGTAs were conceived to strengthen Indigenous Peoples' decision-making systems, using their knowledge of their territories, and allowing the maintenance and transmission of such knowledge to future generations (Baveresco & Meneses, 2014).

In the wake of this policy, some Indigenous communities successfully implemented PGTAs in the Amazonian State of Acre. The NGO Acre Pro-Indian Commission provides training for Acre's Indigenous agroforestry agents (AAFI). These agents are responsible for carrying out community surveillance; dialogues with local, state, and national authorities; and the occupation of strategic areas for the protection of territories which safeguards land rights.²⁵ In the northeast region, FUNAI acquired two cattle-ranching farms in 2007. The Tingui Botó people received the partially degraded land with dead springs, silted rivers, and pesticide-contaminated soil – and without riparian forest. The community produced seedlings of native species to recover the vegetation, managed to improve water quality, reestablished the fauna and flora, and strengthened family farming. The community has a factory producing manioc flour, which is consumed by families and the surplus is sold in commerce (Baveresco & Meneses, 2014). Another promising example of a PGTA success is the “Pacto das Águas” Program, set up by the Rikbaktsa, Zoró, Arara, and Gavião peoples of northwestern Mato Grosso State. The program keeps forests standing through improved forest management of Brazil nuts and natural rubber.²⁶

Other Rights

The 1988 Constitution also recognizes procedural rights for Indigenous Peoples and obligates the Federal Public Prosecutor (MPF) to defend such rights and interests in all relevant judicial proceedings.²⁷ The constitution grants federal courts jurisdiction to adjudicate disputes over Indigenous rights.²⁸ Another significant advancement in Indigenous land rights in the wake of the 1988 Constitution was the 2002 ratification of

²⁵ See <https://abre.ai/agroecoacre>.

²⁶ See www.pactodasaguas.org.br.

²⁷ Brazil Constitution, Articles 129(V) and 232.

²⁸ Brazil Constitution Article 109(XI).

ILO Convention No. 169, calling for the protection of Indigenous rights, including the right to free, prior, and informed consultation and/or consent (FPIC).²⁹

Article 21 of the American Convention on Human Rights (ACHR), promulgated in Brazilian law by Decree 678/1992,³⁰ guarantees the right to private and communal properties. Likewise, Article 8 of the ACHR establishes the right of the individual to be heard in the courts. These provisions have been interpreted by the Inter-American Court of Human Rights (IACHR) as suggesting that Indigenous Peoples should be heard on all matters involving their communal property.³¹ Likewise, Article 26 of the ACHR provides for the right to progressive development, which cannot impede upon the realization of other economic and social rights provided for in the Pact of San Salvador³² and afforded to Indigenous Peoples. Finally, the American Declaration on the Rights of Indigenous Peoples (ADRIP),³³ adopted in 2016, is a *soft law* (non-binding) instrument that grants greater cultural autonomy and diversity. Article XXV, 2 guarantees the right to lands they traditionally occupy; Articles III and XXI the right to self-determination; and Articles XXIII, 2, XXVIII, 3, and XXIX, 4 the right to be consulted before any measure that could affect them.

Current Challenges and Opportunities for Indigenous Land Rights Enforcement

Post-1988, the Indigenous movement has continued to grow and expand dialogue and deliver achievements despite resistance. In 2006, Gersem

²⁹ See www.planalto.gov.br/ccivil_03/_Ato2004-2006/2004/Decreto/D5051.htm.

³⁰ See www.planalto.gov.br/ccivil_03/decreto/d0678.htm.

³¹ In this sense, see the IACHR decision in *Community Garifuna Triunfo de la Cruz & its members v. Honduras*. Merits, Reparations and Costs. Judgment of October 8, 2015. Series C No. 305; IACHR., *Case of Kichwa Indigenous People of Sarayaku v. Ecuador*. Merits and reparations. Judgment of June 27, 2012. Series C No. 245; IACHR., *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Merits, Reparations and Costs. Judgment of August 31, 2001. Series C No. 79; IACHR., *Case of the Xákmok Kásek Indigenous Community. v. Paraguay*. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214; IACHR., *Case of the Kaliña and Lokono Peoples v. Suriname*. Merits, Reparations and Costs. Judgment of November 25, 2015. Series C No. 309; IACHR., *Case of the Saramaka People. v. Suriname*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172.

³² Report on Admissibility and Merits No. 38/09, Case 12.670; National Association of Ex-Employees of the Peruvian Social Security Institute et al. v. Perú, adopted by the Inter-American Commission on Human Rights, March 27, 2009, para. 140–147.

³³ See www.oas.org/es/council/AG/regular/46RGA/documents.asp.

Luciano, an intellectual Baniwa, in a tone of hope, stated that Brazil's Indigenous Peoples were living at an outstanding historical moment. They had been "breathing a less repressive air, resuming their ethnic and identity social projects, rescuing, revaluing, and reviving cultures and traditions, reappropriating their lands, relearning their languages, and returning to practice their rituals and ceremonies" (Luciano, 2006).

Nonetheless, Verdum (2009) comments that none of the post-1988 governments, even the most progressive, implemented significant changes in the state's political-administrative practices and structures, with a stagnation in measures recognizing the political autonomy of Indigenous Peoples, as well as the lack of demarcation of lands outside the Amazon. The PNGATI, intending to fund and propel Indigenous self-government, largely has not been implemented, despite the isolated successes, culminating with the closure of bodies to execute the policy by the Bolsonaro administration.³⁴ These have been supported by the current administration.³⁵ The former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, also visited Brazil in 2009 and issued a report documenting several rights violations and making recommendations for the Brazilian state to improve the conditions for their implementation (Anaya, 2009).

In 2016, during Anaya's successor Victoria Tauli-Corpuz's visit to Brazil, she noted that the situation had only worsened. In her 2016 report, Tauli-Corpuz clearly stated that "today, Indigenous Peoples face more profound risks than at any time since the adoption of the Constitution in 1988." She also observed that the concentration of economic and political powers in the hands of a small segment of Brazilian society, as well as recent political and institutional changes, have contributed to further disempowering Indigenous Peoples and promoting structural discrimination (Tauli-Corpuz, 2016).

In a 2009 landmark Supreme Federal Court (STF) ruling,³⁶ the demarcation of Raposa Serra do Sol lands was upheld, covering an area of roughly 1.7 million hectares. Notwithstanding, the Court also issued controversial opinions that helped to weaken Indigenous People's rights to self-determination, stating that demarcation is limited by the scope of the Federal Union's power, akin to a mere "supporting" participation, under the purview of the Federal Prosecutor. The judge's critique of

³⁴ See <https://ispn.org.br/site/wp-content/uploads/2022/06/Documento10AnosPNGATI.pdf>.

³⁵ See <https://abre.ai/pngati>.

³⁶ See Supremo Tribunal Federal [STF]. Petition. 3.338/2009.

UNDRIP in this lawsuit was also contrary to international law interpretation; the Court found that Brazil should not rely upon the self-determination clause since the Brazilian constitution is “the” only binding law for Brazilian Native peoples, preventing them from being recognized as Indigenous Peoples with self-determination rights.

At first glance, land demarcation rights in Brazil seem robust. According to FUNAI, there exist 736 Indigenous lands across the country, occupying nearly 14 percent of Brazil’s national territory.³⁷ Most demarcated Indigenous lands (54 percent), encompassing more than 98 percent of the total area designated to Indigenous lands in Brazil (Sobrevila, 2008),³⁸ are in the northern regions in the Amazon rainforest.³⁹ Outside of the Amazon region, two-thirds of Indigenous communities live displaced and dispossessed either in small and sparse areas. Many of these areas were created by SPI between 1910 and 1967 as reservations (Oliveira, 1993). FUNAI has a backlog of approximately 490 pending requests for land demarcation and has stalled 132 Working Groups advancing demarcation claims. During the Bolsonaro administration, the government dramatically cut FUNAI’s budget and staff,⁴⁰ and zero progress was made in identifying and demarcating any claimed Indigenous lands.⁴¹

While the juridical treatment of Indigenous territorial claims has been largely unfavorable to Indigenous communities, in September 2023 the Supreme Court finally overruled precedent that prevented Indigenous Peoples from reclaiming their lands. Although the STF had recognized the continuous demarcation of the extensive Raposa Serra do Sol land and confirmed Indigenous land rights in 2009, the Court also set forth the “timeframe doctrine” (*marco temporal*), an interpretation of the constitution requiring Indigenous presence in their claimed area on the very date of the Brazilian Constitution’s promulgation: October 5, 1988.

³⁷ See *Terra Indígena: o que é*, FUNAI.

³⁸ According to Sobrevila, the World Bank funded Indigenous Lands Project that, in 1996, managed to complete the legalization and assistance in the protection of approximately 121 Indigenous areas in the Brazilian Amazon. At this time, only more than 250 Indigenous lands had been demarcated by FUNAI.

³⁹ The rest of the Indigenous lands are divided between “Domínio Mata Atlântica,” with 211 (30 percent), and others, or 77 (11 percent) (IBGE, 2010).

⁴⁰ See <https://abre.ai/intindios>.

⁴¹ See <https://terrasindigenas.org.br>. The pending request data was obtained in a petition filled by FUNAI lawyers in a lawsuit discussing demarcation. The number of the lawsuit is 5001142-89.2017.4.04.7119, before the Federal Court in Cachoeira do Sul.

While the STF decided that the effects of the decision mentioned above would not extend to other cases, lower courts began to adopt indiscriminately the “timeframe doctrine” to nullify the land demarcation processes (Sartori Junior, 2018). Former UN Special Rapporteur on Indigenous Rights Victoria Tauli-Corpuz, among others, argued that the “timeframe doctrine” was in conflict with constitutional provisions by constraining Indigenous rights to lands and natural resources and by hindering valid demarcation processes (Tauli-Corpuz, 2016). Therefore, the September 2023 overruling of this doctrine, has been deemed as an advance for the protection of Indigenous lands.

However, in the National Congress, parliamentarians led by the “Ruralist caucus” (*Ruralistas*), tied to agribusiness, who had been relentlessly proposing bills considered harmful to Indigenous land rights (DHESCA, 2017), reacted negatively to the Supreme Court ruling and the approved Law 14.701/23.⁴² In addition to other provisions, the new Act set forth the timeframe doctrine, requiring the presence of Indigenous communities in a claimed area since 1988, ignoring the overall context of violent evictions that motivated the overruling in the Supreme Court. Further, the powerful Ruralist caucus led a massive campaign to withdraw constitutionally and internationally recognized Indigenous rights with strong support from military and other economic sectors, such as mining.⁴³

Land tenure insecurity, combined with poor socio-economic conditions inside and outside of Indigenous lands, has resulted in Indigenous Peoples’ increased dependency on the state⁴⁴ and in violence from land grabbers.⁴⁵ In turn, the government uses arguments of extreme “poverty” and the absence of self-sustainability to justify economic exploitation on Indigenous lands, permitting large-scale agriculture, mining, logging, and infrastructure works, such as dams, roads, and electric lines.

Many factors explain the difficulties Indigenous Peoples have encountered since 1988 to enforce their constitutional rights. Carvalho (2000)

⁴² See www.planalto.gov.br/ccivil_03/_ato2023-2026/2023/lei/L14701.htm#:~:text=LEI%20N%C2%BA%2014.701%2C%20DE%2020%20DE%20OUTUBRO%20DE%202023&text=Regulamenta%20o%20art.,19%20de%20dezembro%20de%201973.

⁴³ In the last term, there was only one Indigenous representative in the National Congress. Joenia Wapichana was the first Indigenous deputy since Mario Juruna, in 1984, and the first Indigenous woman ever to be elected to the National Congress.

⁴⁴ See <https://abre.ai/notmpf>.

⁴⁵ See CIMI, the several Violence Reports against Indigenous Peoples issued annually: <https://cimi.org.br/observatorio-da-violencia/o-relatorio/>.

writes that Brazil, unlike other Latin American countries, has not supported Indigenous involvement in political processes. The resistance of the military and many parliamentarians to the recognition of Indigenous rights, even if they voted in favor of them in the National Constituent Assembly, was a foreshadowing of the obstacles Indigenous Peoples would face in the coming years – the era of implementation, which saw a dismantling of Indigenous rights (Barbosa & Fagundes, 2018).

Post-Bolsanaro

Bolsonaro's defeat and President Lula's election in October 2022 caused yet another shift in the Brazilian government's relationship with Indigenous Peoples. At the beginning of his term, President Lula created the unprecedented Ministry of Indigenous Peoples (MPI) and appointed as minister Sonia Guajajara, an Indigenous woman who had been elected federal deputy, along with another Indigenous woman, Celia Xakriabá. To head FUNAI, the government appointed Joenia Wapichana, an Indigenous woman who had been the only Indigenous parliamentarian in the last legislature. The MPI coordinates and implements the country's Indigenous policy, including land demarcations. The Lula administration has already completed six demarcation processes, and re-enacted PNGATI bodies dissolved by the previous government.⁴⁶ Additionally, in the early days of the Lula administration, the government took several measures to remedy the humanitarian disaster facing the Yanomami, including removing miners from their lands. The government has not yet managed, however, to reverse the dismantling of FUNAI, whose budget plummeted from R\$1.1 billion in 2013 to R\$645 million in 2023 – a drop of 41 percent in a single decade.⁴⁷

The most notable recent achievement of the Indigenous land rights movement was undoubtedly the STF's decision in September 2023 to reject the "timeframe doctrine." In a case that discussed the nullification of a land demarcation, on the grounds that the community was not present on their Indigenous territories in 1988, the Court unanimously decided that the date of promulgation of the Federal Constitution (October 5, 1988) cannot be used to define an Indigenous communities' traditional land occupation.⁴⁸

⁴⁶ See <https://abre.ai/ebcdem>.

⁴⁷ See <https://abre.ai/otempofunai>.

⁴⁸ See <https://abre.ai/stfmt>.

While the decision supports Indigenous Peoples' interests, many Indigenous communities, lawyers, and allies are critical of this case because the decision also sets forth the government's obligation to compensate good faith non-Indigenous occupants, which is at odds with Article 231 of the constitution, which only allows compensation for any improvements to land by good faith occupants. Critics argue that this stipulation will be a practical obstacle for advancing demarcations, because of the potentially high monetary costs for any compensation to be paid by the government.⁴⁹

Unfortunately, resistance to advancing the implementation of Indigenous rights has not ceased. The composition of the National Congress remains ultraconservative and loyal to economic interests, especially agribusiness interests. In a retaliatory response to this judgment, the National Congress approved Law No. 14.701, which, among other provisions that weaken the protective framework for Indigenous land rights, requires Indigenous presence on the land to be demarcated on the date of the promulgation of the constitution. As of this writing, President Lula vetoed the law, but Congress could still override his veto.

Conclusions and Recommendations

Brazil's transition from dictatorship to democracy in the 1980s resulted in positive legal changes for Indigenous Peoples, especially with the guarantees of the 1988 Constitution. The constitutional guarantee for Indigenous Peoples to occupy their traditional lands remains the primary source of Indigenous People's survival and resistance to ongoing settler colonial laws, policies, and practices throughout the country. While the 1988 Constitution remains the law of the land, the past ten years of struggles to claim Indigenous land rights have demonstrated that the support from the government is critical to the full realization of land rights. Without the Brazilian government's commitment to land rights, Indigenous Peoples will be at continued risk from dispossession and erasure as independent peoples.

Nevertheless, the political mobilization of Indigenous Peoples in the National Constituent Assembly process has provided many important lessons, and the challenging years have been a time of intense mobilization and resistance. Since President Lula took office in 2023, Indigenous

⁴⁹ See <https://abre.ai/carns>.

Peoples have already obtained several gains. The establishment of the MPI offers additional promise, especially under Indigenous leadership, toward respect for Indigenous Peoples' reciprocal and spiritual relationship with their lands. The MPI can support FUNAI to advance land demarcations, create and accomplish territorial and environmental management plans, conduct prior consultations, and strengthen health and educational policies.

The Brazilian Supreme Court must also reaffirm its standing and once more overturn the "timeframe doctrine," especially given that the National Congress may vote to override President Lula's veto to the law that established this requirement to demarcations. The Brazilian National Congress has clearly indicated that any improvements to Indigenous land rights will face strong political opposition in a divided society, particularly by the Ruralistas. Globalization and international commodity markets continue to drive encroachment and impact Indigenous communities and their land rights, and have a strong resonance in Brazilian politics.

Indigenous Peoples must continue to resist and claim political space in state structures toward realizing land rights. Despite being important for advancing the protection of some rights, conflicting interests and power asymmetries limit the possibilities of marginalized groups to make real achievements in political arenas. Driven by grassroots and national political mobilizations, Indigenous Peoples and their allies, in conjunction with global Indigenous interests, must apply constant pressure on the Brazilian state, transnational corporate actors and international investors to protect and safeguard Indigenous land rights in the country. Without this constant vigilance, land rights in Brazil will remain fragile.

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