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"Fecho de Pasto" and "Fundo de Pasto" Communities and Brazil's Federal Supreme Court: An Insight Based on Fraser

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ABSTRACT

This article examines the Brazilian Supreme Court's decisions in Direct Action of Unconstitutionality No. 5783 through the lenses of intersectionality and Nancy Fraser's theory of justice. It asks whether the majority opinions, despite declaring unconstitutional the imposition of a final deadline for *fundo* and *fecho de pasto* communities to request land regularisation and certification of recognition, rely on implicit discursive tools that partially silence intersectional forms of oppression. Existing scholarship has not sufficiently addressed how constitutional adjudication may formally protect traditional communities while reproducing discursive patterns that obscure the overlapping dimensions of territorial, social, and cultural marginalisation. This article fills that gap by analysing the judicial language used in the Justices' opinions and by assessing its relationship with Fraser's categories of redistribution, recognition, and representation. The study adopts a jurisprudential analysis method, supported by indirect documentation, bibliographical research on Fraser's theoretical framework, and documentary research on the Brazilian Supreme Court's rulings in Direct Action of Unconstitutionality No. 5783. It finds that Justice Nunes Marques' opinion employs explicitly asymmetrical discursive tools, while the remaining opinions, although reaching a rights-protective outcome, remain marked by linguistic tendencies that do not fully incorporate an intersectional understanding of oppression. The article contributes to constitutional law and critical legal scholarship by showing how judicial discourse may preserve Eurocentric assumptions even when producing formally emancipatory decisions.

KEYWORDS

Traditional Communities; Brazilian Supreme Court; Intersectionality; Nancy Fraser; Gender

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INTRODUCTION

Traditional populations have a relationship with a specific territory, a socio-political organization; a relationship with the environment and nature through the use of renewable resources and a limited relationship with the market and society.[1] However, it is necessary to ascertain that Agrarian Law encompasses a specific universe of silencing, as there is a set of subjects that are invisible and historically assumed to be non-existent. Thus, the emancipatory reconstruction of Agrarian Law is fundamental, thus giving voice to "a diversity of groupings made invisible by the official pretensions of the legal homogenization of the category of people since the colonial period".[2]

From 1982 onwards, the *fundo de pasto* communities came to include not only the pastoral groups of the Caatinga but also those situated in diverse regions of the state of Bahia. In essence, they represent "a whole of a territory (hinterland, caatinga), a history (of the corrals), a culture (sertaneja), an identity, a mode of production, a pattern of relations with the environment, and social relations".[3] Ferraro and Bursztyn argue that the term *fundo de pasto* designates not only the physical basis of productive activity but also community itself, with immemorial ownership recognised internally and externally.[4]

Fundo de pasto communities rear goats in designated areas located close to the settlement itself, typically in semi-arid regions of the Caatinga biome. By contrast, *fecho de pasto* communities tend to rely on more distant grazing lands, requiring them to travel regularly with their herds due to the limited space available within their territories.

The persistent absence of public policies directed towards the regularisation of land tenure in communal pasture areas has perpetuated a set of historically reproduced social asymmetries, within which peasants and rural workers remain structurally excluded from access to land.

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[1] *See* José H. Benatti, Posse Agroecológica e Manejo Florestal: um estudo das concepções jurídicas sobre os apossamentos das populações tradicionais na Amazônia brasileira [Agroecological Tenure and Forest Management: An Analysis of Legal Conceptions on the Land Occupation of Traditional Populations in the Brazilian Amazon] (2001) (Braz.).

[2] Alfredo W. Berno de Almeida. Terras de Quilombos, Terras Indígenas, Babaçuais Livres, Castanhais do Povo, Faxinais e Fundos de Pasto: Terras Tradicionalmente Ocupadas [Quilombo Lands, Indigenous Lands, Free Babassu Groves, People's Chestnut Groves, Faxinais and Fundo de Pasto: Traditionally Occupied Lands] 25 (2006) (Braz.).

[3] Luiz A. Ferraro Júnior & Marcel Bursztyn. *Tradição e Territorialidade nos Fundos de Pastos da Bahia: do capital social ao capital político*.[Tradition and Territoriality in the Fundo de Pasto Communities of Bahia: from social capital to political capital] Paper presented at the 4th National Meeting of ANPPAS (Brasília, DF, 2008), (Braz.).

[4] *Id.*

This paper examines the emblematic cases involving the Direct Action of Unconstitutionality [hereinafter A.D.I.] No. 5783,[5] which addressed the constitutionality of Article 3, § 2 of Law No. 12.910/2013[6] of the State of Bahia. This provision concerns the land regularisation of rural and vacant state-owned lands traditionally occupied by *fundo e fecho de pasto* communities. The law imposed a deadline for such communities to submit requests for land regularisation.

Although the article examines the implementation of the rights of *fundo* and *fecho de pasto* communities in the jurisprudence of the Federal Supreme Court of Brazil [hereinafter S.T.F.], it advances the broader academic debate on Indigenous peoples' rights and property rights by analysing its specific objectives. To achieve this specific objective, the article undertakes a comparative analysis of the 2023 judgment in A.D.I. No. 5783,[7] which concerned the rights of *fundo* and *fecho de pasto* communities, and the joint judgment decided by the S.T.F. in A.D.I. Nos. 7582, 7583, and 7586, as well as Direct Action of Unconstitutionality by Omission [hereinafter A.D.O.] No. 86 and Declaratory Action of Constitutionality [hereinafter A.D.C.] No. 87,[8] as both decisions address the constitutionality of the *marco temporal* thesis.

In A.D.I. No. 5783,[9] the Attorney General of Brazil subsequently challenged the constitutionality of Law No. 12.910/2013, arguing that the imposition of a temporal limit on the right to seek recognition and certification of territorial rights was incompatible with constitutional guarantees.

The challenge was grounded in the alleged violation of several constitutional and international provisions, including the right to the protection and promotion of cultural diversity enshrined in Articles 215, §1, and 216 of the Federal Constitution,[10] as well as the principles of human dignity and political pluralism set out in Article 1, items III and V. In addition, reference was made to Articles 13 and 14 of the International Labour Organization's Indigenous and Tribal Peoples Convention No. 169 [hereinafter I.L.O. Convention No. 169], ratified in Brazil by Decree No. 5.051 of 2004.[11] The Attorney General further argued that the contested provision directly undermines the right of

[5] Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, Rosa Weber (Sept. 6, 2023) (Braz.).

[6] Lei No. 12.910, de 11 de Outubro de 2013, Law of the State of Bahia (Oct. 11, 2013) (Braz.).

[7] Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, Rosa Weber (Sept. 6, 2023) (Braz.).

[8] Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal (Braz.).

[9] Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, Rosa Weber (Sept. 6, 2023) (Braz.).

[10] Constituição da República Federativa do Brasil de 1988 (Constitution of the Federative Republic of Brazil of 1988) (Oct. 5, 1988), art. 215 (§ 1) and 216.

[11] Decreto No. 5.051, de 19 de Abril de 2004, Diário Oficial da União [D.O.U.] de 20.4.2004 (Braz.).

traditional communities to self-identification, given the intrinsic link between territorial rights and ancestry.

The Legislative Assembly and the Governor of the State of Bahia argued that the establishment of a deadline would foster legal certainty, stability and social pacification. The Regional Institute of Smallholder Agriculture, the Association of Lawyers for Rural Workers of the State of Bahia, and the Federal Public Defender's Office were admitted as *amici curiae*.[12] Conversely, communities that had not, by 31 December 2018, obtained certification of their recognition as *fundo de pasto* and regularised the land traditionally occupied would no longer be able to invoke this instrument of territorial protection.

The central question is whether the temporal criterion is inappropriate and disproportionate, insofar as it affects the relationship between territorial rights and ancestry. By tying the recognition of territorial rights to an arbitrary deadline, do state bureaucracy, legislation and Brazilian Federal Supreme Court (S.T.F.) impose patterns of institutional subordination, economic insecurity, and political underrepresentation, ultimately eroding traditional bonds? Conversely, might the imposition of a deadline contribute to resolving land conflicts and fostering social stabilisation, or would it instead create opportunities for the expansion of land grabbing and real estate speculation?

This paper examines the discursive strategies reproduced in the votes of Brazilian Supreme Court Justices in Direct Action of Unconstitutionality No. 5783,[13] drawing upon Nancy Fraser's theory of justice, particularly her conception of intersectionality. Its specific objectives are fourfold: (a) to investigate legislative innovation concerning the rights of *Fundo e Fecho de Pasto* communities; (b) to analyse Fraser's theory of justice; (c) to propose a comparative analysis of the decision in A.D.I. and the consolidated judgments in A.D.I. Nos. 7582, 7583, and 7586, as well as (A.D.O.) No. 86 and (A.D.C.) No. 87, decided by the Brazilian Federal Supreme Court (S.T.F.) in 2025, through a discussion of the property rights of *fundo* and *fecho de pasto* communities and Indigenous peoples; and (d) to explore the discursive strategies employed in the votes delivered in Direct Action of Unconstitutionality No. 5783 within the framework of Fraser's explanatory conception of intersectionality.

[12] Código de Processo Civil (Lei n.13.105 de 16 de Março de 2015) (Braz.). The Brazilian Code of Civil Procedure (CPC) expressly provides for the participation of the amicus curiae in Article 138. This mechanism is intended to offer technical and specialised input in cases of particular relevance or complexity, thereby assisting judges and courts in reaching more coherent and well-reasoned decisions. Although the amicus curiae does not hold the status of a party to the proceedings, its intervention seeks to enrich legal debate by introducing additional perspectives and information capable of supporting judicial reasoning.

[13] Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, Rosa Weber (Sept. 6, 2023) (Braz.).

As regards justification, this study advances sufficient and relevant grounds to legitimise its undertaking. It reiterates fundamental theoretical reasons that validate both the choice of research design and the selection of the theoretical framework, as well as the broader significance of the general and specific subject matter. With respect to the research topic itself, the inquiry proves justified insofar as, although the Court has historically assumed a counter-majoritarian role in safeguarding a broad spectrum of fundamental rights for vulnerable minorities, textual clues suggest that it may nonetheless reproduce discursive tendencies imbued with Eurocentric stereotypes, marked by the silencing of intersectional forms of oppression. Finally, with regard to the theoretical framework, Fraser's theory is particularly pertinent, insofar as discursive strategies informed by an intersectional approach are indispensable to the effective realisation of the rights of vulnerable minorities and ought to be mobilised by the Justices of the Brazilian Supreme Court.

The central problem addressed in this paper is the following: to what extent did the votes of the majority of the Brazilian Supreme Court justices—although declaring the unconstitutionality of imposing a final deadline for *fundo e fecho de pasto* communities to file requests for land regularisation and certification of recognition or ruling that the Indigenous temporal landmark doctrine is unconstitutional—rely on implicit discursive tools marked by a partial silencing of intersectional oppressions? The working hypothesis advanced here is that Justice Nunes Marques's vote employed explicitly asymmetrical discursive strategies, whereas the votes of the other justices were characterised by discursive tendencies blind to a fully intersectional language. This analysis is conducted through Fraser's counter-hegemonic method, which exposes the persistence of Eurocentric stereotypes in the Court's rulings (approach method). The study adopts a jurisprudential analysis (procedural method), combined with indirect documentation through bibliographical research in papers and books that include Fraser's theoretical framework. In addition, documentary research is employed to examine Supreme Court rulings in Direct Action of Unconstitutionality No. 5783.

METHODOLOGY

The empirical corpus of this article was constructed through documentary research and jurisprudential analysis of publicly available decisions and individual opinions issued by the Brazilian Federal Supreme Court (Supremo Tribunal Federal – S.T.F.). The selection of

cases was purposive and thematic rather than statistical: the corpus was limited to S.T.F. rulings that directly address the constitutional validity of temporal limitations affecting the recognition, regularisation, or demarcation of territories traditionally occupied by vulnerable traditional communities. The starting point of the analysis was Direct Action of Unconstitutionality No. 5783, decided on 6 September 2023, concerning *fundo* and *fecho de pasto* communities in the State of Bahia. In order to situate that decision within the Court's broader constitutional treatment of temporal limitations on traditional territorial rights, the article also examines the joint adjudication of Direct Actions of Unconstitutionality Nos. 7582, 7583, and 7586, Direct Action of Unconstitutionality by Omission No. 86, and Declaratory Action of Constitutionality No. 87, concerning the marco temporal thesis and Indigenous territorial rights. The cases were identified through searches of the S.T.F.'s official case-law and case-monitoring databases, using both docket-number searches and thematic keyword searches. The docket-number searches were conducted using the following entries: "A.D.I 5783", "A.D.I 7582", "A.D.I. 7583", "A.D.I. 7586", "A.D.O. 86", and "A.D.C. 87". The thematic searches combined the following Portuguese keywords and expressions: "*fundo de pasto*", "*fecho de pasto*", "*comunidades tradicionais*", "*territórios tradicionalmente ocupados*", "*marco temporal*", "*povos indígenas*", "*direitos territoriais*", "*regularização fundiária*", and "*tradicionalidade*". The inclusion criteria were: (i) decisions issued by the STF; (ii) decisions concerning traditional, Indigenous, *quilombola*, or comparable communities whose territorial rights are constitutionally or internationally protected; (iii) decisions addressing temporal criteria, deadlines, or cut-off dates capable of affecting the recognition or exercise of such territorial rights; and (iv) decisions containing individual opinions or votes suitable for critical discourse analysis. Materials were excluded where they were merely doctrinal references, secondary literature, legislative materials, or judicial decisions not forming part of the S.T.F. corpus analysed in the article. The analysis focused on the wording of the Justices' opinions, with particular attention to discursive constructions concerning territoriality, traditionality, cultural identity, redistribution, recognition, representation, and intersectional oppression. The corpus was not designed to provide a quantitative survey of S.T.F. case law, but to support an interpretive and critical discourse analysis of the Court's reasoning in the selected leading decisions.

1. THE NEED FOR EMANCIPATORY RENEWAL OF AGRARIAN LAW AND LEGAL EVOLUTION

The *fundo* and *fecho de pasto* communities have a historical origin linked to the colonisation process, especially through the exercise of cattle ranching in the state of Bahia.

1.1. HISTORICAL ORIGINS AND GEOGRAPHY OF THE *FUNDO E FECHO DE PASTO* COMMUNITIES

Fundo de pasto communities are groups of small rural producers from different cities in the semi-arid region of Bahia who organise themselves in a communitarian way to carry out extensive grazing in an open property system. With the decline of the sugar cycle in the Northeast, former cowboy helpers were able to maintain their way of life and economic production independently of the seigniorial authority. In these regions, herds are made up of goats and sheep, which are better adapted to the climatic conditions of the caatinga. Together, these practices illustrate how traditional communities develop ecological knowledge and collective strategies for managing land, ensuring both subsistence and the preservation of cultural traditions. In Bahia, there are five major groups of traditional communities: fishermen, *quilombola, fundo de pasto*, *fecho de pasto* and Indigenous.

Artisanal fishing[14] is practised by fishermen from traditional communities who engage in this activity without commercial or export purposes. It is carried out sustainably, primarily to guarantee subsistence, meet family consumption needs, and preserve cultural traditions.

In turn, the *fundo de pasto* communities designate a social group with growing political capital. Both raise animals without using the practice of individual fencing, as the animals are raised in areas of common use. They practice community use of the land and can be combined with individual use through animal grazing and subsistence agriculture focused on the cultivation of corn, beans and cassava. *Fundo de pasto*

[14] These communities possess indispensable knowledge for the practice of fishing in ways that are environmentally sound, economically viable and compatible with the long-term sustainability of aquatic ecosystems. Their practices stand in clear contrast to large-scale, extractive fishing models, which undermine ecosystem integrity, degrade water bodies and threaten both the subsistence of fishing communities and the reproductive cycles of aquatic species. Recognised as traditional communities, they are therefore entitled to protection with regard to the preservation of their cultural identity, territorial dignity and ways of life, as groups that have actively contributed to the national civilisational process and to the formation of Brazilian society. In this context, they also hold the right to free, prior and informed consultation concerning any legislative or administrative measures that may affect their livelihoods or the governance of their territories. Despite their presence across the vast majority of Brazil's states, these communities have yet to receive adequate recognition and institutional support from public authorities. On the contrary, they continue to face persistent and often severe challenges, largely associated with conditions of marginalisation and social invisibility. These challenges range from basic issues—such as the lack of formal registration, which restricts the regular exercise of their activities—to more complex problems, including widespread river pollution and the cumulative impacts of large-scale development projects imposed without the legally required consultation processes. Key requirements for the effective recognition and protection of these communities include the safeguarding of their collective identity through self-identification, the formal recognition and defence of their territories, and the protection of their distinct ways of life. This entails ensuring access to the material and institutional conditions necessary for the continuation of their economic practices, cultural expressions and social reproduction. In this regard, a central mechanism for advancing such guarantees is the approval of Bill No. 131/2020, which seeks to recognise and secure the territorial rights of traditional fishing communities. The bill frames these territories as both tangible and intangible cultural heritage, subject to legal safeguarding, protection and promotion, and establishes procedures for their identification, delimitation, demarcation and titling. It further defines fishing territories on the basis of criteria such as permanent or seasonal habitation, the exercise of productive activities, and the maintenance of ecological conditions essential for the conservation, shelter and reproduction of species and other resources underpinning the physical, social, economic and cultural continuity of these communities.

communities are predominantly located in the Caatinga biome,[15] where land use is characterised by extensive free-range goat herding. By contrast, *fecho de pasto* systems are situated within the Cerrado biome[16] and are more closely associated with cattle raising, which typically takes place in territorially dispersed and often distant grazing areas.

Geographically, *fecho de pasto* communities are usually situated in humid regions, often near water sources. They live mainly in the cerrado of western Bahia, where cattle are raised on lands located at a distance from their places of residence. Agricultural production is generally centred on cattle farming. *Fundo de pasto* communities raise free-range goats on commonly used lands near their homes. Animal husbandry is carried out on collective lands. *Fundo* and *fecho de pasto* constitute a specific form of peasantry in the hinterlands of Bahia, characterised by the communal use of land for the raising of goats and sheep. Historically, these communities emerged from cultural connections between Black, Indigenous and Portuguese populations. Through territorial occupation and agropastoral systems, they have developed strategies to cope with the climatic constraints of the semi-arid region.

[15] Brazil is a country endowed with rich biodiversity, encompassing a wide range of ecosystems, such as the Pantanal, the Cerrado, the Atlantic Forest, the Amazon, the Pampa, and the Caatinga. According to Melo, 'the Caatinga is a biome exclusively found in Brazil, occupying approximately 54% of the Northeast Region and 11% of the national territory, distributed across nine distinct ecoregions.' Despite its significance, the Caatinga remains one of the least conserved and least scientifically studied biomes in the country. The Caatinga is characterised by a tropical semi-arid climate with high temperatures. Its vegetation is predominantly low-growing, marked by sparse foliage, twisted branches, and thorns. The fauna and flora of the Caatinga are adapted to prolonged periods of drought. The Caatinga includes native plant species such as *facheiro*, *mandacaru*, and *xique-xique*. Its soil is shallow and stony, with low organic matter content, yet relatively fertile. Melo further notes that the Caatinga is defined by 'climatic variability, diverse vegetation, and unique species, forming a mosaic of flora, fauna, and relief. Nevertheless, this rich biome is threatened by the exploitation of natural resources, with only 8% of its area protected within conservation units. More recently, according to Melo, the Caatinga has been undergoing 'a process of environmental degradation, caused by the unsustainable use of its natural resources and exacerbated by rising global average temperatures due to climate change.' The result has been the extinction of its unique species, often before they can be scientifically studied. *See* Janieli de Oliveira Melo et al., *A Caatinga: um bioma exclusivamente brasileiro* [*The Caatinga: An Exclusively Brazilian Biome*], Ciência e Cultura, Oct.-Dec. 2023, at 1, 9 (last visited Jan. 1, 2026) (Braz.).

[16] Each biome exhibits its own specific characteristics. According to Weichert, the Cerrado biome encompasses "a significant diversity of fauna, including mammals, birds, reptiles, amphibians, and fish, and is home to 5 per cent of the Earth's total biodiversity, being considered the richest savanna in the world". The term "Cerrado" derives from the root *cerrar*, meaning "to close" or "to enclose". With regard to the biome's vegetation, this etymological origin is reflected in its general features, as the Cerrado is characterised by dense shrub and grass cover, as well as the low, twisted trees that grow throughout the region. *See* Reginaldo Ferreira Weichert et al., *Cerrado in Focus: The Vital Role of the Cerrado in the Planet's Biodiversity*, Contribuciones a Las Ciencias Sociales, Feb. 2024, at 1 (Braz.).

Some *fundo* and *fecho de pasto* communities are also recognised as quilombola,[17] while others combine fishing with agriculture. These communities may be classified as *quilombola* if they meet the legal requirements established under Portaria Fundação Cultural Palmares [hereinafter F.C.P.] 98/2007[18] namely a history of resistance to historical oppression. The defining feature of quilombola groups is their descent from enslaved Africans who escaped bondage and formed *quilombos*.[19] Under Portaria F.C.P. 98/2007[20] and Decree No. 4,887/2003,[21] recognition and territorial rights are grounded in the principles of self-identification, a distinct historical trajectory, specific territorial relations, and presumed Black ancestry linked to resistance against oppression.[22]

[17] Bunchaft held that "Historically, the term quilombo did not disappear with the abolition of slavery, but instead underwent a process of semantic reconfiguration. Initially, the term was associated with an understanding of cultural resistance aimed at recovering the contribution of African culture and its legacy in Brazil." At a second stage, "it came to encompass a perception of counter-hegemonic and revolutionary resistance. Subsequently, as the Black Movement articulated racial and cultural dimensions with political action, quilombo attained the status of a symbol of Black resistance." Maria E. Bunchaft, *A ADI 3239, interseccionalidade e o critério da autoatribuição: uma reflexão baseada em Fraser* [*The Direct Action of Unconstitutionality Number 3239, Intersectionality and the Self-attribution Criterion: An Insight Based on Fraser*], 128 Revista Brasileira de Estudos Políticos 319, 328, 361 (2024) (Braz.). According to Bunchaft, in Brazil, the period following abolition was marked by the systematic marginalisation of Black populations from the republican project of modernisation. At that time, scientific narratives influenced by social Darwinism were deployed to legitimise racial hierarchies and white dominance, portraying socio-economic inequalities as the product of allegedly natural processes of selection. These essentialist constructions of Black inferiority remained influential throughout the late nineteenth century. A significant discursive reorientation later emerged with Gilberto Freyre's formulation of the idea of racial democracy, which reshaped prevailing interpretations of race relations in Brazil. Nevertheless, Black social movements increasingly rejected this narrative, denouncing the myth of racial harmony and exposing the continuity of institutionalised—and frequently violent—forms of racism affecting Black communities. Criticism of racial democracy has since become a defining feature of the Black Movement and of wider anti-racist struggles, rooted in a long-standing counter-hegemonic tradition opposing forms of violence that disproportionately impact poor and Black populations. *Id.* at 340-361.

[18] Portaria No. 98, de 26 de Novembro de 2007 [Ordinance No. 98, Nov. 26, 2007], Fundação Cultural Palmares (Braz.).

[19] Within this broader historical process, the concept of the *quilombo* did not vanish after the abolition of slavery but instead underwent a profound semantic and political transformation. Initially linked to cultural resistance and the reaffirmation of African heritage in Brazil, the term gradually acquired more explicitly political, counter-hegemonic and revolutionary connotations. As racial and cultural demands became intertwined with organised political action, the *quilombo* came to symbolise Black resistance more broadly. Bunchaft held that though historically originating in individual and collective acts of escape, *quilombos* were reconstituted as spaces of political and cultural struggle, challenging Eurocentric paradigms while asserting territorial claims and demanding differentiated public policies. The Black Movement adopted a range of organisational strategies and forms of political engagement, among which the Brazilian Black Front (*Frente Negra Brasileira*), founded in the 1930s, was particularly significant. This cycle of mobilisation was interrupted by the military coup of 1964, which ushered in a period of repression of Black political activism. Such movements only re-entered the national political arena in 1979, with the establishment of the Unified Black Movement Against Racial Discrimination (*Movimento Negro Unificado*). *See* Bunchaft, *supra* note 17, at 340-361.

[20] Portaria No. 98, de 26 de Novembro de 2007 [Ordinance No. 98, Nov. 26, 2007], Fundação Cultural Palmares (Braz.).

[21] Decreto No. 4.887, de 20 de Novembro de 2003 Diário Oficial da União [D.O.U.] de 21.11.2003, (Braz.).

[22] *Id.*

Indigenous peoples[23] are the original inhabitants of Brazil whose presence predates colonisation. The Federal Constitution of Brazil establishes a specific legal regime for Indigenous peoples in Articles 231 and 232,[24] and this regime contains elements that are also applicable to other traditional communities. It is precisely in this respect that the recognition of ethnic territorial rights takes shape: Indigenous rights are enshrined in Articles 231 and 232 of the Federal Constitution,[25] with the singular characteristic of being recognised as original, while *quilombola* rights are established in Article 68 of the A.D.C.T.[26]

1.2. THE EVOLUTION OF THE PROTECTION OF RIGHTS AND AGROECOLOGICAL POSSESSION

The study of the enforcement of the rights of the *fundo* and *fecho de pasto* communities is relevant because, among traditional communities and peoples, they remain the least known and most invisible, bearing the greatest pressures from agribusiness.

The right of *fundo* and *fecho de pasto* communities to the recognition of title to traditionally occupied lands arises from agroecological possession. Fishermen, Indigenous, quilombola and *fundo* and *fecho de pasto* communities challenge the

[23] Indigenous peoples in Brazil comprise a wide diversity of ethnic groups that inhabited the territory long before the onset of Portuguese colonisation in the sixteenth century. At the time of European arrival, these populations included semi-nomadic societies whose livelihoods were based on hunting, fishing, gathering and shifting cultivation, giving rise to highly differentiated cultural systems adapted to distinct environments. The indigenous population suffered a dramatic decline as a result of direct violence perpetrated by colonisers, as well as the spread of infectious diseases introduced during the colonial period. It was only from the 1980s onwards that this demographic trend began to reverse, with a gradual recovery in population numbers. Brazilian Indigenous peoples have made substantial contributions to global society. Among the most significant are the domestication and cultivation of staple crops such as cassava, maize, sweet potato, chilli peppers, cashew, pineapple, peanuts, papaya, squash and beans, which have since become integral to food systems worldwide. Indigenous groups also played a strategic role in supporting Portuguese territorial consolidation, including the defence of colonial frontiers. Furthermore, they contributed to the formation of Brazilian society through processes of cultural interaction and miscegenation, leaving a lasting imprint on the country's demographic and cultural composition.

[24] Constituição da República Federativa do Brasil de 1988 (Constitution of the Federative Republic of Brazil of 1988) (Oct. 5, 1988), art. 231 (§ 2).

[25] *Id.* art. 231.

[26] *Id.* art. 68.

expansion of agribusiness[27] by adopting agroecology[28] not only as a mode of production but also as a counter-hegemonic mode of resistance and territorial defence.

It was not until 1982 that the *Fundo de Pasto* Project was established, through an agreement signed by the Government of Bahia, the Federal Government and the World Bank, to be implemented by the Bahia Land Institute. With the promulgation of the State Constitution of Bahia in 1989,[29] the way of life of the *fundo* and *fecho de pasto* communities, as well as the regularisation of their lands, gained formal recognition. The Bahia Constitution marked the first legal recognition of *fundo de pasto* communities by providing for the granting of real rights of use. However, these communities were only formally characterised as traditional communities in 2006, with the decree establishing the National Commission for the Sustainable Development of Traditional Peoples and Communities [hereinafter C.N.P.C.T.].[30] This was later replaced by Decree No. 8,750/2016,[31] which created the National Council of Traditional Peoples and Communities within the structure of the Ministry of Human Rights. Full access to the lands and natural resources traditionally used for physical, cultural and economic reproduction was secured only with Federal Decree No. 6,040/2007,[32] which broadened the concept of territory and created the National Policy for the Sustainable Development of Traditional Peoples and Communities [hereinafter P.N.P.C.T.]. Yet, according to the State Attorney General's Office, regularisation remains restricted to the granting of real rights of use.

[27] According to Arruzzo, since the 1970s, Brazil has experienced a steady expansion of large-scale corporate monocultures, both in terms of production volumes and cultivated land. This growth has been closely linked to the advance of modern agriculture into the Cerrado regions, significantly increasing the output and export of agricultural commodities, particularly soybeans and meat. Such expansion has not been merely productive in nature; it has also intensified land and economic concentration, alongside the rising influence of financial capital within agricultural activities. From the early 2000s onwards, these dynamics became more pronounced, marked by stronger processes of territorial and natural resource appropriation, frequently supported by state policies and institutional frameworks. Roberta Carvalho Arruzzo, Livia Domiciano Cunha & Liziane Neves dos Santos, *Relações Territoriais Entre Povos Indígenas e Agronegócio no Brasil: Conflitos e Resistências* [*Territorial Relations Between Indigenous Peoples and Agribusiness in Brazil: Conflicts and Resistance*], 18 Revista Tamoios 165 (2022) (Braz.). The consolidation of agribusiness in Brazil has therefore entailed substantial transformations across technical, political, financial and productive dimensions. Spatially, these changes have materialised through a combined process of expansion and concentration, reshaping the organisation of agricultural production across the national territory. *See* Samuel Frederico, *Economia política do território e as forças de dispersão e concentração no agronegócio brasileiro* [*Political Economy of Territory and the Forces of Dispersion and Concentration in Brazilian Agribusiness*], GEOgraphia, Feb. 2016, at 68 (Braz.).

[28] In contrast to the bureaucratic logic of agribusiness, agroecological tenure is non-individualistic, binding cultural traditions directly to the land. Collective access to natural resources produces consensual norms that protect these spaces while reinforcing group cohesion. Benatti,*supra* note 1.

[29] Constituição do Estado da Bahia (Constitution of the State of Bahia) (Oct. 5, 1989).

[30] Decreto No. 5.840, de 13 de Julho de 2006 Diário Oficial da União [D.O.U.] de 14.7.2006 (Braz.).

[31] Decreto No. 8.750, de 9 de Maio de 2016, Diário Oficial da União [D.O.U.] de 10.5.2016 (Braz.).

[32] Decreto No. 6.040, de 7 de Fevereiro de 2007, Diário Oficial da União [D.O.U.] de 8.2.2007 (Braz.).

At the state level, Law No. 12.910/2013[33] provides for the regularisation of rural and vacant lands occupied by *fundo* and *fecho de pasto* communities. Its preamble, however, refers to "occupied lands" rather than "territories", the latter carrying a broader meaning that encompasses political and cultural dimensions. The law establishes the granting of real rights of use as the main instrument of regularisation and introduces a deadline for self-recognition of traditionality. Certification is issued by the Secretariat for the Promotion of Racial Equality [hereinafter S.E.P.R.O.M.I.], regulated under Ordinance No. 007/2014,[34] which makes self-definition a prerequisite for recognition. The deadline for certification was 31 December 2018, after which only communities certified by S.E.P.R.O.M.I. could obtain contracts granting real rights of use.

Moreover, there has been little conceptual development or debate regarding alternative forms of possession. Agroecological tenure, for instance, constitutes a foundational source of legitimacy for the recognition of traditionally occupied lands.[35] In Bahia, it has been the principal instrument underpinning land regularisation for the *fundos de pasto* and securing the recognition of their territorial rights.[36] Nonetheless, despite this legal recognition, the challenges persist: disputes often extend over many years, and the process of land regularisation continues to face significant obstacles.

Unlike the individualistic model of rural land ownership, agroecological tenure is grounded in a sustainable relationship between traditional communities and the land. It fosters agroforestry practices, the preservation of natural resources, and the transmission of cultural traditions. By maintaining collective use of land and access to natural resources, these communities foster consensual norms that safeguard their territories, strengthen group cohesion, and sustain practices of extractivism, shifting cultivation, hunting and fishing. In this sense, agroecology embodies both a productive and a political project, affirming the traditionality of these communities and their right to land as the basis of cultural survival.

Despite the differences, fishermen, Indigenous, quilombola and *fundo* and *fecho de pasto* communities share the common objective of preserving their cultural traditions through a sustained relationship with the land. This relationship of ancestry and

[33] Lei No. 12.910, de 11 de Outubro de 2013, Law of the State of Bahia (Oct. 11, 2013) (Braz.).

[34] *Portaria* SEPROMI nº 007/2014, de 31 de março de 2014 (State of Bahia, Braz.), Secretaria de Promoção da Igualdade Racial [SEPROMI] (State of Bahia, Braz.).

[35] *See* José Heder Benatti, *Das Terras Tradicionalmente Ocupadas ao Reconhecimento da Diversidade Social e de Posse das Populações Tradicionais na Amazônia* [*From Traditionally Occupied Lands to the Recognition of Social Diversity and Land Tenure among Traditional Populations in the Amazon*], *in* 1 Propriedades em Transformação: Abordagens Multidisciplinares sobre a Propriedade no Brasil [Properties in Transformation: Multidisciplinary Approaches to Property in Brazil] 195 (Débora Ungaretti et al. eds., 2018) (Braz.).

[36] Benatti, *supra* note 1, at 99.

spirituality with the land is often expressed through agroecological practices that link subsistence, cultural reproduction and collective land use. With regard to Indigenous peoples, the relevant regulatory framework is established in the Constitution.

The territorial rights of Indigenous peoples predate the creation of the Brazilian State, which is responsible for demarcating and declaring territorial boundaries, as well as legalising possession arising from traditional ownership. Accordingly, the 1988 Federal Constitution[37] recognises Indigenous land as traditional land, based on the requirements set out in Article 231, caput, and its respective paragraphs. In summary, traditional land is that which is permanently used and employed in productive activities, being essential to the preservation of environmental resources and necessary for physical and cultural reproduction.

At present, the doctrine of *indigenato* constitutes the basis for recognising traditionality, as it rests on the assumption that the right to land traditionally occupied by Indigenous communities is original, prior to and pre-existing the creation of the Brazilian State, whose role is merely to acknowledge it. Indigenous possession of traditional lands, grounded in ancestral and spiritual bonds and characterised as an original right, does not depend on a title granted by the government or on the establishment of a cut-off date; rather, historical and cultural presence in the territory suffices. For instance, in the judgment of A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87,[38] Justice Gilmar Mendes upheld the doctrine of *indigenato* as the foundation for traditional possession.

As Indigenous lands constitute property of the Union and Indigenous peoples hold original rights over traditionally occupied lands, the applicable procedure is demarcation rather than expropriation. With regard to expropriation in the form of eviction (*desintrusão*), the objective is to remove unlawful occupants while preserving Indigenous possession and usufruct, dismantling illegal activities and, in certain cases, compensating good-faith occupants. Landowners who occupy areas demarcated as Indigenous lands in good faith are entitled to compensation. This constitutes expropriation based on ancestry, a legal process carried out by the Public Authority, through which possession of private land is recovered for the titling of collective lands

[37] Constituição da República Federativa do Brasil de 1988 (Constitution of the Federative Republic of Brazil of 1988) (Oct. 5, 1988), art. 231 (§ 2).

[38] Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal (Braz.).

traditionally occupied by Indigenous peoples. The Public Authority engages in prior negotiation with the landowner regarding the amount of compensation.[39]

The 1989 Constitution of the State of Bahia,[40] while progressive in certain respects—such as recognising community land use and cultivation—does not provide a precise framework for land regularisation, thereby generating legal uncertainty and the potential for conflict. Addressing this gap requires greater investment in public policies at the federal level, alongside legislation explicitly targeting private properties that do not fulfil their social function, in order to secure territorial rights and prevent the perpetuation of land concentration.[41] Although the 1989 Constitution of Bahia[42] advanced by recognising community use and cultivation of land, it did not clearly resolve the issue of land regularisation, leaving scope for legal uncertainty and conflicts. Greater investment in public policies and stronger laws targeting private lands that do not meet their social function would therefore be necessary.[43]

Other traditional populations, such as riverside dwellers and nut gatherers, have benefited from regularisation mechanisms, particularly agro-extractivist settlement projects. In recent years, however, the instruments available for enforcing territorial rights have proven insufficient to guarantee land security for traditional communities. This is partly due to structural incompatibilities with the land market and the expansion of monocultures. Despite some progress, there has been little conceptual innovation regarding alternative forms of land tenure. Agroecological tenure, however, offers a

[39] Constituição da República Federativa do Brasil de 1988 (Constitution of the Federative Republic of Brazil of 1988) (Oct. 5, 1988), art. 184. The article 184 establishes the expropriation of rural property that fails to fulfil its social function, thereby imposing a constitutional limitation on the exercise of private property. Expropriation for social interest is carried out for the purposes of agrarian reform (rural land) or, in the case of idle urban property, to ensure the social function of property. In such cases, the public authorities withdraw private property in pursuit of the public interest. By contrast, confiscatory expropriation applies to property used for illicit purposes, such as the cultivation of psychotropic plants. Expropriation for public utility is distinct from, and should not be conflated with, expropriation for social interest. It constitutes an administrative procedure through which the State transfers private property to the public domain in situations involving public works, essential services, or public emergencies. A prior declaration of public utility and prior monetary compensation are required. The expropriation of immovable property is typically aimed at the construction of schools, hospitals, and transport infrastructure. Its legal basis is Decree No. 3,365 of 1941.

[40] Constituição do Estado da Bahia (Constitution of the State of Bahia) (Oct. 5, 1989).

[41] *See* Fernanda G. Leal Dantas, *Regularização Fundiária das Comunidades Tradicionais de Fundo de Pasto* [Land Regularisation of Traditional Fundo de Pasto Communities] (2015) (Undergraduate Law Monograph, State Autarchy of the São Francisco Valley), https://geografar.ufba.br/sites/geografar.ufba.br/files/2015_fernanda_gabriela_dantas.pdf (last visited Jan. 2, 2024) (Braz.).

[42] Constituição do Estado da Bahia [Constitution of the State of Bahia] Oct. 5, 1989 (Braz.).

[43] *See* Alfredo W. Berno de Almeida, *A reconfiguração das Agroestratégias: novo capítulo da guerra ecológica* [*The Reconfiguration of Agro-strategies: A New Chapter in the Ecological War*], *in* Terras e Territórios na Amazônia: demandas, desafios e perspectivas [Lands and Territories in the Amazon: Demands, Challenges and Perspectives] 27 (Sérgio Sauer & Wellington Almeida eds., 2011) (Braz.).

crucial foundation of legitimacy for recognising traditionally occupied lands. In Bahia, it has become the principal mechanism by which *fundo de pasto* communities secure their territorial rights. Yet, despite legal recognition, challenges persist: disputes often last for years and regularisation processes remain fraught with obstacles.

Article 2, item XV, of Law No. 9.985/2000,[44] commonly known as the National System of Nature Conservation Units [hereinafter S.N.U.C.] Law, originally introduced the concept of traditional populations, but this provision was subsequently vetoed. By contrast, Law No. 13,123/2015[45] provides the following definition of a traditional community:

A culturally differentiated group that recognises itself as such, has its own form of social organisation, and occupies and uses territories and natural resources as a condition for its cultural, social, religious, ancestral, and economic reproduction, using knowledge, innovations, and practices generated and transmitted by tradition.[46]

According to the National Policy for Sustainable Development, traditional lands are defined as "spaces necessary for the cultural, social and economic reproduction of traditional peoples and communities".[47] Article 68 of the Transitional Constitutional Provisions Act [hereinafter A.D.C.T.][48] reflects "the actions of other social movements, stemming from the struggle for agrarian reform and the actions of the Black movement, which defended the quilombo as an expression of political-cultural resistance in Brazil". This provision was only regulated in 2001 through Federal Decree No. 3.912/2001,[49] which authorised the Palmares Cultural Foundation to oversee administrative procedures for the identification, territorial delimitation and land titling of remaining quilombo communities.[50]

Within this framework, priority is given, first, to lands occupied by Indigenous peoples and *quilombos*; second, to areas designated for the protection of natural ecosystems and those subject to the occupation of traditional communities; and third, to plots of land earmarked for the implementation of agrarian reform.

The lands traditionally occupied embody "a diversity of forms of collective existence of different peoples and social groups in their relations with nature's

[44] Lei No. 9.985, de 18 de Julho de 2000, Diário Oficial da União [D.O.U.] de 18.7.2000 (Braz.).
[45] Lei No. 13.123, de 20 de maio de 2015, Diário Oficial da União [D.O.U.] de 21.5.2015 (Braz.).
[46] *Id.*
[47] Decreto No. 6.040, de 7 de Fevereiro de 2007, Diário Oficial da União [D.O.U.] de 8.2.2007 (Braz.).
[48] Constituição da República Federativa do Brasil de 1988 [Constitution of the Federative Republic of Brazil of 1988] Oct. 5, 1988, art. 68 (Braz.).
[49] Decreto No. 3.912, de 10 de Setembro de 2001, Diário Oficial da União [D.O.U.] de 11.9.2001 (Braz.).
[50] Constituição da República Federativa do Brasil de 1988 [Constitution of the Federative Republic of Brazil of 1988) Oct. 5, 1988, art. 68 (Braz.).

resources".[51] From this perspective, agroecological tenure emerges as a legal category that synthesises the very foundation of legitimacy required for the recognition of traditionally occupied lands.[52]

It was only after 2003 that the context began to change, with the introduction of a set of programmes and policies directed at quilombos and other traditional communities, thereby broadening the recognition of their territorial rights. In that year, President Luiz Inácio Lula da Silva signed Decree No. 4,887/2003,[53] which regulated Article 68 of the A.D.C.T.[54] and expanded its implementation through a range of measures. These included the establishment of the Special Secretariat for Policies to Promote Racial Equality by Law No. 10.678/2003,[55] the creation of the National Council for the Promotion of Racial Equality [hereinafter C.N.P.I.R.] by Decree No. 4.885/2003,[56] and the creation of the National Policy to Promote Racial Equality [hereinafter P.N.P.I.R.] by Decree No. 4.886/2003.[57]

Building on this institutional framework, Justice Alexandre de Moraes emphasises that communities with this profile fall within the constitutional definition of traditional communities, enjoying protection equivalent to that granted to quilombola groups under Article 231 of the Constitution[58] and Article 68 of the A.D.C.T..[59] Their mode of territorial use is inseparable from their collective identity as a social group. As Arruti observes, until 2003 the Ministry of Culture coordinated the Brazil Quilombolas Programme. From the enactment of Decree No. 4,887/2003[60] onwards, however, the Special Secretariat for Policies to Promote Racial Equality [hereinafter S.E.P.P.I.R.] came to play a central role in the coordination of government initiatives, integrating policies and reallocating resources such as those of the *Bolsa Família* welfare programme.

Nevertheless, the Bolsonaro government dismantled the entire process of land titling and demarcation for quilombola and other traditional communities. Having pledged not to demarcate "a single centimetre" for Indigenous reserves or quilombola territories, the former president actively deconstructed public policies safeguarding the cultural and territorial rights of these communities. This was reflected in a

[51] Benatti, *supra* note 1, at 40.
[52] *Id.* at 40.
[53] Decreto No. 4.887, de 20 de Novembro de 2003, Diário Oficial da União [D.O.U.] de 21.11.2003 (Braz.).
[54] Constituição da República Federativa do Brasil de 1988 [Constitution of the Federative Republic of Brazil of 1988] Oct. 5, 1988, art. 68 (Braz.).
[55] Lei No. 10.678, de 23 de Maio de 2003, Diário Oficial da União [D.O.U.] de 26.5.2003 (Braz.).
[56] Decreto No. 4,885, de 20 de Novembro de 2003, Diário Oficial da União [D.O.U.] de 21.11.2003 (Braz.).
[57] Decreto No. 4.886, de 20 de Novembro de 2003, Diário Oficial da União [D.O.U.] de 21.11.2003 (Braz.).
[58] Constituição da República Federativa do Brasil de 1988 (Constitution of the Federative Republic of Brazil of 1988) (Oct. 5, 1988), art. 231.
[59] *Id.* at 68.
[60] Decreto No. 4.887, de 20 de Novembro de 2003, Diário Oficial da União [D.O.U.] de 21.11.2003 (Braz.).

disproportionately severe budget cut of R$85,000.00 from the funds allocated to the regularisation of quilombola territories, which had previously covered technical visits, research, and studies.

This dismantling was compounded by Law No. 13,844/2019,[61] which violated the right of traditional communities to consultation by extinguishing the Special Secretariat for Family Agriculture and Agrarian Development, thereby weakening one of the key institutional mechanisms responsible for advancing their territorial rights. The right to consultation grants Indigenous peoples, quilombolas and traditional communities political authority to influence and participate in administrative and legislative decisions affecting their lands and rights. Under the Bolsonaro government, this right was systematically undermined. Although expressly guaranteed by I.L.O. Convention No. 169,[62] agencies tasked with implementing public policies for these communities were dismantled, and their functions transferred to bodies aligned with agribusiness interests.

Under the Bolsonaro government, the National Institute of Colonisation and Agrarian Reform [hereinafter I.N.C.R.A.][63] was removed from the purview of the Chief of Staff and placed under the Ministry of Agriculture, producing a profoundly negative impact on the realisation of quilombola territorial rights. This institutional shift was compounded by the Brazilian state's complete neglect in implementing public policies for traditional peoples during the COVID-19 crisis. Furthermore, Ordinance No. 57[64] introduced a clear tendency towards the bureaucratisation of the certification process, directly affecting some 2,500 quilombola communities that sought land titles on the basis of the criterion of self-attribution.

Under Ordinance 57/2022,[65] the issuance of a self-declaration certificate required not only the minutes of meetings and assemblies, as under the previous regulation, but also a detailed report on the community's history, supported by data, documents and studies. Where further documentation was necessary, communities were to be notified electronically via the Palmares Foundation portal. However, the Coordenação Nacional de Articulação das Comunidades Negras Rurais Quilombolas [hereinafter C.O.N.A.Q.] Note observed that Ordinance 57/2022[66] was enacted without

[61] Lei No. 13.844, de 18 de Junho de 2019, Diário Oficial da União [D.O.U.] de 18.6.2019 (Braz.).
[62] Decreto No. 5.051, de 19 de Abril de 2004, Diário Oficial da União [D.O.U.] de 20.4.2004 (Braz.).
[63] National Institute of Colonisation and Agrarian Reform (INCRA) is a Brazilian federal agency established in 1970, currently linked to the Ministry of Agrarian Development and Family Agriculture (MDA), with the objectives of implementing agrarian reform, regularising public lands owned by the Union, managing the national rural property registry, and organising the land tenure structure in the country.
[64] Portaria No. 57, de 27 de Outubro de 2022 [Ordinance No. 57 of Oct. 27, 2022] (Braz.).
[65] *Id.*
[66] *Id.*

debate or consultation with community representatives, thereby contravening the principles of I.L.O. Convention No. 169.[67]

However, Ordinance No. 57, published under the Bolsonaro government, was revoked by the Palmares Foundation. With the recent election of President Luiz Inácio Lula da Silva, the Ministry of Racial Equality now includes the Secretariat of Policies for Quilombolas, Traditional Communities of African Origin, Terreiro Peoples and Roma Communities.[68]

During Lula's second administration, Decree No. 6.040/2007[69] had already established the P.N.P.C.T. This decree sought, first, to guarantee traditional peoples and communities access to the territories and natural resources necessary for their physical, cultural and economic reproduction, and second, to ensure the prompt recognition of self-identification, thereby enabling full access to individual and collective rights, particularly in situations of conflict or threats to their integrity.

More recently, Decree No. 11,481/2023[70] created the C.N.P.C.T., a collegial and consultative body integrated into the Ministry of Environment and Climate Change. The C.N.P.C.T. is an institutional body tasked with fostering the sustainable development of traditional communities, while ensuring the protection of their territorial, socio-environmental, economic, and cultural rights. Under the current Lula administration, there is thus a renewed tendency to formulate and implement public policies that are responsive to the territorial, social and cultural rights of traditional peoples and communities, including the *fundo* and *fecho de pasto* communities.

The legal and normative basis for attributing territorial rights to a traditional community lies in the occupation of land in accordance with the community's traditions. As José Afonso da Silva emphasises with regard to Indigenous peoples, "traditionally" refers not to a temporal circumstance, but to the customary way in which Indigenous groups inhabit and use the land, their modes of production, and, more broadly, their traditional relationship with territory.[71]

The territorial rights of quilombola communities and other traditional peoples, however, cannot be examined in isolation, for they are shaped by a complex set of

[67] Decreto No. 5.051, de 19 de Abril de 2004, Diário Oficial da União [D.O.U.] de 20.4.2004 (Braz.).

[68] *See* Governo lança pacote de medidas para promover igualdade racial, [Government launches package of measures to promote racial equality], *CNN Brasil* (Nov. 20, 2023), https://www.cnnbrasil.com.br/politica/governo-lanca-pacote-de-medidas-para-promover-igualdade-racial-veja-13-acoes/ (Braz.).

[69] Decreto No. 6.040, de 7 de Fevereiro de 2007, Diário Oficial da União [D.O.U.] de 8.2.2007 (Braz.).

[70] Decreto No. 11.481 de 6 de Abril de 2023, Diário Oficial da União [D.O.U.] de 6.4.2023 (Braz.).

[71] José Afonso da Silva, *Parecer sobre marco temporal e renutente esbulho* [Legal Opinion on the Temporal Framework Thesis and the Concept of Persistent Unlawful Dispossession]. (São Paulo: University of São Paulo, 2016). https://acervo.socioambiental.org/sites/default/files/documents/F1D00193.pdf (Braz.).

multidimensional factors that directly influence the discursive construction of the social identities of their members. With these considerations in mind, the following section turns to an analysis of Fraser's theory of justice.

2. NANCY FRASER'S THEORY OF JUSTICE

Fraser argues that claims for recognition belong to the sphere of morality. Departing from Honneth's psychological model—in which non-recognition is framed as a form of identity depreciation—her approach interprets demands for recognition through a deontological lens. In this framework, status subordination generates injustices that can only be challenged through a politics of recognition grounded in a deconstructive perspective.[72]

In Fraser's status model, recognition must be detached from the question of identity and should instead focus on social status. Rather than reinforcing the identity of ethnic groups, it is necessary to assess the extent to which members of Indigenous communities are recognised as full partners in society. This is the meaning of participatory parity. How do they participate as equal partners in social interactions? What role do institutions, the family, the market, and civil society organisations play in achieving participatory parity across the dimensions of recognition, representation, and redistribution? In the status model advocated in Redistribution or Recognition?: A Political-Philosophical Exchange, Fraser presupposes a two-dimensional framework based on two spheres: the sphere of recognition, which encompasses social status, and redistribution, which addresses class-based conflicts.

In *Scales of Justice*, Fraser develops her two-dimensional theoretical model into a three-dimensional theory of justice by incorporating a third sphere: the political. Political obstacles to the norms of participatory parity affect decision-making processes in ways that prevent individuals from deliberating as full partners in democratic social life. The political thus becomes the arena in which struggles for redistribution and recognition are contested.[73]

In her more recent works, Fraser conceptualises capitalism as an institutionalised social order structured by a series of institutional separations that

[72] Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation*, *in* Redistribution or Recognition? A Political-Philosophical Exchange 7 (Nancy Fraser & Axel Honneth eds., 2003).

[73] Nancy Fraser, Scales of Justice. Reimagining Political Space in a Globalizing World (2010).

establish boundaries between economic production and social reproduction, human society and non-human nature, exploitation and expropriation, and politics and economics. Within this framework, she distinguishes the condition of expropriated subjects from that of the exploited, both economically and politically.[74]

At this point, it is necessary to clarify the meaning of expropriation. Expropriation refers to processes of capital accumulation that dispense with contractual labour relations, operating instead through the confiscation of capacities and resources either violently—as in slavery—or in more concealed forms within contemporary commercial relations, such as predatory debt or foreclosure. From an economic perspective, expropriation is central to capitalist accumulation, as it relies on unfree, dependent, and unwaged labour from which capital extracts value by other means.[75] It is, in Fraser's words, "an ongoing confiscatory process essential to sustain accumulation in a crisis-prone system".[76]

Expropriated individuals include colonised subjects, Indigenous peoples, members of dependent domestic nations, and groups subordinated to the capitalist core, such as prisoners and undocumented migrants, who are deprived of citizenship and lack political protection, being unable to claim state defence in the face of violence. The resources subject to confiscation may be labour, land, animals, mineral and energy resources, as well as human capacities such as sexuality, reproduction, or even organs. By contrast, exploitable workers are formally free: they can sell their labour power for wages, and although deprived of the means of production, they nonetheless retain legal citizenship.[77]

In the Brazilian context, Fraser's distinction between exploitation and expropriation is particularly illuminating for understanding the condition of traditional communities. Quilombola, Indigenous and *fundo* and *fecho de pasto* communities are not simply workers deprived of the means of production, but citizens whose very territories, resources, and cultural practices are subject to systematic expropriation. Their land is confiscated through agribusiness expansion, illegal mining, deforestation and state-led projects that prioritise extractive interests over communal rights. Moreover, environmental degradation—such as water contamination and the destruction of

[74] Nancy Fraser & Rahel Jaeggi, Capitalismo em debate: Uma conversa na Teoria Crítica [Capitalism in Debate: A Conversation in Critical Theory] 129 (2020) (Braz.).
[75] *See* Nancy Fraser, *Expropriation and Exploitation in Racialized Capitalism: A Reply to Michael Dawson*, 3 Critical Hist. Stud. 163 (2016).
[76] Fraser & Jaeggi, *supra* note 74, at 61.
[77] *Id.*

biodiversity—constitutes an indirect yet equally confiscatory process, undermining the material basis of collective survival.

Unlike formally "free" wage workers, these communities often lack effective legal and political protection, as demonstrated by the systematic dismantling of participatory mechanisms and the state's neglect in guaranteeing prior consultation. They thus exemplify Fraser's category of expropriated subjects: groups situated at the margins of the capitalist core, whose dispossession sustains accumulation elsewhere. In this sense, the expropriation of traditional communities in Brazil is not a historical residue, but an ongoing practice essential to contemporary forms of capitalist expansion.

Indeed, capitalism cannot be dissociated from racial oppression, since dependent labour and political subjection are central to the very constitution of the category of race. Fraser interprets the subjection of expropriated individuals as a prerequisite for the freedom of those subject to capitalist exploitation; without the former condition, the latter would be rendered unfeasible. Racialised dependent labour thus emerges as a 'non-economic condition of possibility' for capitalist society.[78]

In state-administered capitalism, the boundary between expropriation and exploitation has been attenuated, though not eliminated. The development of racially segmented labour markets within the capitalist core subjected racialised workers to wages insufficient to cover the socially necessary costs of their reproduction. As Fraser observes, "expropriation articulated directly with exploitation, entering into the internal constitution of wage labour".[79] Moreover, in such contexts, the distinction between exploitation and expropriation was blurred, since both operated as interconnected processes of accumulation. Expropriation was carried out not only by foreign powers but also by postcolonial states, whose development strategies often included the dispossession of their Indigenous populations.[80]

In Brazil, the dehumanising processes of expropriation are evidenced by flagrant violations of the principles enshrined in Convention No. 169 of the International Labour Organization,[81] as documented by social organisations. A report by the C.O.N.A.Q., prepared with the support of the Unified Workers' Centre [hereinafter C.U.T.], identifies multiple actions of the Brazilian state that contravene I.L.O. Convention No. 169.[82] Systematising information from 2019 and 2020, the report highlights a series of federal government measures that undermine quilombola communities' rights to

[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] Decreto No. 5.051, de 19 de Abril de 2004, Diário Oficial da União [D.O.U.] de 20.4.2004 (Braz.).
[82] *Id.*

self-determination and participation in decision-making processes concerning their territorial rights. It further stresses the state's omission in guaranteeing rights and formulating public policies responsive to the specific needs of quilombola communities and other traditional peoples. This neglect became particularly acute during the COVID-19 crisis, which exacerbated the cultural, economic, and territorial vulnerabilities of these populations.

The effacement of the boundaries between expropriation and exploitation has reshaped the dynamics of political subjectivation. As the figure of the worker-citizen diminishes, a hybrid category emerges: the "expropriable-and-exploitable citizen-worker, formally free but acutely vulnerable".[83] In any case, the boundary between expropriation and exploitation remains racialised, situating racial minorities predominantly on the expropriation side of the spectrum.[84]

This effacement is mirrored in the dehumanising conditions experienced by members of the *fundo* and *fecho de pasto* communities. Despite the formal legal recognition of their territorial rights, multiple challenges persist, including the lack of secure titles, vulnerability to drought, pressure from illegal land acquisition, legal insecurity, and enduring social stereotypes that stigmatise these groups as adhering to a "backward" way of life.[85] Illegal land acquisition remains one of the main causes of land concentration in rural Brazil, as it enables ownership to be asserted through fraudulent means.[86]

The same dynamic may also be understood, in Fraser and Jaeggi's terms, as the production of a formally free yet profoundly vulnerable subject.[87] Nevertheless, the line separating expropriation from exploitation continues to operate through racialised forms of subordination.[88]

Subsistence farming within these communities faces even greater hurdles, being perceived as an impediment to livestock production and corporate agriculture premised on monoculture.[89]

In this context, illegal land acquisition, employed by farmers and large extractive companies, deepens dispossession and reinforces the expansionist logic of agribusiness.[90]

[83] Fraser, *supra* note 75, at 163-78.
[84] *Id.*
[85] *See* Dantas, *supra* note 41.
[86] *Id.* at 78.
[87] Fraser & Jaeggi, *supra* note 74, at 127.
[88] *See* Dantas, *supra* note 41.
[89] *See id.*
[90] *See id.*

According to Fraser, Arruzza and Bhattacharya, in the "postcolonial" Global South, Indigenous and tribal peoples are subjected to processes of expropriation that often involve the sequestration of their lands as collateral for debt. The authors contend that this racialised expropriation of traditional peoples and communities is intrinsically linked to the dynamics of exploitation resulting from the transfer of a significant share of production to the Global South.[91] The following section conducts a comparative analysis of the judgment in A.D.I. No. 5783 and the consolidated judgments of A.D.O. No. 86, A.D.C. No. 87, and A.D.I. Nos. 7582, 7583, and 7586.

3. SUMMARY OF THE JUSTICES' VOTES ON A.D.I. NO. 5783 AND JOINED ADJUDICATION OF A.D.I. NOS. 7582, 7583, AND 7586, A.D.O. NO. 86, AND A.D.C. NO. 87

In the judgment of Direct Action of Unconstitutionality No. 5783,[92] the majority of the Justices of the Brazilian Supreme Court declared Article 3, § 2 of Law No. 12.910/2013[93] of the State of Bahia unconstitutional, following the opinion of the Rapporteur, Justice Rosa Weber. Justice Nunes Marques partially upheld the action: while he considered the deadline abstractly reasonable, he deemed its starting date to run from the publication of the minutes of the case. As noted, Article 3, § 2 of Law No. 12.910/2013 had a significant impact on the territorial rights of traditional communities, particularly in light of their ancestral relationship with the land. For this reason, Justice Weber held that Article 3, § 2 was unconstitutional, as it imposed an unjustified constitutional limitation by requiring communities to comply with the 2018 temporal framework in order to have their traditionality recognised. As she emphasised, "collective lands are not merely a real right, but part of the existence of traditional communities and a necessary element for their physical and cultural reproduction, as the constituent has explicitly highlighted with respect to the rights of Indigenous peoples".

[91] Cinzia Arruzza et al., Feminism for the 99%: A Manifesto 44 (2019).
[92] Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, Rosa Weber (Sept. 6, 2023) (Braz.).
[93] Lei No. 12.910, de 11 de Outubro de 2013, Law of the State of Bahia (Oct. 11, 2013) (Braz.).

3.1 OPINION OF JUSTICE WEBER (RAPPORTEUR) IN THE JUDGMENT OF DIRECT ACTION OF UNCONSTITUTIONALITY NO. 5783

In the judgment of Direct Action of Unconstitutionality No. 5783, Justice Rosa Weber held that the denial of the territorial rights of traditional communities entails the denial of their very identity, rendering invisible the community's recognition of its own cultural distinctiveness. She argues that cultural assimilation into the surrounding society, rather than fostering integration, results in "cultural annulment", which may even culminate in the physical disappearance of the community.[94] In this reasoning, Justice Weber challenges a hegemonic and Eurocentric conception of modernity—centred on the white European male—and affirms that the Constitution embraces an alternative understanding of the civilising process, one grounded in pluralism and in the recognition of cultural diversity as central.

Equality, as a fundamental right, thus encompasses both dimensions of justice: recognition and redistribution. For Justice Weber, the recognition of quilombola territorial rights reflects these two facets of social justice simultaneously: on the one hand, the demand for socio-economic justice through the protection of land; on the other, the struggle for recognition through the prevention of cultural assimilation. What is ultimately at stake is the existential dimension of the *fundo* and *fecho de pasto* communities, whose practices and traditions are inseparable from their historically occupied lands.[95]

Justice Rosa Weber's reasoning resonates closely with Fraser's multidimensional theory of justice. By affirming that the denial of territorial rights entails the denial of identity itself, Weber highlights the inextricable link between redistribution and recognition. The protection of lands guarantees the socio-economic conditions for survival (redistribution), while safeguarding cultural uniqueness prevents assimilation and ensures parity of esteem (recognition).

From a Fraserian perspective, however, these two dimensions are insufficient without also addressing the political obstacles that prevent traditional communities from participating as equals in democratic processes. The *fundo* and *fecho de pasto* communities, much like quilombola and Indigenous groups more broadly, face systemic political misrepresentation: they are excluded from decision-making arenas where their territorial rights are defined and continually threatened by legal doctrines such as the *temporal framework* thesis. In this sense, Weber's position can be understood as

[94] *Supra* note 92.
[95] *Id.* at 29.

anticipating Fraser's three-dimensional conception of justice, which integrates redistribution, recognition, and representation as mutually constitutive principles for the achievement of participatory parity.

Participatory parity signifies that all individuals must have the opportunity to participate on an equal footing in social life and in social interactions, without being subjected to institutional subordination. Genuine social justice arises when all participate as full partners with equal opportunities in social interactions. For Fraser, misrecognition stems from subordination within social structures, thereby distancing her account from a psychological approach that construes the effects of misrecognition as a deformation of subjectivity.

3.2 DECISION IN A.D.I. NO. 5783 AND THE JOINT JUDGMENT IN A.D.I. NOS. 7582, 7583, AND 7586, AS WELL AS A.D.O. NO. 86 AND A.D.C. NO. 87

In A.D.I. No. 5783, Justices Cármen Lúcia, Cristiano Zanin, Alexandre de Moraes, Edson Fachin, Luís Roberto Barroso, and Luiz Fux concurred with the Rapporteur's opinion. Justice Nunes Marques upheld the constitutionality of a five-year limitation period, to be calculated from the date of the Supreme Federal Court's judgment.[96] Justices Gilmar Mendes, André Mendonça, and Dias Toffoli did not participate in the vote. Justice Flávio Dino was appointed as a Justice of the Supreme Federal Court in 2024. In the judgment of A.D.I. No. 5783, Justice Barroso concurred fully with the majority opinion, affirming that the deadline established in Article 3, § 2 of Law No. 12.910/2013[97] violates the right to the protection of cultural diversity, as well as the principles of human dignity and pluralism.[98]

In the joint adjudication of A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, Justice Gilmar Mendes argued that the *marco temporal* thesis violates Item III of Theme 1,031 of the General Repercussion framework and the jurisprudence of the Inter-American Court of Human Rights.[99] The *marco temporal* thesis was deemed unconstitutional by the Rapporteur, reaffirming that Indigenous original rights are not

[96] *Id.*
[97] Lei No. 12.910, de 11 de Outubro de 2013, Law of the State of Bahia (Oct. 11, 2013) (Braz.).
[98] *Supra* note 93.
[99] *See* supra note 8, at 124.

subject to a fixed date. The theory of *esbulho renitente* (continuing dispossession),[100] according to the Rapporteur, fails to acknowledge the asymmetry of power between Indigenous peoples and the private actors who expelled them from their lands. In sum, the doctrine of *esbulho renitente* introduces an impossible evidentiary burden for those "who do not possess a culture of preserving formal documentation", and it lacks proportionality with respect to its intended aim of ensuring legal certainty.[101]

3.2.1. JUSTICE GILMAR MENDES'S OPINION IN THE JOINT JUDGMENT IN A.D.I. NOS. 7582, 7583, AND 7586, AS WELL AS A.D.O. NO. 86 AND A.D.C. NO. 87.

In the joint judgment in A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, Justice Gilmar Mendes acknowledged the historical omission of the State in complying with Article 67 of the A.D.C.T.,[102] which required the completion of all demarcation procedures by 1993. He set a ten-year deadline for the Union to conclude pending demarcation processes. The votes of the other Justices reiterated the original character of Indigenous territorial rights. Justices Fachin, Zanin, Cármen Lúcia and Dino

[100] *Renitente esbulho* (persistent unlawful dispossession) is a doctrinal concept developed by the Supreme Federal Court (Supremo Tribunal Federal – STF) to describe the continued loss of possession of Indigenous lands prior to 5 October 1988 arising from judicialised possessory disputes. The second criterion is that of traditionality, which complements the *marco temporal* thesis. Under this thesis, the land must have been occupied by Indigenous peoples on the date of the promulgation of the Federal Constitution; only then does one proceed to consider the second element, namely the nature of the relationship between Indigenous peoples and the land in question. If Indigenous peoples were not in occupation of the land on 5 October 1988, the second criterion of traditionality is not examined. According to José Afonso da Silva, 'the term *traditionally* does not refer to a temporal circumstance, but rather to the traditional manner in which Indigenous peoples occupy and use the land, and to their traditional mode of production — in short, to the traditional way in which they relate to the land'. He further observes that 'some communities are more settled, others less so; some range across broader territories through which they move, and so forth. Hence, it is said that everything is carried out in accordance with their usages, customs and traditions.' However, the *marco temporal* thesis does not apply in cases of so-called *renitente esbulho* (persistent unlawful dispossession). According to the Brazilian Federal Supreme Court (S.T.F.): 'Persistent dispossession is characterised by an effective possessory conflict, initiated in the past and continuing up to the temporal criterion corresponding to the date of the promulgation of the 1988 Constitution, materialised either through factual circumstances or through judicialised possessory litigation.' Thus, even if, on 5 October 1988, Indigenous peoples were not physically occupying the land, it may nonetheless be regarded as 'land traditionally occupied by Indigenous peoples', provided it is demonstrated that they were expelled as a result of a possessory conflict but continued to contest the area until the temporal criterion (the date of promulgation of the 1988 Constitution). In such circumstances, persistent unlawful dispossession (that is, ongoing and insistent dispossession) is established. Accordingly, where Indigenous peoples were not in occupation of the land at the date of promulgation of the 1988 Constitution, but persistent dispossession is proven, the traditional character of Indigenous possession is deemed to be present, and the area will be recognised as Indigenous land for the purposes of Article 231 of the 1988 Constitution.

[101] *Supra* note 8, at 124.

[102] Ato das Disposições Constitucionais Transitórias, Constituição da República Federativa do Brasil de 1988 (Constitution of the Federative Republic of Brazil of 1988) (Oct. 5, 1988), art. 67.

introduced more robust protective safeguards, asserting that no statute or constitutional amendment may infringe Indigenous rights.

In the joint judgment in A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, Justice André Mendonça was the sole Justice to vote in favour of the constitutionality of the *marco temporal* thesis.[103] In the same case, Justice Nunes Marques indicated that he was inclined to uphold the constitutionality of the *marco temporal* thesis; however, he ultimately revised his vote in order to align himself with the position adopted by the Court.[104]

The maintenance of the *marco temporal* thesis—both for Indigenous communities and for *fundo* and *fecho de pasto* communities—violates these groups' participatory parity in the dimensions of redistribution and recognition, while also revealing discursive tendencies permeated by Eurocentric ethno-racial stereotypes. Furthermore, such an approach may potentially revive the logic of forced removals by replacing traditional territories with alternative areas that are, as a rule, distant, unsuitable, and devoid of cultural ties with the affected communities.[105]

With regard to resettlement, the Rapporteur argued that, where the absolute impossibility of demarcation is proven, compensation could be granted to Indigenous communities through the allocation of "equivalent lands" to those "traditionally occupied."[106]

As a starting point, the demarcation of traditionally occupied Indigenous territories is imperative. In cases where land conflicts cannot be resolved through traditional demarcation, the Brazilian State may designate specific areas to which the same protective legal framework and usage rules applicable to traditionally occupied lands would apply. The Indigenous community must be heard, based on proportionality, and in observance of objective criteria grounded in public utility or social interest.

On the other hand, by establishing rules, deadlines and exceptions, the Rapporteur may, in practice, weaken the constitutional protection of Indigenous territorial rights. As good-faith occupants may remain on the land until full

[103]Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal (dissenting opinion of Judge Mendonça) (Braz.).

[104]Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal (opinion of Judge Marques) (Braz.).

[105]Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal (opinion of Judge Mendes) (Braz.).

[106]*Id.*

compensation is paid—and considering that the State frequently delays the payment of court-ordered debts—there are textual indications that Indigenous communities may be prevented from accessing their lands for an indefinite period.

An examination of the Rapporteur's opinion reveals textual indications of a potential hollowing-out of the effectiveness of Indigenous peoples' original right to their traditional lands, a right that is independent of deadlines and of any act of State concession, and which constitutes an expression of their own counter-hegemonic legal language.

In the joint judgment in A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, the Rapporteur reiterated that, on an exceptional basis, economic activities in the form of cooperation and contracting with private parties are permitted, provided they are subject to oversight by the National Foundation for Indigenous Peoples [hereinafter F.U.N.A.I.], with the execution of such activities entrusted to Indigenous communities. According to the Rapporteur, the right to collective property admits restrictions, provided that the requirements established in the jurisprudence of the Inter-American Court of Human Rights are observed. In this regard, he cited precedents of the Court that neither prohibit economic exploitation nor require, in absolute terms, the consent of affected communities, but which establish three requirements: (a) effective participation of communities through prior, free and informed consultation; (b) the prior conduct of an environmental impact assessment; and (c) benefit-sharing with the community.[107]

In the joint judgment of A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, Justice Gilmar Mendes expressly prohibited leasing arrangements or legal transactions that restrict Indigenous direct possession.[108] He also upheld the right of private parties to fair and prior compensation for necessary and useful improvements, in cases involving the depletion of property or possessory rights, in light of the American Convention on Human Rights.[109] He further argued that, where the resettlement of non-Indigenous occupants is not possible, the Union must compensate them for the value of the unimproved land (*terra nua*), payable either in cash or in agrarian debt bonds.[110]

[107]Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal, at 44-46 (opinion of Judge Mendes) (Braz.).

[108]*Id.* at 187.

[109]Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[110]Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal (opinion of Judge Mendes) (Braz.).

In the joint judgment in A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, he held that, in the absence of a *marco temporal* thesis, the Union must compensate not only improvements but also the unimproved land itself for titleholders with legitimate titles, prior to the conclusion of demarcation procedures. The Rapporteur defended the establishment of a provisional and structural solution to address land conflicts involving Indigenous territories. In this context, he set a deadline of 180 days for the government to present an action plan aimed at ensuring the exclusive usufruct of Indigenous communities over traditional lands whose demarcation is already at an advanced stage. Additionally, a ten-year deadline was established for the Union to complete demarcations.[111]

Regarding Article 9 of Law No. 14.701/2023,[112] which concerns compensation for rural producers, Justices Gilmar Mendes, Alexandre de Moraes, Cristiano Zanin, and Flávio Dino held that rural producers may only invoke good faith up to the issuance of the ordinance by the Ministry of Justice.

Nonetheless, by instituting rules, deadlines and exceptions, the Rapporteur may, in practice, weaken the constitutional protection of Indigenous territorial rights. As good-faith occupants may remain on the land until full compensation is paid—and considering the State's recurrent delays in settling court-ordered payments—there are textual indications that Indigenous communities may be prevented from accessing their lands for an indeterminate period. Moreover, there are discursive indications that the requirement of prior compensation for unimproved land significantly increases the cost of demarcation procedures, enabling the Union to invoke budgetary constraints as a justification for failing to comply with the ten-year deadline. From this perspective, I propose that the establishment of deadlines by the Rapporteur, although intended to ensure celerity, in fact creates financial and temporal requirements that may, in practice, paralyse demarcation processes, thereby undermining the participatory parity of members of Indigenous communities.

3.2.2. JUSTICE ALEXANDRE DE MORAES'S OPINION IN A.D.I. NO. 5783 AND IN THE JOINT JUDGMENT CONCERNING A.D.I. NOS. 7582, 7583, AND 7586, A.D.O. NO. 86, AND A.D.C. NO. 87.

In the judgment of A.D.I. No. 5783, Justice Alexandre de Moraes affirms that the State has a constitutional duty to protect Brazil's cultural heritage. The *fundo* and *fecho de pasto*

[111] *Id.* at 221.
[112] Lei No. 14.701, de 20 de Outubro de 2023, Diário Oficial da União [D.O.U.] de 20.10.2023 (Braz.).

communities, he stresses, constitute 'rich forms of occupation and use of the territory, of the Caatinga and the Cerrado, preserving traditions and forms of social and human interaction, which are especially protected by the Constitution.'[113] The imposition of a temporal limitation therefore poses a direct threat to their very existence. Their relationship with the ecology of the territories is both the foundation of their way of life and an expression of their cultural identity. By imposing a deadline for *fundo* and *fecho de pasto* communities to submit applications for land regularisation, the Bahia law contravenes the constitutional objective of safeguarding the rights of vulnerable groups.[114]

The territorial rights of traditional communities, Moraes continues, qualify as fundamental rights, insofar as they are constitutive of both individual and collective identity. As such, they cannot be restricted by legislative majorities. Furthermore, they are subject to the principles of non-retrogression and of adequate protection, which prohibit both the erosion and the insufficient safeguarding of fundamental rights.[115]

In the joint judgment of A.D.I. Nos. 7582, 7583, and 7586, A.D.O. No. 86, and A.D.C. No. 87, Justice Moraes emphasised that the *marco temporal* thesis cannot constitute a definitive criterion for demarcations; rather, the reference point must be employed as a protective and compensatory regime, in light of the theses established under Theme 1031.[116]

3.2.3. THE OPINIONS DELIVERED BY JUSTICES ZANIN, TOFFOLI AND DINO IN A.D.I. NO. 5783 AND IN THE JOINT JUDGMENT IN A.D.I. NOS. 7582, 7583, AND 7586, A.D.O. NO. 86, AND A.D.C. NO. 87.

In the joint judgment of A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, Justices Zanin, Toffoli and Fachin concurred in the opinion of Justice Mendes as to the unconstitutionality of *marco temporal* thesis, while endorsing the reservations expressed by Justice Dino regarding the unconstitutionality of Article 10 of Law No. 14.701/2023,[117] which provides that the rules governing mandatory judicial

[113]Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, at 97 (opinion of Judge Moraes) (Sept. 6, 2023) (Braz.).
[114]*See Id.* at 111.
[115]*Id.* at 111.
[116]Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal, opinion of Judge Moraes (Braz.).
[117]Lei No. 14.701, de 20 de Outubro de 2023, Diário Oficial da União [D.O.U.] de 20.10.2023 (Braz.).

disqualification and judicial recusal, as set out in the Brazilian Code of Civil Procedure, apply to anthropologists and other specialists involved in demarcation proceedings.

According to Justices Toffoli, Zanin and Dino, Article 10 is unconstitutional on the ground that the administrative demarcation process is governed by its own specific procedural framework. They argued that Law No. 9,784/1999[118] is sufficient to regulate administrative proceedings. Accordingly, the imposition of rigid judicial procedural rules upon an administrative procedure amounts to a violation of the principle of the separation of powers. By contrast, Justices Gilmar Mendes and Alexandre de Moraes considered Article 10 of Law No. 14.701/2023 to be constitutional.

Specifically, in A.D.I. No. 5783, Justice Zanin maintained that traditional communities are protected under Articles 215 and 216 of the Constitution:[119] "The right to popular, Indigenous, Afro-Brazilian culture and other groups participating in the national civilising process constitutes a social right of primary relevance."[120] By imposing a time limit for land regularisation, however, "the State of Bahia places at risk the very existence of dignity and the development of the individuals who are part of this group and share its way of life."[121] Ultimately, "the Federal Constitution does not impose any statute of limitations for recognising the cultural rights of traditional communities."[122] Accordingly, the state law violated the constitutionally recognised rights of possession and property of these groups.

Justice Zanin further emphasised that while Law No. 12.910/2013[123] expanded certain rights, it simultaneously restricted others, thereby contravening the principle of non-retrogression. Although entities of the federation enjoy administrative autonomy, the Bahia law went further by limiting access to land once the deadline had expired. The constitutional right to cultural protection and expression, he noted, cannot be reduced to a matter of state discretion. Law No. 12.910/2013[124] merely "fulfilled its duty to regularise vacant areas that belonged to the Public Administration and were traditionally occupied, through the granting of the real right of use".[125]

[118]Lei No. 9.784 de 29 de Janeiro de 1999, Diário Oficial da União [D.O.U.] de 1.2.1999 (Braz.).
[119]Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, opinion of Judge Zanin, adhering to Judge Dino (Sept. 6, 2023) (Braz.).
[120]Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, at 64 (opinion of Judge Zanin, adhering to Judge Dino) (Sept. 6, 2023) (Braz.).
[121]*Id.* at 66.
[122]*Id.* at 73.
[123]Lei No. 12.910, de 11 de Outubro de 2013, Law of the State of Bahia (Oct. 11, 2013) (Braz.).
[124]*Id.*
[125]Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, at 75-76 (opinion of Judge Zanin) (Sept. 6, 2023) (Braz.).

In the judgment of A.D.I. No. 5783, during the course of proceedings, Justice Toffoli advocated for the establishment of a twelve-month period for regularisation. However, in the final judgment, he upheld the unconstitutionality of the temporal framework, which limited the territorial recognition of the communities.[126]

In the joint judgment in A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, Justice Toffoli concurred with the Rapporteur on several points, including the unconstitutionality of Article 13 of Law No. 14.701/2023,[127] applying item VIII of Topic 1,031 of General Repercussion, while also ensuring the right to compensation for private individuals.[128]

Justice Toffoli also supported the declaration of unconstitutionality by omission of Article 67 of the Transitional Constitutional Provisions Act[129] and endorsed the extension of the 180-day period for the completion of demarcations. He made a reservation regarding compensation for good-faith occupation of traditional Indigenous lands, asserting that it should be limited to cases in which there is proven state error in the titling of the area, and should not occur automatically.[130]

3.2.4. JUSTICE FACHIN'S OPINION IN A.D.I. NO. 5783 AND THE JOINT JUDGMENT IN A.D.I. NOS. 7582, 7583, AND 7586, A.D.O. NO. 86, AND A.D.C. NO. 87

Justice Fachin, presupposing the vulnerability of traditional communities in the face of the State's disregard for the singular context of *sertanejo* culture and the absence of adequate legal mechanisms to secure their rights, held that the establishment of a temporal framework for the acquisition of possessory rights and protection against land grabbers produces injustice and violates the Constitution. The constitutional text has never imposed a resolutive condition for the recognition of traditionality. It is therefore impermissible to restrict the effectiveness of a fundamental right on the basis of a temporal criterion.[131]

[126] *Id.* at 66.
[127] Lei No. 14.701, de 20 de Outubro de 2023, Diário Oficial da União [D.O.U.] de 20.10.2023 (Braz.).
[128] *See* Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal, opinion of Judge Toffoli (concurring in part and joining the opinion of Judge Mendes) (Braz.).
[129] Temporary Constitutional Provisions Act, Constituição da República Federativa do Brasil de 1988 (Constitution of the Federative Republic of Brazil of 1988) (Oct. 5, 1988), art. 67.
[130] *See* Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal, opinion of Judge Toffoli (concurring in part and joining the opinion of Judge Mendes) (Braz.).
[131] *See* Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, Rosa Weber (Sept. 6, 2023) (Braz.).

Specifically in the joint judgment of A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, Justice Fachin's opinion rejected the *marco temporal* thesis and emphasised that Indigenous territorial rights to traditionally occupied lands are original and pre-existing. Accordingly, the demarcation procedure does not constitute Indigenous lands but merely declares that the area is traditionally occupied by the community in accordance with its way of life.[132] Indigenous possession reflects the community's habitat, culminating in the formation of identities. The constitutional protection afforded to the "original rights over the lands they traditionally occupy" does not depend on the existence of a cut-off date of 5 October 1988, nor on the characterisation of *persistent unlawful dispossession* as a physical conflict or as a persistent judicial dispute at the time of the promulgation of the Constitution. Similarly, in A.D.I. No. 5783, he had previously emphasised that the constitutional text has never imposed a resolutive condition for the recognition of traditionality for *fundo de pasto* communities.[133]

Furthermore, in the case concerning Indigenous communities, Justice Fachin rejected the provisions authorising the allocation of equivalent lands, on the grounds that such measures would weaken the original right of communities to their ancestral lands.

The Inter-American Court of Human Rights has held that the obligation to restore or demarcate the original Indigenous territory is not absolute, as there are circumstances in which the demarcation and titling of traditional lands are not feasible for a variety of reasons, or in which the removal of third parties is unviable or excessively complex, as occurred in *Yakye Axa Indigenous Community v. Paraguay*. In situations where direct restitution is not effectively possible, the State may promote the expropriation of land for reasons of social interest with the aim of guaranteeing Indigenous usufruct, subject to prior and fair compensation.

In such circumstances, according to the Inter-American Court of Human Rights, the State is authorised to grant alternative lands or, subsidiarily, to provide compensation to the community, in accordance with Article 16(4) of I.L.O. Convention No. 169.[134] The allocation of alternative lands should not be construed as a measure falling within the State's unfettered discretion. Rather, it constitutes an exceptional and subsidiary solution,

[132] *See* Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal, at 115 (dissenting opinion of Judge Fachin) (Braz.).

[133] *See* Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, opinion of Judge Fachin (Sept. 6, 2023) (Braz.).

[134] Decreto No. 5.051, de 19 de Abril de 2004, Diário Oficial da União [D.O.U.] de 20.4.2004 (Braz.).

admissible only where, for objective and duly substantiated reasons, the regularisation of the traditional territory proves unfeasible, as emphasised by the Inter-American Court of Human Rights in *Yakye Axa Indigenous Community v. Paraguay*.[135]

The Inter-American Court of Human Rights has further stressed that minimising the ancestral relationship between Indigenous communities and their territories has repercussions for other fundamental rights, including the right to cultural identity and the very survival of Indigenous communities and their members. The restriction of private property rights of third parties may therefore be relevant to achieving the collective objective of preserving cultural identities within a pluralistic society under the American Convention, provided that the payment of fair compensation to those affected is ensured, in accordance with Article 21(2) of the Convention. However, the Court has clarified that this does not imply that, in every conflict between private or State territorial interests and those of Indigenous communities, the latter must invariably prevail. Where, for concrete and justified reasons, States are unable to adopt measures to restore traditional territories and communal resources, compensation must be granted, guided primarily by the significance that land holds for Indigenous peoples.[136]

In this respect, Article 16(4) of I.L.O. Convention No. 169 provides that:

> Where return is not possible, [...], these peoples shall, in all cases where feasible, be provided with lands of quality and legal status at least equal to those of the lands previously occupied by them, and which are sufficient to meet their needs and ensure their future development. Where the peoples concerned express a preference for monetary compensation or compensation in kind, such compensation shall be granted with appropriate safeguards.[137]

The selection of alternative lands, the payment of fair compensation, or a combination of both cannot be grounded on the State's mere discretion. Such measures must be determined through an integrated interpretation of I.L.O. Convention No. 169 and the American Convention, and developed through dialogue with Indigenous peoples, in accordance with their own consultation procedures, values, customs, and customary law.

Justice Fachin further held that it is the duty of the Brazilian State to "remove the obstacles that prevent the eviction (*desintrusão*) of Indigenous territory, the fulfilment of which cannot depend on case-by-case assessments, nor on the adoption of vague criteria

[135]Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005). https://www.corteidh.or.cr/docs/casos/articulos/seriec_125_esp.pdf.
[136]*Id.* at 148-149.
[137]Decreto No. 5.051, de 19 de Abril de 2004, Diário Oficial da União [D.O.U.] de 20.4.2004 (Braz.).

such as proportionality, public utility, or social interest, which are readily susceptible to capture by political and economic interests".[138]

In contrast to the Rapporteur's opinion, Justice Fachin reaffirmed that, under the prevailing constitutional order, "the Brazilian State is not vested with the authority to assess the necessity or proportionality of the expropriation of Indigenous lands"[139] This is because "all such criteria operate under a presumption in favour of Indigenous peoples' territorial rights, and any departure from them requires indispensable and exceptional proof of the factual impossibility of guaranteeing those rights".[140]

According to Justice Fachin, although the jurisprudence of the Inter-American Court of Human Rights recognises that Indigenous peoples' right to property over their traditional territories is not absolute and may be subject to restrictions, the current Brazilian legal order affords more robust protection to Indigenous territorial rights than to mere possession or occupation of such lands. This enhanced protection derives from the constitutive relationship between land, existence, ancestry, and spirituality. Such protection is expressly enshrined in Article 231, § 6 of the Constitution of the Republic,[141] which establishes the nullity and unenforceability of titles of ownership whose object consists of lands recognised by the constitutional text as traditionally occupied by Indigenous peoples.'[142]

In A.D.I. No. 5783, Justice Fachin[143] held that entire communities had been rendered invisible by the legal system. Traditional peoples and communities—whose existence is grounded in cultural continuity and in ancestral relationships with their territories—cannot have their constitutional rights conditioned on an arbitrary temporal limitation.

They have remained and continue to be in the limbo of legal invisibility because they are dispossessed and expelled from their lands, whether by public or private violence. Such peoples, resisting the oppression they suffer, can temporarily distance themselves from their original lands, but they do not lose their ethnic identity, which is

[138] *Id.* at 34.
[139] *Id.* at 25.
[140] *Id.*
[141] Constituição da República Federativa do Brasil de 1988 [Constitution of the Federative Republic of Brazil of 1988] (Oct. 5, 1988), art. 231 (§ 6).
[142] Ações Diretas de Inconstitucionalidade Nos. 7582, 7583, & 7586, Ação Direta de Inconstitucionalidade por Omissão No. 86, and Ação Declaratória de Constitucionalidade No. 87, Supremo Tribunal Federal, at 32 [dissenting opinion of Judge Fachin] (Braz.).
[143] Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, [opinion of Judge Fachin] (Sept. 6, 2023) (Braz.).

intrinsically linked to the land, from which originated the conception of the people and the community.[144]

Establishing a temporal framework for "the attribution of a fundamental right to the recognition of the rights of the traditional community implies a diminution of the rights inherent in citizenship."[145] For these communities, "land holds no commercial value; rather, it represents a relationship of identity, spirituality and existence [...]".[146] Justice Fachin therefore concludes that the imposition of a resolutive condition amounts to the denial of the very existence of traditional communities, leading with certainty to territorial disintegration and the expulsion of individuals from lands destined for commercial exploitation.[147]

3.2.5. JUSTICES NUNES MARQUES'S AND ANDRÉ MENDONÇA'S OPINIONS IN THE JOINT ADJUDICATION A.D.I. NOS. 7582, 7583, AND 7586, AS WELL AS A.D.O. NO. 86 AND A.D.C. NO. 87, AND IN A.D.I. NO. 5783.

In A.D.I. No. 5783, Justice Nunes Marques partially diverged from the majority. In his view, the terms of the law did not violate the Constitution, as a state law may legitimately establish a deadline for the recognition of traditionality. According to this reasoning, the act of recognition is merely declaratory in nature. He considered the provision unconstitutional only in light of the COVID-19 pandemic. While acknowledging the constitutional protection afforded to popular, Indigenous and Afro-Brazilian cultural expressions, Nunes Marques argued that this does not preclude the legislator from operationalising such protection by creating "procedural rules, including reasonable deadlines for the manifestation of interested parties."[148] For him, the right in question is a real right of use conferred by the administration upon a group of cultural relevance, but one that does not derive from any express constitutional provision.[149]

The endorsement of the *marco temporal* thesis in A.D.I. No. 5783 by Justice Nunes Marques and in the judgment of A.D.I. Nos. 7582, 7583, and 7586, as well as A.D.O. No. 86 and A.D.C. No. 87, by Justice André Mendonça, whether in relation to *fundo* and *fecho de pasto* communities or to Indigenous communities, infringes the participatory parity

[144]Silva, *supra* note 71, at 71.
[145]Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, [opinion of Judge Fachin] (Sept. 6, 2023) (Braz.).
[146]*Id.* at 112.
[147]*Id.* at 118.
[148]Ação Direta de Inconstitucionalidade No. 5783, Supremo Tribunal Federal, at 82 (opinion of Judge Marques) (Sept. 6, 2023) (Braz.).
[149]*Id.*

of these groups, as robustly defended by Fraser, across the dimensions of redistribution, recognition, and representation. It further reveals discursive tendencies permeated by Eurocentric ethno-racial stereotypes.

Moreover, Justice Gilmar Mendes's proposal concerning the allocation of alternative lands risks reviving the logic of forced removals, by replacing traditionally occupied territories with alternative areas which are, as a rule, distant, unsuitable, and devoid of any cultural connection with the affected communities.

The following section analyses the silencing of intersectional oppressions in the votes of a few Justices of the Brazilian Supreme Court on the Direct Action of Unconstitutionality No. 5783.

4. DISCUSSION: THE INVISIBILITY OF INTERSECTIONAL OPPRESSIONS IN THE DISCURSIVE TENDENCIES OF THE VOTES OF THE BRAZILIAN SUPREME COURT JUSTICES ON THE DIRECT ACTION OF UNCONSTITUTIONALITY 5783

With regard to intersectionality, Fraser rejects essentialist and static conceptions of identity, emphasising instead that identities are discursively constructed within diverse historical contexts. She advances an explanatory account of intersectionality that interrogates how discourse theory can reveal the processes through which social identities are formed and how the cultural hegemony of dominant groups is challenged.[150] She further underscores the value of a pragmatic model for feminist epistemology, reaffirming the centrality of social context in communicative practices and the plurality of discursive arenas. This approach makes it possible to conceive of identities as complex, variable and discursively constructed.[151]

The term *intersectionality* was first introduced by Crenshaw to describe the interconnection of race, gender and class. Rooted in Black feminist activism, it challenged the feminism of white, heterosexual, elite women. Crenshaw highlighted the

[150]Nancy Fraser, Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis (2013).
[151]*See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan. L. Rev. 1241 (1991).

interdependence of race and gender, while Black feminism more broadly fostered theoretical innovations by Black women who developed their own methodologies.[152]

Nancy Fraser, in turn, advanced an explanatory conception of intersectionality by situating the oppression of race, gender and class within the capitalist social order. Capitalism, she argues, organises the dynamics of racialised expropriation and its entanglement with class oppression.[153] Intersectionality in this framework does not treat oppressions as discrete, but as intertwined within the capitalist order, which both consumes the wealth of expropriated peoples and relies on gendered forms of reproductive labour, since capital is "also a devourer of care".

Fraser identifies "the institutional mechanisms through which capitalist society produces gender, race, and class as transecting axes of domination".[154] These modes of domination do not assume a functional role in the accumulation of capital, however, and instead represent a contradictory role: on the one hand, all are enabling conditions for accumulation; but on the other hand, all are also sites of contradiction, potential crisis, social struggle, and "non-economic" normativity. This point holds for class, as Marx insisted, but equally for gender, race, and imperialism – indeed, also for democracy and ecology.[155]

[152]The roots of intersectional thinking can be traced back to earlier debates predating the emergence of Black feminism in the 1970s. Through historical contextualisation, Brah recalls the life of Sojourner Truth, who in 1851 gained prominence at the Women's Rights Convention in Ohio. In her speech, she articulated a perspective that simultaneously addressed the anti-slavery struggles of Black people in the South and the demands of white women in the North. *See* Avtar Brah, *Difference, Diversity, Differentiation*, 2 Int'l Rev. Socio. 53 (1991). From the 1970s onwards, intersectional issues extended beyond academia into feminist collectives of Black women and lesbians, and by the 1980s the contributions of Bell Hooks, Angela Davis, Audre Lorde and Patricia Hill Collins had become particularly influential. *See* Audre Lorde, *Age, Race, Class and Sex: Women Redefining Difference*, *in* Campus Wars: Multiculturalism And The Politics Of Difference 191 (John Arthur & Amy Shapiro eds., 1995); bell hooks, Black Looks: Race and Representation (Routledge 2015) (1992);Patricia H. Collins, Intersectionality as Critical Social Theory (2019). Kergoat, meanwhile, introduced the notion of consubstantiality, initially linking sex and class before expanding it to include race. *See* Danièle Kergoat, *Ouvriers = ouvrières? Propositions pour une articulation théorique de deux variables: sexe et classe sociale* [*Workers = Women Workers? Proposals for a Theoretical Articulation of Two Variables: Gender and Social Class*], Critiques de l'Économie Politique, Oct.-Dec. 1978, at 65 https://prod-cdn.atria.nl/wp-content/uploads/sites/2/2019/01/25091534/ANEF-1978093300001.pdf (last visited May 2, 2025) According to Akotirene, however, this approach sidelines the protagonism of Black feminism by framing intersectionality in terms of three dimensions: the sexual division of labour, reproductive control and racism. For Akotirene (2018), intersectionality instead serves as a methodological tool that reveals the inseparability of racism, capitalism and cisheteropatriarchy. Building on this recognition, Davis reinterprets American slavery through the lens of colonialism, identifying it as a cornerstone of racist practices that continue to shape Black lives. Lorde (2019) advanced the debate by foregrounding sexuality and refining the perspective of Black lesbian women, thereby underscoring the diversity within Black women's experiences. *See* Angela Y. Davis, Women, Race & Class (Random House 1981).

[153]Nancy Fraser, Cannibal Capitalism: How Our System Is Devouring Democracy, Care, and the Planet – And What We Can Do About It (2022).

[154]Fraser & Jaeggi, *supra* note 74, at 129.

[155]*Id.*

The expropriation of racialised subjects is, in this sense, a structural precondition for the economic exploitation of labour. This connection is neither incidental nor contingent: a system premised on the limitless expansion and private appropriation of surplus value necessarily cultivates capital's interest in confiscating the labour, productive resources, capacities, and territories of dependent populations.[156] The distinction between exploitation and expropriation is therefore grounded not only in class, but also in domination and racially coded status. In practice, this dynamic subjects racialised women to invisible and poorly paid reproductive work, while financial capital intensifies the extraction of value from both expropriated populations and wage labour. Fraser further stresses that intersectionality is central to feminism precisely because it captures how gender, race, and class oppression interact in complex, dynamic, and multidimensional ways.[157]

The distinction between exploitation and expropriation is grounded not only in class but also in domination and racially coded status. International arrangements have entrenched these hierarchies, producing expropriable subjects in peripheral regions through the intervention of powerful states. The expropriation of racialised groups is therefore a structural precondition for the economic exploitation of labour.

In practice, this dynamic subjects racialised women to invisible and poorly paid reproductive work. The connection between capitalism, gender oppression and racial expropriation is structural rather than contingent: the system depends on the extraction of resources and capacities from expropriated populations. In its pursuit of surplus value and unlimited profit, capital increasingly confiscates labour and means of production, while financial capital maximises returns by exploiting the dependence of subject populations and intensifying the extraction of value from wage labour.

Capitalism thus shapes the dynamics of racialised expropriation and its entanglement with class oppression. Intersectionality highlights that these are not separate oppressions to be aggregated, but interwoven forms rooted in the capitalist economic order. The connection between capitalism and racial oppression is therefore structural rather than contingent: the system depends on the confiscation of resources, capacities and territories from expropriated populations. In its pursuit of surplus value and unlimited profit, capital increasingly extracts labour and means of production, while financial capital intensifies this process by maximising returns through the deepened dependence of subject populations and the heightened extraction of value from wage labour.

[156]Fraser, *supra* note 75, at 163-178.
[157]Fraser & Jaeggi, *supra* note 74, at 129.

5. CONCLUSION

I observe that, by conditioning the recognition of communities' territorial rights on arbitrary deadlines set by state bureaucracy, the law entrenches decontextualised parameters that perpetuate economic insecurity, political marginalisation, and structurally racialised subordination. Women belonging to *fundo* and *fecho de pasto* communities are disproportionately impacted, insofar as they are subject to intensified economic exploitation and racialised expropriation. Such dynamics culminate in the systemic devaluation of reproductive labour, which remains obscured within a Eurocentric and patriarchal agrarian framework.

Notwithstanding the counter-majoritarian role of the Brazilian Supreme Court, the discursive tendencies in A.D.I. No. 5783[158] reveal the absence of legal-institutional porosity for the contestatory and counter-hegemonic language of the Black and *quilombola* movements, given that all votes are marked by the silencing of intersectional oppressions. On the basis of the assumption that there exists an inseparable relationship between collective lands and both physical and cultural reproduction, the Court reiterated that territorial rights are encompassed by the fundamental right to culture. Indeed, the very conception of traditional tenure stems from the intrinsic link between traditional communities and their territorial rights, which are constitutive of their identity as such. It follows that imposing cultural assimilation into the majority society not only violates dignity—conceived in its collective dimension—but also contravenes international human rights obligations, particularly Articles 13 and 14 of I.L.O. Convention No. 169.[159]

The fundamental right to property must, therefore, transcend a privative and individualist conception, as it is best interpreted within the framework of the fundamental right to collective culture and ownership. On this point, Justice Rosa Weber was emphatic: the denial of territorial rights to traditionally occupied lands is tantamount to denying a people's very identity.[160] According to Justice Rosa Weber, such a legal restriction is both inadequate and disproportionate, as it fails to resolve land conflicts or promote social peace.[161] Despite invisibility and persistent obstacles, even communities displaced from their land do not lose their ethnic identity, for their traditions remain rooted in their relationship with the land. This relationship constitutes

[158] A.D.I. No. 5783 (Braz.), *supra* note 5 (opinion of Weber, J., Rapporteur).
[159] Decreto No. 5.051, de 19 de Abril de 2004, Diário Oficial da União [D.O.U.] de 20.4.2004 (Braz.).
[160] *Ação Direta de Inconstitucionalidade* (A.D.I.) No. 5783 [Direct Action of Unconstitutionality], Supremo Tribunal Federal [S.T.F.], Relator: Rosa Weber (Sept. 6, 2023) (Braz.).
[161] *Id.*

the fundamental element of traditionality. The awareness of one's own identity is the decisive parameter in determining which groups qualify as traditional, and it is not for the state to deny the self-recognition of a people.

I propose that the imposition of a deadline for the *fundo* and *fecho de pasto* communities to seek land regularisation and recognition certificates is, therefore, best understood as a legal artifice designed to legitimise dehumanising processes of expropriation of colonised subjects. For Fraser, whereas exploitation permits the accumulation of capital through ostensibly free contractual exchange, expropriation entails the outright confiscation of labour, land, animals, minerals, as well as the sexual and reproductive autonomy of human beings. The exploited are citizens—individuals with rights who enjoy state protection and can freely dispose of their labour power. The expropriated, by contrast, are unfree and dependent subjects deprived of political protection: colonised peoples, Indigenous communities, and undocumented migrants. Expropriation is not an accidental by-product of capitalism but a constitutive feature, one that is profoundly entwined with racial oppression.

As Arruzza, Bhattacharya and Fraser contend, "the expropriation of racialised people has enabled capital to increase its profits by confiscating natural resources and human capacities for whose replenishment and reproduction it does not pay".[162] The creation of racialised and colonised subjects subjected to dehumanising expropriation is thus a defining attribute of capitalism. Within this framework, Justice Nunes Marques's vote employed explicitly asymmetrical discursive tools. By denying legal protection to members of traditional communities as moral, free and equal persons—contextualised in relation to class, gender and varying degrees of political representation—his reasoning exposes them to deleterious processes of expropriation.

If the implicit discursive constructions deployed in the majority opinions break with Eurocentric arguments, they nonetheless exhibit a striking silencing of intersectional oppressions. While the majority's votes are inclusive in their conclusions, they remain only partially emancipatory in their reasoning.

I argue that the theorization of Agrarian Law has been permeated by a set of silencings that affects invisible and voiceless subjects whose claims have been considered historically irrelevant to certain legal categories forged in the colonial perspective of the white man and belonging to an economic elite. On the other hand, the remaining *quilombo* communities are groups that engage politically in a counter-hegemonic perspective and claim territorial rights from the State. In short, *fundo* and *fecho de pasto*

[162]Arruzza et al., *supra* note 91.

communities are effective subaltern counterpublics of resistance theorised by Fraser who fight for territorial rights and the establishment of a constitutional interpretation of the temporal framework criterion not permeated by Eurocentric criteria. Therefore, it is essential to overcome a set of atrocities established by groups associated with agribusiness that are involved in agrarian disputes and the violation of ethnic rights.

The defence of the *marco temporal* thesis in A.D.I. No. 5783 by Justice Nunes Marques invoked a linguistic-discursive strategy of textual subordination of vulnerable minorities through explicitly asymmetrical arguments. Thus, the members of the *fundo e fecho de pasto* communities, instead of being interpreted as moral, free and equal persons or as subjects that are contextualised and differentiated according to class, gender and race, were conceived by Justice Marques as abstract subjects following a logic of expropriation and Eurocentrism.

As Justice Rosa Weber pointed out, the establishment of a deadline to delimit the element of traditionality violates the territorial rights of members of traditional communities in the spheres of recognition, concerning uses and customs, and redistribution, concerning territorial rights.[163] In territorial matters, the central issue is how each traditional community interacts with its territory according to its uses, customs, and traditions, a relationship that varies according to the specificity of each community.[164] However, the votes did not expressly address the violation of participatory parity in the sphere of political representation. This omission is significant because a complex set of factors—including community resistance to dispossession, access to information, political articulation, and economic status—interact in shaping how rights are claimed and enforced.[165] Accordingly, although the majority of the Justices followed Justice Rosa Weber's vote in declaring Article 3, § 2 of Law No. 12.910/2013 of the State of Bahia unconstitutional,[166] their reasoning made no reference to the counter-hegemonic, intersectional claims of the Black movement, which was not even summoned to the proceedings.

I argue that it is necessary to take this analysis a step further, since Brazilian Supreme Court decisions that expressly safeguard minority rights in both their dispositive section and their reasoning remain insufficient. A critical examination of the discursive tools employed in judicial reasoning is essential to ensure that judgments are

[163] A.D.I. No. 5783 (Braz.), *supra* note 5 (opinion of Weber, J., Rapporteur).

[164] *See* Maria E. Bunchaft, *O Julgamento da ADI No. 3239 no STF: uma reflexão à luz da teoria tridimensional de Nancy Fraser* [The Judgment of ADI No. 3239 in the Supreme Federal Court: A Reflection in Light of Nancy Fraser's Three-dimensional Theory], 14 Constituição, Sistemas Sociais e Hermenêutica: Anuário do Programa de Pós-Graduação em Direito da Unisinos 175 (2018).

[165] *Id.*

[166] Lei No. 12.910, de 11 de Outubro de 2013, Law of the State of Bahia (Oct. 11, 2013) (Braz.).

emancipatory not only in their dispositive sections but also in implicit arguments. Such scrutiny preserves the Court's institutional openness to the counter-hegemonic language of feminist, Black, and *quilombola* social movements.

In this sense, the analysis of discursive constructions in the votes of the Brazilian Supreme Court is indispensable for dismantling entrenched gender stereotypes. While the Court's justices often adopt an emancipatory stance in the dispositive sections of their decisions, their implicit argumentative strategies are frequently framed by Eurocentric paradigms that render members of traditional communities intersectionally invisible and reinforce their stigmatisation.

Accordingly, it is imperative that the Federal Supreme Court, through appropriate discursive frameworks, problematises gender as a constitutive dimension of the principle of non-discrimination, thereby acknowledging the entanglement of racial and gender oppression and their structural foundations in the capitalist order. The Court should incorporate the explanatory conception of intersectionality, treating gender and race as constitutive social markers of justice. Building on the invisibility of reproductive labour, it is necessary to move beyond the androcentric discourse of the "country man" and to recognise and empower women from *fundo* and *fecho de pasto* communities as central actors in the struggle for recognition. Thus, the emancipatory reconstruction of Agrarian Law is fundamental, granting voice to minorities, and avoiding dehumanising processes of expropriation resulting from cultural disintegration.

Although the Justice's vote had the merit of upholding the territorial and cultural rights of traditional communities in the spheres of recognition and redistribution, it was marked by an intersectional silencing regarding race, gender, and levels of political empowerment. A complex set of factors—ranging from community resistance to dispossession, access to information, political organisation, and economic status—interact in shaping how rights are claimed and enforced. This corroborates the hypothesis that, although the majority of the Justices followed the reasoning of Justice Rosa Weber in declaring Article 3, § 2 of Law No. 12.910/2013 of the State of Bahia unconstitutional, their votes made no reference to the counter-hegemonic, intersectional claims of the Black movement, which was not even summoned to the proceedings. Such omission constitutes a violation of the participatory parity of these communities within the sphere of recognition. The outcome is the reproduction of implicitly Eurocentric discourses, in which race and gender markers remain absent.

From Fraser's perspective, the defence of an explanatory conception of intersectionality would be fundamental to the realisation of the territorial and cultural rights of traditional communities. Such a framework is capable of opposing both the

implicitly Eurocentric discourses of the majority and the explicitly asymmetrical arguments advanced by Justice Nunes Marques. As numerous intersectionality theorists emphasise, issues concerning territorial rights have differentiated impacts on traditional communities depending on race, economic conditions, resistance to land invasions, and degrees of political empowerment. Fraser insists that these complexities must be interrogated through an explanatory conception of intersectionality, which reveals the structural mechanisms through which oppression operates. By contrast, the imposition of a rigid, universalist deadline for the verification of land ownership obscures the distinct contexts in which traditional communities exercise their rights, thereby rendering invisible "a set of asymmetries arising from gender, class, and race."[167]

[167]Maria E. Bunchaft, *supra* note 164.

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The author reports there are no competing interests to declare.

DATA AVAILABILITY STATEMENT

The empirical material analysed in this article consists exclusively of publicly available judicial materials issued by the Brazilian Federal Supreme Court (Supremo Tribunal Federal – S.T.F.). The corpus comprises the opinions and votes delivered in Direct Action of Unconstitutionality No. 5783, decided on 6 September 2023, and in the joint adjudication of Direct Actions of Unconstitutionality Nos. 7582, 7583, and 7586, Direct Action of Unconstitutionality by Omission No. 86, and Declaratory Action of Constitutionality No. 87. These materials were accessed through the S.T.F.'s official case-law and case-monitoring databases by means of docket-number searches and thematic keyword searches, including "A.D.I. 5783", "A.D.I. 7582", "A.D.I. 7583", "A.D.I. 7586", "A.D.O. 86", "A.D.C. 87", "*fundo de pasto*", "*fecho de pasto*", "*comunidades tradicionais*", "*territórios tradicionalmente ocupados*", "*marco temporal*", "*povos indígenas*", "*direitos territoriais*", "*regularização fundiária*", and "*tradicionalidade*". No interviews, fieldwork, surveys, or non-public documents were used. No personal, confidential, or sensitive data were collected or processed. The article relies on documentary analysis and critical discourse analysis of official judicial texts, interpreted in light of Nancy Fraser's

theoretical framework. Because all primary legal materials are publicly available from the STF, there are no restrictions on data access. The author's interpretive annotations and analytical notes were produced for the purposes of the critical discourse analysis and do not constitute a separate dataset.