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AN ORDINARY TASK TO ANY CONSTITUTIONAL COURT?: OVERINTERPRETATION AND THE TIME OF OCCUPATION CRITERION (*MARCO TEMPORAL*) IN THE RAPOSA SERRA DO SOL INDIGENOUS LAND[1]

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ABSTRACT: This paper investigates the connections between the phenomenon of overinterpretation in Law and the time of occupation criterion, called marco temporal thesis, using the Law and Literature methodology. The category of overinterpretation hereby considered comes from the literary theory by Italian semioticist Umberto Eco. In this paper, overinterpretation theory is applied to Law, from its interlocution with Literature. This very category was mentioned in the Report n.001/2017, by the Brazilian Federal Attorney General's Office, on the marco temporal thesis, which gave rise to the judgement analysis of Petition 3388/RR, by the Brazilian Federal Supreme Court, also known as the case of Raposa Serra do Sol Indigenous Land, when the abovementioned thesis was established. Then follows the analysis on the approximations between overinterpretation and the institutional safeguards provided for in the sentence, which go beyond the original case; as well as the hyperfictional aspect of the marco temporal thesis, which, by adopting a restrictive interpretation of indigenous territorial rights, denies the colonial process and the State's own efforts to carry out forced removals of indigenous peoples. It also ignores the historicity and traditional occupation of the Brazilian territory by the indigenous peoples, which crosses textual limits and contradicts the Constitution itself.

KEYWORDS: Raposa Serra do Sol Indigenous Territory; Overinterpretation; Law and Literature.

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1 INTRODUCTION

The Brazilian Constitution of 1988 has prescriptions regarding the indigenous peoples, in substantial different approaches than the previous constitutions of the country. It breaks with the assimilationist paradigm, previously predominant in legal documents, such as the Indigenous Statute of 1973, which considered the progressive integration of indigenous populations to the national community as its goal, as if "indigenous" were a transitory category of people to be introduced to an indistinctive whole. With this historical context, the current Brazilian Constitution promotes a paradigmatic transition (Pereira, 2002), as it assures the plurality of ethnical, racial and cultural terms in the Brazilian state.

This constitutional text assures and recognizes the indigenous territories, and attributes to the Federal Government the duty to demarcate them and likewise provides, together with international documents, for indigenous autonomy. However, it also limits expressively the use, even by the indigenous persons themselves, of traditionally occupied lands due to their condition of federal public goods, attributed by the art. 20 of the Constitution.

Although the Constitution of 1988 has established, in article 67, of Transitional Constitutional Provisions Act (ADCT), the period of five years from its enactment for the Union to complete the demarcations, this was not accomplished, hindering the full enjoyment of indigenous rights provided for in the Constitution, and resulting in a series of violent actions with forced removals, land conflicts, legal insecurity and a condition of indignity due to the impossibility of subsistence conditions.

Even though the deadline of the constitutional term has expired over 27 years ago, the processes were not concluded, some of them were never started, and it becomes one of the main causes of land conflicts in Brazil (Ipea, 2020), despite the fact that territory rights are central for sociability, dignity, and cultural reproduction of indigenous populations. So, there have been undeniable legal advances, including internationally, but the reality is that several conflicts around indigenous lands still emerge in Brazil at a regular basis (Bragato and Neto, 2017), especially

regarding the Union's duty of demarcation, as stated in art. 231 of the Constitution.

In this context, on May 20, 2005, a popular action was filed against the Union. Although it originally did not compete to the Supreme Federal Court (STF), due to the federal nature of the conflict, the Claim 2.833 was established to the STF, pursuant to art. 102, I, "f", of the Constitution. Petition 3388/RR, also known as the case of the Raposa Serra do Sol Indigenous Land, was then judged by the aforementioned court in 2009 and became final in 2015, after the judgment of the declaratory embargoes then proposed. Although the popular action that sought to dissolve the demarcation was judged unfounded, there were several consequences for the demarcation of Indigenous Lands in Brazil.

By extrapolating the original case, institutional differences and damage to indigenous territorial rights were perpetuated, mainly due to the inclusion of the so-called *marco temporal* thesis, that is, the time of occupation criterion, in the list of institutional safeguards provided for in the decision. The reproduction of this restrictive interpretation in relation to indigenous rights, provided for in articles 231 and 232 of the Constitution, gives rise to the analysis of the present study. It is thus developed from the methodological contributions of studies in Law and Literature, especially Law as Literature, considering the repercussions of overinterpretation in Law, as well as its hyperfictional results.

2 WHAT DOES THE LAW SAY AND WHAT WOULD WE LIKE IT TO SAY? OVERINTERPRETATION FROM LITERARY THEORY TO LEGAL THEORY

In the context of literary theory, the Italian semioticist Umberto Eco deals with overinterpretation, as he rises up against the lines crossed by certain scholars, who supposedly promote a "perverse appropriation of unlimited semiotics –, so that readers produce an unlimited, uncontrollable flow of readings" (Trindade, 2019, p.449, translated). Before the formulation of this category, the underlying issue "was the dialectic between the rights of texts and the rights of their readers" (Trindade, 2019, p.4 49, translated), and in the works produced at that

time, such as *Opera Aberta*, published in 1960, Eco sought to address the "semiotic foundations of this experience of opening" (Trindade, 2019, p.449, translated).

However, later, the author begins to analyze the limits then crossed by this initial moment of opening, rising up "against the exaggerations often committed by the readers" (Trindade, 2019, p.449, translated) and proposing a rescue of the text original value. To do so, Eco brings some examples of overinterpretation cases, some of which result in anachronism, which promote an "excessive spending of hermeneutical energies that the text does not corroborate" (Eco, 1995, p. 9, translated). As opposed to that, the author suggests "economy criteria to be followed when reading a text as a world or the world as a text" (Eco, 1995, p.9, translated), among which is the limitation imposed by the very text, the literal meaning of what has been written.

Deconstructivist practices, as the author mentions, follow the idea of "strongly shifting the emphasis to the initiative of the recipient and the absolute ambiguity of the text, in such a way that the text becomes pure stimulus for interpretive drifting" (Eco, 1995, p.10, translated). This excessive freedom, whose final result escapes the original text, demands a counterweigh, which might not be limited to shifting to the opposite idea, but to acknowledge that "some interpretations are blatantly mistaken readings, and must not prevail, as they violate the materiality of the very text, that is, its textuality" (Trindade, 2019, p.450, translated). On that, Eco (1995, p.81, translated) highlights:

> Before a text is produced, it would be possible to invent any kind of text. Once a text has been produced, it is possible to make it say many things – in certain cases, a potentially infinite number of things – but it is impossible – or at least critically illegitimate – to make it say what it does not say.

In the practice of Law, the relationship author-reader-text happens similarly to how it does in literature, from whence Eco creates his reflections, and, as Henriete Karam (2017, p.1034, translated) adds:

> Practicing a panoramic view over the topic of creation in the legal discussion shows that – similarly to literature – the law has a constant oscillation between conceptions of objectivist and subjectivist prevalence,

> and the freedom given to the judge's creative power is always associated with subjectivity.

Thus, in the theory of law, it is possible to identify a similar movement, which at times attempts to solve the matter of interpretative reading and the known resilience of language locating the meaning within a text, and at times does so by following the reader's will, so sometimes the law is the protagonist, sometimes the judge is so. This movement can be seen in different theoretical approaches to the Law.

From the 18th century, when legal positivism starts to become a dominant paradigm of law, its manifestations are also marked by its oppositions, demonstrating this movement between the subject (reader) and the object (the text) (Streck, 2010), which is similarly portrayed by Eco in literary studies. In its classic version, it emerges as exegetical positivism in France; in Germany, it manifests itself from the jurisprudence of concepts, and in England, as the analytical jurisprudence (Streck, 2017).

From formalism, marked by the attachment to the text and its restrictive interpretation, the theory migrates to a more open view. In England, representatives of Analytical Jurisprudence are identified, and its antithesis is also manifested elsewhere, namely: legal realism; as for France, the School of Exegesis also meets its antithesis: Free Scientific Research; and in the German scenario, of late codification, the Jurisprudence of Concepts will be contested by the School of Free Law and by the Jurisprudence of Interests (Losano, 2008).

However, a flaw survives every one of these approaches, and those theses and antitheses do not show themselves able to deal with a question that is often denied, ignored, or seen as fatalistic: the problem of interpretation, that is, how to deal with the gaps and incomplete ideas when interpreting the Law? Due to misidentification of the main problem, the solution then identified resulted in problems. This is because, due to the antitheses, little by little, what was previously concentrated in the supposed objectivity of the law, started to be deposited solely in the subjectivity of the judge (Karam, 2017).

Thus, in order to overcome the classical formalism, which identifies legal positivism in its first manifestations, the will of the interpreter

reaches the spotlight. However, if for legal realism the law is only the product of will, "regardless of its content, the theoretical situation is the same as that of positivism with a legal basis: the difference is that the judiciary takes the place of law maker" (Streck, 2017, p.161, translated).

It is also in this sense, that is, maintaining the subject-object relationship, that Kelsen's normativist positivism deals with the question of interpretation. For Kelsen, the Law presents itself to the interpreter as "a framework in which there are several possibilities of application, and every act that remains within this frame, that fills this frame in any possible sense, is in conformity with the law" (Kelsen, 2007, p.390, translated).

These are some assumptions that support Kelsen's understanding that, in the application of the Law by the judiciary, "the cognitive interpretation (obtained by an operation of knowledge) of the Law to be applied is combined with an act of will, in which the figure applying the Law makes a choice between the possibilities revealed through that same cognitive interpretation" (Kelsen, 2007, p.394, translated). This perspective yields to the fatalism that it is not possible to control the judge's interpretation, either because of a need for broad concepts that could encompass numerous application hypotheses, given that the Law is capable of exhausting the prediction of all conducts; or because language, even if it is intended to determine the maximum, is polysemic and allows multiple meanings.

Considering this background, overinterpretation is also tangible in courts, as a consequence of the discussion on the limits of interpretation, and, similarly to literary theory, legal interpretation is either based on "the belief in the author's intention; the assumption of the reader's intention; the rescue of the text's intention" (Trindade, 2019, p.452, translated). When menacing the Law, the phenomenon of overinterpretations relies on the coercive power of judicial decisions (Trindade, 2019), in a legitimate exercise of right restrictions by the State, as happened in the Raposa Serra do Sol case. Before analyzing the consequences of overinterpretation in this particular case, it is worth analyzing the judgment regarding the demarcation of the Raposa Serra do Sol Indigenous Land.

3 INDIGENOUS LAND RAPOSA SERRA DO SOL AND THE MARCO TEMPORAL THESIS: INSTITUTIONAL SAFEGUARDS

Although the popular motion on the Raposa Serra do Sol Indigenous Land dates back of 2005, and Petition 3388/RR had been sentenced by the Supreme Court in 2009, the discussion about this Indigenous Territory is not recent. The presence of native peoples in the region was proven in the process and dates back to the colonial period, when the first Portuguese explorers arrived the area in the 18th century (Farage, 2009). In 1917, part of the region was granted as protected indigenous land, and the administrative process on the land's demarcation was started in 1977 (Sartori Junior, 2017).

However, it was only in 1993 that "effective measures, such as the proposal for territorial borders, anthropological report and the area research by FUNAI" were taken, and "it was suggested to the Ministry of Justice the recognition of an area of 1.67 million hectares as traditionally occupied" (Sartori Junior, 2017, p.146-147, translated). Administrative complaints to the demarcation were presented by the State of Roraima and by individuals, pursuant to Decree No. 1,775, of 1996, which deals with the abovementioned administrative procedure.

These complaints were dismissed by the Minister of Justice, giving rise to the edition of Ordinance No. 820, of 1998, also supported by Order No. 50/98, and Order No. nº 009/93, by the President of Funai, granting 1,678,800 hectares to the Indigenous Land (Brazil, 2009). The State of Roraima rose up and tried to annul the ordinance, with no success. Seven years later, Ordinance No. 534/2005 was published, ratifying with reservations No. 820/98, setting the area at 1,743,089 hectares, including the municipalities of Normandia, Pacaraima and Uiramutã.

The declaration of permanent possession favored the Ingarikó, Makuxi, Patamona, Taurepang and Wapixana indigenous ethnicities, and reached, in the north, the milestone located on Mount Roraima, at the trijunction of the Brazil/Venezuela/Guyana borders (Brasil, 2009). Subsequently, the Ratifying Decree of April 15, 2005 was edited. New actions were proposed and the jurisdiction of the Supreme Court was established, but there was no annulment of the administrative acts, giving

rise to the removal of non-native people from the area, which also resulted in violent conflicts in the region

Then, in 2008, the Supreme Court began the judgment of the aforementioned popular action, which deals with the demarcation of the Raposa Serra do Sol Indigenous Land and sought the declaration of nullity of Ordinance n. 534/2005, of the Ministry of Justice, as well as the homologation decree of April 15, 2005, documents that supported the demarcation. Among the reasons raised by the author, the following stand out: defects in the administrative process, given the supposed lack of dialogue with non-native people affected by the demarcation; continuous model of demarcation, which would be against the interests of the State of Roraima, by harming security, as it is a border region, as well as the agricultural production in the region.

Another argument was the impossibility for the Union to declare as an Indigenous Land, therefore, a federal public good, a significant part of the State of Roraima, considerably reducing the territorial extension of the referred federative unit, which, according to the author, would not be reasonable. The Union, in turn, presented the historical survey of indigenous occupation in the region, attesting to the traditional occupation of the area, in the molds of art. 231, of the CRFB/88. The Attorney General's Office gave an opinion for the dismissal of the action, reinforcing the Union's arguments, in addition to having highlighted the need not to mistake indigenous possession with possession in the form of civil law; and the inexistence of any damage to the autonomy of the State of Roraima, precisely because of the original and previous character of the indigenous territorial rights involved.

From the arguments raised by the State of Roraima, new requests were prepared, to be applied "to any demarcation of indigenous lands" (Brasil, 2009, p.110, translated), namely: adoption in discontinuous ways or on islands; the exclusion of the municipal seats from eventual demarcations, in this case the municipalities of Uramutã, Normandia and Pacaraima; the exclusion of the border area; the exclusion of properties owned or owned prior to 1934 and of land titled by INCRA before 1988, and the exclusion of state and federal highways, as well as plantations, construction areas and intended for hydroelectric projects.

Considering this intention to apply the same jurisdiction to every case of demarcation, the Supreme Court established "genuinely constitutional coordinates, of undeniable applicability" (Brasil, 2009, p. 213, translated), or even, the "institutional safeguards needed by the superlative social-historical importance of the cause" (Brasil, 2009, p. 215, translated), structured in nineteen caveats regarding the actions of the Executive Power and the rights of indigenous peoples. Such caveats were elaborated considering the need to establish parameters for the demarcation of indigenous lands to be carried out by the Federal Executive Branch, aiming to reconcile indigenous interests, national defense, and environment preservation.

Among these coordinates is what was identified in the sentence as "the positive content of the act of indigenous lands demarcation", identified in caveat n. 11. In this item, the intention was to establish "regulatory frameworks" in order to better guide the performance of administrative demarcation processes. There are four criteria highlighted, namely: *marco* temporal, that is, the time of occupation criterion; the traditionality of the occupation; the criterion of concrete amount of land and practical purpose of the traditional occupation; and the criterion of the extensive territorial concept of the so-called principle of proportionality.

The focus of this study is precisely the time of occupation criterion, *marco temporal*, which establishes the date of the 1988 Constitution's promulgation, that is, October 5, 1988, as an "irreplaceable reference" for the recognition of indigenous rights over lands they traditionally occupy. As the rapporteur points out, "land that they have traditionally occupied, it should be noted, and not those that they might come to occupy, nor the lands they had occupied at other times, but with no sufficient continuity to reach this objective criterion of October 5, 1988" (BraSil, 2009, p.296, translated). The vote goes on to emphasize the need to establish a supposed "objective criterion", whose intention is to "put a definitive end to the everlasting discussions about any other time-based reference of occupation for indigenous areas" (Brasil, 2009, p.298, translated).

With this, as stated in the judgment, the intention was to avoid fraud and the proliferation of artificial villages that would require demarcation, as well as the violent e xpulsion of Indian peoples to mischaracterize the

traditionality of possession of their lands. Still, in the words of the rapporteur: "the newest Brazilian Fundamental Law is the guideline of the indigenous issue and this delicate discussion on land occupation to be demarcated by the Union for permanent possession and exclusive use by certain aboriginal ethnicities" (Brasil, 2009, p.298, translated).

Although the time of occupation criterion was applied to the demarcation case of Raposa Serra do Sol, as Sartorini Junior states, the discussion on establishing objective criteria to demarcation of traditional lands comes from the 1990s:

> [...] on other occasions when the STF was urged to express its opinion on the content of indigenous territorial rights in the Constitution. In the vote of Judge Marco Aurélio Mello, there is a transcription of an excerpt from the Writ of Mandamus nº 21.575-5/MS, appreciated by the Congress on February 3, 1994, as well as a mention of the decision of Judge Peçanha Martins, of the Superior Court of Justice, in Writ of Mandamus nº 4.821/DF. Both discuss immemoriality, traditionality and what would be the "reasonable time" for claiming traditional occupation (Sartori Junior, 2017, p.162, translated).

In the case under analysis, the assessment of the occupation traditionality "could not be ruled out by the Cartesian verification of the indigenous presence, equating traditional possession with civil possession" (Sartori Junior, 2017, p.161, translated). This is because, despite the Constitution functioning as a guideline, with the role of objective regulatory framework to be adopted for the demarcation, the Supreme Court also established the possibility of departing from this criterion, through the proof of expulsion from the lands, aiming to exclude the possibility of using fraudulent documents and/or land acquirement by eviction.

However, despite this apparent attenuation with regard to the application of the time of occupation criterion, there are several questions that arise from the aforementioned eviction. Among them, it is worth noting

> What actions can be considered to de-characterize the time criterion in a context of guardianship, as it was before 1988? Does the non-physical presence on October 5th mean the absence of villages – a stereotypical view of territoriality – or does it cover the sporadic and rarefied traditional relationship with the

> territory, such as visits to sacred sites and subsistence hunting and fishing? (Sartori Junior, 2017, p.161, translated)

Dissent persisted, despite the Court's intention to establish "objective regulatory criteria", bringing a "definitive end to this everlasting" issue. Even though the popular action was dismissed by a majority of Judges, the proposal of Judge Menezes Direito was accepted to establish the aforementioned "institutional safeguards", as conditions capable of guiding the process of indigenous land demarcation. This decision resulted in a series of disagreements, especially regarding the extent of this decision's effects, which gave rise to the filing of several motions for clarification, precisely seeking to clarify this point as well.

To illustrate the mentioned dissent, the Attorney General of the Union edited, in the use of the powers conferred on it by art. 87, sole paragraph, item II, of the Federal Constitution, and art. 4, items X and XVIII, of Complementary Law No. 73, of February 10, 1993, Ordinance No. 303, July 2012, provides for institutional safeguards for indigenous lands in accordance with the understanding established by the Supreme Court in Petition 3.388 RR. The ordinance was edited even before the final decision of the Raposa Serra do Sol case, and repeated some excerpts from the ruling, emphasizing the need to "standardize the performance of the units of the Attorney General's Office" (AGU, 2012, p.1, translated), in addition to establishing the review of demarcation processes based on the time of occupation criterion.

In the same month, Funai released a technical note on Ordinance nº 303/12 of the Attorney General's Office, pointing out that the measure "restricts the recognition of indigenous peoples' rights, especially territorial rights, enshrined in the Federal Constitution, by adopting as parameter a non-definitive decision by the Supreme Court to standardize the performance of the units of the Attorney General's Office" (FUNAI , 2012, p.1, translated). Therefore, according to the technical note, the ordinance should be revised, "under penalty of increasing legal uncertainty and jeopardizing the constitutionally guaranteed rights of indigenous communities" (FUNAI, 2012, p.1, translated).

In 2013, the Supreme Court judged the motions for clarification, which were opposed in the light of the judgment of the Full Court of 2009. In this judgment, it was established that the decision rendered in a class action has no binding effect, so that "they do not extend, automatically, to other processes in which similar matters are discussed" (Brasil, 2013, p.2, translated), showing, however, persuasive force, "from which a high argumentative burden arises in cases where it is considered to overcome their reasons" (Brazil, 2013, p.2, translated). The validity of the 19 institutional safeguards was also confirmed, and the continued demarcation of the Raposa Serra do Sol indigenous land was maintained.

Still, there were several consequences of this trial for land demarcation of indigenous peoples in Brazil. Especially to support a restrictive application of indigenous territorial rights guaranteed in the Constitution, with consequences, for instance, on revisions and cancellations of demarcations in progress (Bragato and Neto, 2017). In the case Guarani-Kaiowá, in Mato Grosso do Sul, of Guyrároka Indigenous Land, the demarcation was annulled in 2014, based on the thesis of time occupation criterion.

In 2020, 17 demarcation processes were returned by the Minister of Justice to Funai, so that they could be reviewed in light of the time of occupation criterion (Folha de São Paulo, 2020). Currently, the constitutionality of this thesis is discussed in Extraordinary Appeal n.1,017,365, with general repercussion (topic 1031) recognized by the Supreme Court, in 2019. This case, still to be judged, originates in the dispute involving the Xokleng people, in Santa Catarina, who claims the demarcation of the Ibirama-Laklãnõ Indigenous Land. Indigenous people were repeatedly expelled from their lands throughout the 20th century, which resulted in a drastic reduction of their lands in a history of violence and dispossession.

The *marco temporal* thesis, the time of occupation criterion, was applied in this case ignoring the fraud, violence and expulsions suffered, which occurred with the direct participation and support of the Brazilian State itself. It is a case that demonstrates the impact and relevance of the Raposa Serra do Sol case. It also highlights the inconsistencies of the *marco temporal* thesis, with its legal fragility and unconstitutionality,

since it disregards the reasons why the indigenous peoples were not in their respective territories on October 5, 1988; or places an excessive burden of proof on those who were the victims of a documented, known colonial historical process sponsored by the Brazilian State.

This paradigmatic case represents many others of demarcations that were questioned, many of which, in 2021, are still pending judgment, which shows the current dimension of this discussion and also its direct consequences for Brazilian indigenous peoples. This state of affairs demands critical analysis, especially with regard to the pretension of the *marco temporal* time of occupation criteria, and the adoption of "institutional safeguards". The next chapter brings this rationale, based on the dialogue between Law and Literature.

4 OVERINTERPRETATION AND THE *MARCO TEMPORAL* TIME OF OCCUPATION CRITERION: "A COMMON TASK TO ANY CONSTITUTIONAL COURT?"

Following the application of the *marco temporal* occupation time criterion, in 2017, the Attorney General's Office issued Opinion No. 001, reinforcing the need for institutional safeguards to be observed in all demarcation processes, with mandatory compliance by the bodies of Federal Public Administration, directly and indirectly. On that occasion, the Attorney General's Office also stated:

> Often, the characteristics of the cases submitted to the Courts, usually being highly complex conflicts of interest that give rise to a range of possibilities and responses arranged in texts with multiple different meanings that collide with each other, require the interpreters (of the magistrate panels) to a hermeneutic effort towards the holistic understanding of the interpretive context of systematic knowledge and the topical or problematic apprehension of the case, which can lead to *processes of creative interpretation or overinterpretation of texts and, with that, to the construction of meanings not previously observed or understood. This interpretative construction on the text of the Constitution is a common task to any Constitutional Court*, and the jurisprudence of the Supreme Court is full of decisions that undertook creative interpretations of the constitutional provisions (AGU, 2017, translated, highlighted).

Report n.001/2017 by the Attorney General's Office expressly mentions the concept of overinterpretation, even naming Umberto Eco.

According to the document, it was the difficult and complex legal issues involving land demarcation that gave rise to "the development of processes of creative interpretation of the Constitution, especially of its articles 231 and 232, which make up the system of fundamental rights and guarantees for indigenous people" (AGU, 2017, translated).

Similarly to that, still during the trial of the Raposa Serra do Sol case, the then judge Joaquim Barbosa highlighted:

> I believe that we are here delving into a field in which the Federal Supreme Court has no experience. We are entering the field of what is called judge-made-law. It is the type of activity typical of countries where the Judiciary makes the law. It makes the law and delegates its execution to a judge. To delegate, how does it work? By setting clear directives, setting goals, setting deadlines. We cannot delegate this to a Regional Court and to the judges of Roraima without these clear directives, because we do not know what the local reality is. If we do this, nothing will happen (Brasil, 2017, p.863, translated).

These forms of Law application are pointed out as means to solve the so-called complex cases, which "a range of possibilities and responses arranged in texts with multiple different meanings that collide with each other" (AGU, 2017, p.3, translated), as highlighted by the opinion of the Attorney General's Office and several excerpts from the judgment in question. Back to the issue of overinterpretation in Law, the point is not exactly the multiplicity of possible interpretations, as the report suggests. But the textual limitations imposed by an open text, which according to Eco (1995, p.81, translated): "continues to be a text, and a text can provoke an infinity of readings without, however, allowing random readings".

So it is still possible to say that a certain reading is wrong, even though many readings are possible. Thus, when dealing with overinterpretation, Umberto Eco rebels against abuses of the referred interpretative drifting, he is defining limits and criteria of economy to better guide the hermeneutical task. Therefore, he does not approve, as Report n. 001/2017, creative interpretation or the need for overinterpretations, but criticizes the excess of previous openness, which make misinterpretations possible, moving away from textuality: these are overinterpretations.

The way it was used in the Raposa Serra do Sol case, the *marco temporal* criterion has no constitutional justification, as there are no time-based norms for land occupation anywhere in the law. Oppositely to what Eco states regarding the possibilities of text-reading, although it is possible to make a text say many different things, "it is impossible – or at least critically illegitimate – to make it say what it does not" (Eco, 1995, p. 81, translated). This excess of interpretation was not even needed in the abovementioned Native Land's case, that is, the parameters built in the discussions during the Raposa Serra do Sol case came up with the *marco temporal* criterion but did not use it to solve the case.

The other nineteen institutional safeguards prescribing directives to the action of the Executive Power, as stated by the then judge Joaquim Barbosa, go "into a field in which the Federal Supreme Court has no experience. We are entering the field of what is called judge-made-law" (Brasil, 2009, p.863, translated). The reference could not be more appropriate, given that in the judgment the original popular action was extrapolated by the Judiciary, with the so-called "institutional safeguards", whose content was intended to encompass situations that did not even need to be raised for the resolution of the dispute that gave rise to the demarcation of the Raposa Serra do Sol Indigenous Land.

In this sense, overinterpretation can be seen as an act of solipsism and, thus, activism, as it is based on extratextual elements, which defend "inevitably the will of the reader. Overinterpretation is based on elements exterior to the text, but inner to the consciousness of the subject. This is where it gets dangerous. Every act of overinterpretation implies a certain degree of privatizing language" (Trindade, 2019, p. 456, translated). This idea is based on the view that "the world and knowledge are supposedly submitted to the consciousness of the subject" (Trindade, 2019, p. 457, translated), who creates the world according to his or her subjectivity, making the meanings of this world a personal possession.

The *marco temporal* criterion of the Supreme Court is against the indigenous thesis, according to which the native communities have original or birth rights over the lands they have traditionally occupied,

since they suffered the colonization process and the loss of their lands by non-natives (Mendes Junior, 1912). Historical documents account for this, since the colonial period, with the Royal Charter of November 30, 1611, the Grant of April 1, 1680 and the Law of June 6, 1755, which was also constitutionalized by the Constitution of 1934 (Perrone-Moisés, 1992).

The 1988 Constitution did not follow such a different path in this area. It also recognized indigenous rights to territory, as provided for in art. 231, without establishing any type of time criterion to consider the promulgation of the Constitution. This is due to the precedence of these rights in relation to the State itself. It is for no other reason that the "recognition" of these rights remains established, which precede the promulgation of the Constitution, and it does not promote any creation of privileges, but rather recognizes them, given the long history of occupation and successive expropriation of native communities in Brazil.

Establishing a time limit of the Constitution promulgation in 1988 as the starting point to grant traditional lands to native peoples, whose occupation obviously dates back from that date, is a perfect example of the overinterpretation phenomenon, as it is the act of making a text say what it does not say, with an impossible reading from a systemic and coherent interpretation of the Constitution. This finding is also reinforced by the 19 institutional safeguards, which aim to elevate the Supreme Court to the status of legislator, imposing generic regulatory criteria, not even provided for by law, which trespass the role of the Legislative Power.

In addition to presenting itself as being the result of overinterpretation, the *marco temporal* criterion of occupation is also structured as a hyperfictional element, given its mismatch with history and everything that has been constructed in relation to indigenous rights, since the Royal Charter, in November 1611. When extrapolating textual limits, the Court disregarded, for example, the provisions of art. 231, of the Constitution, and the history of the Brazilian State, as a direct agent, whether at the federal or state level, in the period before the Constitution, especially in the civil-military dictatorship and in the Getúlio Vargas

government, as a promoter and participant of forced displacement of several communities in the national territory (Taroco, 2018).

As González observes, with the narrative turn and in the proposal of the Narrativist Theory of Law, fiction assumes the role of a "transversal legal statute" (González, 2013, p.53, translated), since he understands that legal systems "are fictional installations and sometimes hyperfictional" (González, 2013, p.54, translated), to the extent that Law itself is a "fictional linguistic form of a purely textual world" (González, 2013, p.54, translated), with the *corpus juris* being a discursive-narrative category, even when identified as prescriptive. It operates, as González proposes, from a performative act of *inventio*, which is fictional, whose "ontic-verbal device is counterfactual (*possibilia*), that is, it generates a world different from the real one" (González, 2013, p.54, translated).

This fictional trait of the Law inserts it in narrativity, and emerges from the idea of representation (Bentes, 2020), in which fiction associates itself with the mimesis of reality, in a view that considers fiction as the invention of reality (Moreira; Taroco, 2020). Being fictional does not mean, hence, to be deceiving, but symbolic, since "fictions are linguistic devices that indirectly expose the truth" (Piglia, 2001, p. 221, translated). Law is frequently based on fictional ideas, as González points, which generate and recreate new fiction pieces, so "the production of fictional narratives in Law is autopoietic" (González, 2013, p. 55, translated).

The link with Literature happens from this aptitude translated into institutional poeticity, which generates social fiction pieces, as real figurations (Moreira; Taroco, 2018), responsible for instituting "new conditions in the real world and, in addition, ample possibilities of ending up imposing themselves completely onto the real world" (González, 2013, p.54, translated). In the Raposa Serra do Sol case, the detachment from historical records and the assumptions established from a public language, founded on an intersubjectivity, account for this hyperfictional trait, which in law assumes the power to restrict indigenous territorial rights, as if found with several annulments and demarcation revisions after the trial of petition 3388/RR.

When dealing with the possible worlds and their inner contradictions in the theory of narrativity, Eco (1995) brings a visual example to illustrate what he means as a possible impossible world. The image brought up by Eco is the famous Penrose drawing, whose feature of geometric impossibility can also be identified in Escher's lithographs, as in the well-known "Relativity". At a first glance, the object of Penrose's drawing seems to be possible, as well as the establishment of a time criterion that adopts the 1988 Constitution as a parameter.

However, if one follows the course of the drawing's lines as guided especially by the drawing itself – in this case, the history of the indigenous presence and the provisions of the constitutional text, which start from the original occupation –, what is verified is that this object cannot exist. Or, as Eco (1995, p.175, translated) states, "a world in which such an object can exist will perhaps be possible, but it will surely be beyond our capacity to conceive, however flexible and superficial we may decide to be".

The case of the Guarani-Kaiowá people, in Mato Grosso do Sul, of the Guyrároka Indigenous Land, illustrates well the level of this hyper-fictionality, which ignores historical facts and concrete evidence, and challenges, such as in Eco's words, the capacity for conception and the very Democratic State of Law, under the terms provided for by the Constitution. Sentenced by the Federal Supreme Court, in the ordinary appeal in writ of mandamus n. 29.087/DF, 2014 (Brasil, 2014), the controversy was judged approximately five years after the case of the Raposa Serra do Sol indigenous land, and exemplifies how the time of occupation criterion came to be used to support a restrictive interpretation regarding the demarcation of indigenous lands.

The sentence was the annulment of the demarcation process based on the *marco temporal* criterion, which took place without the Guarani-Kaiowá people being heard and not even having been a party to the process. The indigenous people tried several times to appeal the decision, but the case became final in mid-2016, representing a very concrete result of the time of occupation criterion, a result of overinterpretation, as analyzed in this study, and also a symbolic case, which brings together a

set of violations of indigenous rights, but also the incessant resilience and protagonism of this group.

Currently, the Guarani-Kaiowá are supported by a precautionary measure (MC 458-19) granted by the Inter-American Commission on Human Rights, which represents the international repercussions of this case. Despite the unfavorable sentence, a paradigm of the *marco temporal* criterion in a restrictive interpretation of indigenous territorial rights, the resistance and performance of the Guarani Kaiowá also continued in the national courts. On April 8, 2021, the Federal Supreme Court upheld a rescissory action filed by the indigenous people, which seeks to reverse the aforementioned annulment of the Guyraroka Indigenous Land's demarcation, in Mato Grosso do Sul.

At present, the Guarani Kaiowá, who were not heard in the process that annulled the demarcation of their land, based on the *marco temporal* criterion, have been awaiting the aforementioned judgment since 2018, the date on which the rescission action was proposed, which at first was not known to the rapporteur. Upon appeal, the decision was reversed and, unanimously, the action was known, which was a reason for celebration for the Guarani Kaiowá, who for more than 20 years have faced violence and successive expulsions from their lands in the region of Mato Grosso do Sul.

As Erileide Domingues, young Guarani Kaiowá leader of tekoha Guyraroka, mentions: "this favorable decision is a very important step for us, but we know that more things are coming and we are ready and looking forward to being part of this process" (CIMI, 2021, translated). They demand: "that the community be heard, especially the centenarians, the leaders, the children who grew up here, the people who took back this village. It is important to listen and understand the reason for recovering our space" (CIMI, 2021, translated).

The words of the Guarani Kaiowá leadership are an alert to the interpretative limits, a call to face the overinterpretative drifting of the time of occupation criterion. It is but a creation interested in restricting indigenous territorial rights, aligned with the demands of economic sectors that support the revision of indigenous rights, in an offensive whose performance has been decisive in the National Congress. Up to

2019, 180 proposals in the National Congress dealt with the rights of indigenous peoples, among which 33 are classified as anti-indigenous, as they propose measures with the potential to undermine constitutionally guaranteed rights (CIMI, 2017).

To accept the *marco temporal* criterion, even if it is possible at the level of fictional legal discourse, is to establish the Judiciary as another field of dispute and restriction of territorial rights essential for a dignified life and established to do justice to the colonial invasions. An unconstitutional criterion, whose adoption of mitigating factors such as the "eviction" factor or a non-Cartesian consideration of this objective framework, are not able to overcome. Either because of the undemocratic trait left by the activism of overinterpretation, or because of the reproduction, in the light of the 21st century, of a historical denial of indigenous territorial rights.

5 FINAL CONSIDERATIONS

Although the popular action that sought to annul the demarcation was dismissed by a majority of judges, the proposal by judge Menezes Direito was accepted to establish the so-called "institutional safeguards", as conditions to guide the demarcation process of native lands. Despite the apparent positive result for indigenous territorial rights, materialized by the dismissal of the action that sought to annul the demarcation of the Raposa Serra do Sol Indigenous Land, the aforementioned safeguards, in particular the one that establishes the time of occupation criterion, deserve careful attention by its negative repercussions.

The establishment of the nineteen safeguards mentioned, which overcome the divergence object of the popular action and trespass the law – especially the one that deals with *marco temporal* – promote overinterpretation of the constitutional text. They go beyond the limits of the textual, extracting what is not included in it and even contradicts it. This overinterpretation is also based on legal fiction, which invalidates the original condition of indigenous peoples, as the first inhabitants of what would become the Portuguese colony, by establishing October 5, 1988 as the only time milestone. It also denies everything that had previously been

recognized by the Royal Charter, in November 1611, and also by the Constitution of 1934.

Among legal fiction and overinterpretation, in a context of judicial activism, marked by the scarce view of constitutionality in relation to indigenous rights, there is also inadequacy of hermeneutical order. When using the Constitution as an "objective framework", aiming at establishing a supposed zero degree of meaning, ignoring, or trying to "put a definitive end to the everlasting discussions", in historicity and in the documents that precede it, space is opened for restrictive interpretations of indigenous communities' rights, with the predominance of voluntarism and subjection of meanings, incompatible with the Democratic Rule of Law.

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