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ARTICLES

Decoding the Judicialization of Indigenous Territories in Brazil: A QCA-Based Approach

Leonardo Barros Soares[1], Catarina Chaves Costa[2] and Giovanna Dutra Silva Valentim[3]

ABSTRACT Why are Indigenous Territories judicialized? To answer this question, we employed Qualitative Comparative Analysis (QCA) approach in its crisp-set modality, using a dataset of 74 cases of Indigenous Territories, comprising 57 cases that were in litigation before the Supreme Court and 17 cases that were not judicialized. We tested the following causal conditions: 1. the occurrence of economic and land conflicts; 2. state inefficiency; 3. the institutional design of the policy for recognizing traditional lands; and 4. the application of the temporal milestone thesis. We hypothesize that the occurrence of economic and land conflicts is the main explanatory factor for the phenomenon under investigation. We conclude by pointing out that the elements that explain judicialization are structural in the formation of the Brazilian state and are therefore complex to resolve.

KEYWORDS Indigenous Territories; judicialization; QCA; land conflict; Supreme Court.

1. Universidade Federal de Viçosa, Department of Social Sciences, Viçosa, Minas Gerais, Brazil | https://orcid.org/0000-0002-1049-1881
2. Universidade de São Paulo, Department of Political Science São Paulo, São Paulo, Brazil | https://orcid.org/0000-0002-0727-0543
3. Universidade de São Paulo, Department of Political Science São Paulo, São Paulo, Brazil | https://orcid.org/0000-0002-2480-7728

Descifrando la judicialización de las tierras indígenas en Brasil: una aproximación basada en el enfoque QCA

RESUMEN ¿Por qué las tierras indígenas están sujetas a procedimientos judiciales en Brasil? Para responder a esta pregunta, utilizamos el Análisis Comparativo Cualitativo (ACC) en la modalidad *crisp set* sobre 74 casos de territorios indígenas, 57 casos de territorios indígenas en litigio ante la Corte Suprema Federal y 17 casos no judicializados. Probamos las siguientes condiciones causales: 1. la aparición de conflictos económicos y de tierras; 2. ineficiencia estatal; 3. el diseño institucional de la política tradicional de reconocimiento de tierras; y 4. la aplicación de la tesis del marco temporal. Nuestra hipótesis es que la ocurrencia de conflictos económicos y territoriales es el principal factor explicativo de la judicialización de las reivindicaciones sobre territorios indígenas. Concluimos que los elementos explicativos de la judicialización son estructurales en la formación del Estado brasileño y, por tanto, su solución es compleja.

PALABRAS CLAVE Territorios indígenas; judicialización; QCA; conflicto de tierras; Suprema Corte de Justicia de la Nación.

Decodificando a judicialização de Terras Indígenas no Brasil: uma abordagem baseada na QCA

RESUMO Por que as terras indígenas são judicializadas no Brasil? Para responder a essa questão, empregamos *Qualitative Comparative Analysis* (QCA), na modalidade *crisp set*, sobre 74 casos de Terras Indígenas, dentre os quais 57 casos em disputa no Supremo Tribunal Federal e 17 casos não judicializados. Foram testadas as seguintes condições causais: 1. a ocorrência de conflitos econômicos e fundiários; 2. a ineficiência estatal; 3. o desenho institucional da política de reconhecimento de territórios tradicionais; e 4. a aplicação da tese do Marco Temporal. Sugerimos que a ocorrência de conflitos econômicos e fundiários é o principal fator explicativo da judicialização da demarcação de terras indígenas. Concluímos argumentando que tais fatos são estruturais na formação do Estado brasileiro e, por isso, de difícil resolução.

PALAVRAS-CHAVE Terras Indígenas; judicialização; QCA; conflito fundiário; Supremo Tribunal Federal.

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Introduction[1]

Court rulings concerning the demarcation of the Indigenous Territory (IT) of Raposa Serra do Sol in Roraima, along with the recently concluded trial on the validity of the "temporal framework thesis" (*marco temporal)* as a criterion for recognizing traditional Indigenous Territories in Brazil, have placed the question of land claims judicialization on both national and international political agendas. As Raposa Serra do Sol is a particularly conflict-ridden area, it constitutes a notable case, and its recognition as an IT has drawn criticism from economic and military actors. The second case, related to the Temporal Framework Thesis, has been recognized by the Supreme Federal Court (STF) as having "general repercussions," suggesting its outcome will influence similar cases in the future. In both cases, common factors have been the intense mobilization of Indigenous leaders, government and non-government organizations, public statements by military commanders, legal opinions from jurists, and heated media debates.

However, the prominence of these cases should not overshadow the significant number of ITs that are in various stages of the demarcation process, whose legitimacy is under dispute in the country's higher courts. Although these cases receive less attention, they can be equally damaging to the realization of the constitutional rights granted to Indigenous peoples under Article 231 of the Federal Constitution, which mandates the recognition of lands traditionally occupied by these populations. Judicialized Indigenous Territory cases can last for years, further increasing the vulnerability of Indigenous people to the many rights violations they are already subjected to. Understanding this phenomenon in depth can help policymakers, Indigenous leaders, and their allies establish empirically based solutions.

Accordingly, in this article, we aim to answer the following question: What are the determining factors that lead to the judicialization of the demarcation process?

Our working hypothesis, based on a literature review of the judicialization of Indigenous Territories (Soares *et al.*, 2021), is that the main driving force behind the judicialization of Indigenous Territories are economic and land-related conflicts over the ownership of territories recognized as traditional Indigenous Territories. Evaluating the validity of this hypothesis and investigating the role of other contributing factors in shaping a constellation of elements that lead to conflicts requiring resolution in the

1. This work was presented at the 8th National Meeting on the Anthropology of Law (ENADIR) and the 47th Annual Meeting of the National Association for Postgraduate Studies and Research in Social Sciences (ANPOCS), receiving numerous comments, most of which were incorporated into the text. The research was carried out with the support of the Minas Gerais Research Foundation (FAPEMIG) through a scientific initiation scholarship (PIBIC) for undergraduates and one for high school students (BIC JR) in the 2022-2023 cycle, awarded respectively to Guilherme Francisco Miranda and Thomás Fontes Parizzi. The authors would like to thank the Foundation and the scholarship holders for their commitment to the project. They also would like to thank the two anonymous reviewers that provided them with significant insights. Any omissions, however, remain the sole responsibility of the authors.

Brazilian judicial system are the key objectives of this study. To test our hypothesis, we analyzed a set of 74 Indigenous Territory cases, comprised of 57 cases judicialized before the STF, while 17 cases were not judicialized. We applied the Qualitative Comparative Analysis (QCA) approach, in its crisp-set modality, to this set of cases.[2]

The article is structured as follows. In addition to this introduction, which serves as an overview for the reader, the study is divided into three main sections. In the first section, we discuss the judicialization of Indigenous Territories as a distinct form of judicialization, providing a brief theoretical background on the subject. In the second section, we explain the methodological strategies we employed to investigate the judicialization process of Indigenous Territories, as well as the factors and causes that drive this process. Finally, in the third section, we present our interpretation of the results obtained. We conclude by highlighting our key findings.

Before moving to the theoretical discussion, it is important to clarify the basic procedures involved in demarcating Indigenous Territories for readers unfamiliar with the process. The demarcation process is an administrative procedure regulated by Decree No. 1,775 of 1996 (Brazil, 1996) and is primarily executed by the federal executive branch through the National Foundation for Indigenous Peoples (FUNAI).[3] In short, the demarcation process consists of the following steps: (1) a delimitation study of the Indigenous area, conducted by a team of experts coordinated by anthropologists; (2) the delimitation and demarcation of the Indigenous Territory; (3) the issuance of a declaratory ordinance by the Ministry of Justice recognizing the traditional nature of the Indigenous Territory; (4) the approval of the Indigenous Territory through a presidential decree; and (5) the registration of the Indigenous Territory with the Union's Property Secretariat.

The focus of this article is not on the administrative adversarial phase allowed during the second stage of the demarcation process, which can sometimes be mistaken for judicialization. Instead, we focus on judicial conflicts, which may arise at any point during the demarcation process, and as we will see, often occur after its conclusion.

Finally, it is essential to recognize that the phenomenon analyzed here is truly complex, and an interdisciplinary approach that encompasses sociological, anthropological, historical, and legal discussions would add more nuance to its investigation, as evidenced, for example, by the works of Cunha and Barbosa (2018), Ferreira (2021), and Souza Filho (1998). Nevertheless, we emphasize that our theoretical-methodological approach

2. The specifics of the research approach employed will be presented in the second section of this article.

3. The National Indian Foundation was established by Law No. 5,371 of 1967 (Brazil, 1967) and recently had its name changed by Provisional Measure No. 1,154 of 2023 (Brazil, 2023) to denote the new political orientation of the third presidential term of the Lula government with regard to Indigenous peoples. Initially part of the structure of the unprecedented Ministry of Indigenous Peoples, the agency is now part of the organizational chart of the Ministry of Justice and Public Security, under the chairmanship of Indigenous leader and former federal deputy Joênia Wapichana.

is limited—with its associated gains and losses—by the disciplinary field of political science, which focuses on legal phenomena, with the aim of providing a more specific contribution to the topic under debate.

1. Judicialization of Indigenous Lands: A Distinct Case of Judicialization of Politics in Brazil

In this article, we employ the idea already introduced in previous research (Soares *et al.*, 2022) that judicialization of Indigenous Lands demarcation is a specific case of judicialization of politics in Brazil. To understand this statement, we must briefly review the theoretical debate on the subject, providing the reader with a broader understanding of the terms involved.

Generally, judicialization refers to (i) the process by which legislative and/or administrative bodies incorporate mechanisms and procedures characteristic of judicial institutions; and (ii) the process through which courts and/or judges actively intervene in the creation, interpretation, or definition of public policies (Ribeiro; Arguelhes, 2019). In both cases, the basic premise is the expansion of the Judiciary's role, either by increasingly regulating social relations through legal rules or by continually seeking social claims through judicial avenues (Domingo, 2004; Hirschl, 2011).

In this article, our understanding of judicialization aligns more with the second definition, as we define the process as the transfer of normative decisions concerning Indigenous Lands and their demarcation procedures to the courts—particularly the STF (Amado, 2020).

In Latin American literature, the judicialization process is typically explained in different ways, given that repeated recourse to the judicial system can result from both governmental and social factors (Sieder; Schjolden; Angell, 2005). From the government's perspective, the crisis in legitimacy of democratic institutions, combined with their own fragility or incapacity (Domingo, 2004), has led important processes for consolidating social rights, which should have originally been debated in legislative or even executive spheres, to be transferred to the judiciary to ensure their effectiveness.

From the social perspective, socio-economic inequalities, racism, and the social exclusion of a large portion of the population have hindered certain groups' access to public spaces of representation, leading to the political marginalization of specific social demands and causes (Domingo, 2004). In this context, judicialization becomes a viable alternative for advocating important social agendas that, due to these difficulties, cannot enter the political agenda through ordinary means.

In Brazil, part of the literature tends to consider that judicialization is primarily caused by inherent characteristics of the Brazilian institutional model, particularly those established with the re-democratization of 1988. The promulgation of the Federal Constitution not only allowed new social demands to be invoked in court (since the list of constitutional rights was expanded) but also enabled the use of new procedural instruments to guarantee the effective protection of those rights.

Universalization of access to justice and expansion of the STF's role have also played a significant part in transforming the Judiciary into an agent responsible for decisions with far-reaching social implications. On the first point, it is worth noting the expansion of active legitimacy to propose Direct Unconstitutionality Actions, which provided citizens with broad access to the defense of collective, individual, diffuse, or other types of rights. On the second point, control of constitutionality enabled the STF to intervene in constitutional conflicts and engage in the political arena (Verbicaro, 2008).

Furthermore, with the reformulation of judicial guarantees, the reconfiguration of the Public Defender's Office, and the expansion of the prerogatives of the Public Prosecutor's Office (beyond the criminal sphere), the Federal Constitution brought about numerous changes to the institutional apparatus of the Judiciary, directly impacting the increase in judicial demands in the country.

In the specific case of Indigenous peoples, poor implementation of Indigenous policies by governments and failure to respect constitutional rights have led many organizations and social movements to adopt mobilization strategies to enforce the recognition and respect of Indigenous rights. An increase in litigation by social movements signals their expectation that the judiciary will be capable of resolving their demands, whether to recognize their rights or resolve conflicts between established rights and practices that violate them (Eudaily, 2004).

For Indigenous peoples, judicialization, particularly with regard to territorial rights, has thus become an important feature of their struggle for rights. Beyond being a legal tool and strategy for defending their interests, judicialization also serves as an alternative to ensuring the protection of their territories and, consequently, the preservation of their ways of life.[4] This approach is related to the fact that Indigenous social movements, by mobilizing the judiciary, can impact the political agenda of states (Eudaily, 2004). According to Scholtz (2006), through judicialization of cases, Indigenous peoples have

4. We are referring here to the phenomenon known as "strategic litigation", which can be summarily defined as the mobilization of the courts to advance - or block - political agendas considered vital to certain social groups. It is notable that this strategy has been part of the Brazilian Indigenous movement's repertoire of political action, with the increasing presence in court cases of Indigenous people with a law degree. In this regard, we should pay attention to the emerging movement of "Indigenous jurists" and "Indigenous advocacy" (APIB, [*s.d.*]).

positioned themselves as essential and strategic agents for future government political plans, making it easier for their interests to be considered in critical moments and future negotiations.

In common law countries such as Canada, it is usual for Indigenous peoples to appeal to federal courts to guarantee their territorial rights (Ray, 2016). Cases such as *Calder v. British Columbia* (Canada, 1973) and *Delgamuukw v. British Columbia* (Canada, 1997) were pivotal in changing the relationship between national government and Canadian Indigenous peoples, enabling the recognition of Indigenous property titles and leading to the revision of treaties and territorial negotiation processes in the country.[5]

In South America, the use of courts by Indigenous populations is relatively less frequent than in North America. Much of the time, courts in the region are used to challenge Indigenous territorial demarcation and titling processes rather than to guarantee that these procedures be carried out. In Brazil, the judicialization of Indigenous Land claims primarily focuses on territorial rights and demarcation processes. In fact, a struggle for recognition and enforcement of the property rights of Indigenous communities and peoples has led to increased judicialization. However, most of these lawsuits come from landowners or private individuals attempting to avoid or prevent the demarcation of Indigenous Lands (Soares *et al.*, 2022).

Therefore, in addition to considering the judicialization of Indigenous demarcation as a particular case of the judicialization of politics, we view the demarcation of Indigenous Lands as judicialized when "one of the parties involved decides to file a lawsuit at any level of the Brazilian judiciary with the aim of contesting, seeking redress, or even annulling the demarcation" (Soares *et al.*, 2022, translated). Understanding the causes and factors behind this judicialization is essential not only to determine who is truly behind these procedures but also to explore ways to use these processes in favor of Indigenous peoples.

2. Investigating the Judicialization of Indigenous Lands: Methodological Strategies

To test our working hypothesis, we first sought to outline a set of cases on Indigenous Lands (ITs) where the dependent variable was judicialization. In other words, we created

5. The two judgments are remarkable in the history of relations between First Nations and the Canadian state because they promote the recognition of the original ownership of Canadian Indigenous peoples over tracts of national territory, even without recognition through the conclusion of treaties with the state. Moreover, the second of them went further and broadened the understanding of the list of evidence that could be brought before the court for trials on territorial recognition issues, including oral records, dances, songs and other cultural expressions.

a non-representative sample that included both judicialized and non-judicialized ITs. Initially, we selected 57 judicialized ITs based on cases available on the STF website. The remaining 17 cases were gathered from a database used in previous research, bringing the total to 74 cases.[6] These cases are as follows:

- Judicialized cases: KA,[7] GK, AK, BU, GU, GY, JG, JR, JT, KDW, SCR, SBR, TKT, TIP, YK, NW, XNG, SM, PBB, ZR, PAR, ARI, EWN, ESC, JAP, MWT, PRC, PEQ, VGP, XCT, KPT, KAY, BV, CCP, PTX, CJP, TMB, LEN, GOV, KKT, JSD, PKR, XCR, ARN, BOV, VJA, KAX, ARG, APY, KYP, MKN, RSS, ASG, RIG, GAL, VSE, KON, ILL, XPC, PCI, TBV, GUA.

- Non-judicialized cases: AB, CP, CL, JT, KT, MD, BC, XP, XPC, RC, GT, YL, CI, IW, UW, TD, GB, XC.

The conflation of data from different sources and of various natures into the same database requires clarification. For judicialized IT cases, the body of interest comprises all documentation available on the STF's website, such as petitions and rulings, collected during the second half of 2022. For non-judicialized cases, the analyzed corpus comprises demarcation processes obtained through Brazil's Access to Information Law (LAI) in 2020 and 2022. These documents vary substantially in style, purpose, length, and scope, which required us to apply methodological treatment to "trim" the disparities between the two corpora.[8] Throughout 2023, our research team met periodically to analyze the data and discuss the assignment of scores to causal conditions, seeking interpretive homogeneity and procedural soundness.[9]

Once we defined our set of cases, we applied the Qualitative Comparative Analysis (QCA) research approach. QCA is a set of concepts and analytical techniques designed to

6. Here we refer to the constantly expanding database on the demarcation of Indigenous Lands in Brazil, based on data extracted from the files containing the demarcation processes, obtained from FUNAI's Access to Information Law request. This database is one of the fruits of the research entitled "Indigenous Territorial Recognition Policy in Brazil: Actors, Institutions and Processes", coordinated by Leonardo Barros Soares between 2020 and 2021. The expansion from the first twelve cases to the current forty was made possible after receiving financial support from the Brazilian Political Science Association (ABCP) through its *Small Grants Program* in 2022, which allowed us to hire research assistants Catarina Chaves Costa and Victória Ambrósio, to whom we express our gratitude here.

7. We have chosen to refer to the ITs by acronyms so as not to allow them to be immediately identified, preserving the communities from any misinterpretations or bad faith that could be made from the findings presented here.

8. The heterogeneity of the data compiled, and our research approach absolutely prevented us from incorporating accounts of Indigenous leaders into the debate, providing insight into how Indigenous peoples interpret these judicial processes. We believe this could be an interesting research agenda to be developed in the future.

9. The team involved in the process of reading and coding the data from the Politics and Indigenous Peoples in the Americas Research Group (POPIAM) was made up of the following students: Catarina Chaves Costa, Giovanna Dutra Valentim, Luiza Brilhante Bezerra, Guilherme Francisco Miranda, Maria Eduarda Silva Carregal, Gabriela Azevedo Borges, Victória Oliveira Ambrósio, Maria Eduarda Lopes da Silva Gomez, Iara Terra Pereira da Veiga, Ana Carolina Vaz, Gabriel Creão, Mariana Costa Silveira and Thomás Fontes Parizzi. We would like to publicly acknowledge the importance of these students' commitment to the collective construction of scientific knowledge.

identify causal configurations that can help explain a given phenomenon. The central idea of this approach is that certain outcomes of interest to the researcher can result from various combinations of different factors. In other words, QCA seeks to unravel the multicausality inherent in complex social phenomena.

The modality used in this study is the crisp set. In short, this modality assigns binary scores (0 or 1) to indicate the absence or presence of a specific causal condition and the outcome of interest (RES),[10] as opposed to the fuzzy set modality, which assigns continuous scores to causal conditions based on a theoretical review of the research topic.

The causal conditions we considered valid for explaining the judicialization of ITs are as follows:[11]

1. **Economic and Land Conflicts (CONF):** These are, to use a more general category, "conflicts of interest"—situations centered around disputes regarding the ownership of a specific territorial extension between Indigenous people and squatters, land grabbers, loggers, ranchers, and farmers seeking economic exploitation. These conflicts can occur at local, regional, national, or even international levels (Santos, 2020; Maia; Souza Júnior, 2017; Silveira, 2016; Simoni, 2009; Huertas, 2020).

2. **State Inefficiency (INEF):** The inefficiency of the Brazilian state has emerged as a significant factor contributing to the vulnerability of demarcation processes to judicial actions. By state inefficiency, we refer to the unresponsiveness of the Brazilian state, its agents, and its institutions across the three levels of government. This category includes everything from claims of normative gaps—i.e., the absence of clear regulations in certain aspects of the demarcation process—to various omissions that can lead to judicialization (Maia; Souza Júnior, 2017; García, 2017; Chagas, 2012). The most commonly cited issue in this regard is delay in concluding the demarcation process (Arenhart, 2015; Amaral, 2017; Galdino, 2022; Simoni, 2009).

3. **Institutional Design of the Policy for Recognizing Traditional Lands (DESIN):** The institutional design of the policy for demarcating Indigenous Lands is another element that favors judicialization (Neves, 1999; Vieira; Rosa, 2015; Vieira, 2017; Neves; Machado, 2017). Brazil's demarcation policy has a dual nature that makes it particularly vulnerable to litigation. On the one hand, it presents itself as an administrative procedure that should simply recognize an original right, already

10. Note that "1" is used for judicialized ITs and "0" for non-judicialized ITs.

11. The factors listed here were taken from Soares *et al.* (2022). There is a more detailed description of them in that publication.

enshrined in longstanding legislation and, more recently, in the 1988 Constitution, through technical and bureaucratic means. On the other hand, as we demonstrated in a recent study, this "mere procedure" is strongly influenced by political variables that intervene in its formulation, implementation, and evaluation (or lack thereof) (Soares *et al.*, 2021).

4. **Application of the Temporal Framework Thesis (MTEMP):** Finally, and symptomatic of a trend that may increase in the coming years, some authors have identified application of the Temporal Framework Thesis as a relevant factor for understanding the judicialization of Indigenous Land demarcations in Brazil (Santos, 2021). In short, MTEMP is a legal counter-thesis that aims to establish a temporal framework for validating land claims made by Brazilian Indigenous peoples. It requires either proof that these people traditionally occupied the claimed territory in 1988 or, at the very least, evidence of an ongoing dispute over its occupation.

The structuring of cases and causal conditions in the crisp-set modality resulted in the following Table 1.

TABLE 1 – QCA Data Matrix

CASES	CONF	INEF	DESIN	MTEMP	RES
KA	1	0	0	0	1
GK	1	1	1	1	1
AK	1	0	0	1	1
GU	0	0	0	1	1
GY	1	0	1	1	1
JG	1	0	0	0	1
JR	0	1	0	0	1
JT	1	1	1	1	1

continua

CASES	CONF	INEF	DESIN	MTEMP	RES
KDW	1	1	1	0	1
SCR	1	1	0	1	1
SBR	1	0	0	1	1
TKT	1	0	0	0	1
TIP	1	1	1	0	1
YK	1	1	0	0	1
NW	1	0	1	0	1
XNG	1	0	1	0	1
SM	1	1	1	0	1
PBB	1	1	0	1	1
PBB	1	1	0	0	1
ZR	1	0	1	0	1
PAR	1	0	0	1	1
ARI	1	1	1	0	1
EWN	1	1	1	1	1
ESC	1	1	1	1	1
JAP	1	0	1	0	1
MWT	1	1	1	1	1
PRC	1	1	1	0	1
PEQ	1	1	1	1	1

continua

CASES	CONF	INEF	DESIN	MTEMP	RES
VGP	I	I	I	I	I
XCT	I	O	I	O	I
KPT	O	I	I	O	I
KAY	I	O	I	I	I
BV	I	O	I	I	I
CCP	I	I	I	O	I
PTX	I	I	I	O	I
CJP	I	O	O	O	I
TMB	I	I	I	O	I
LEN	I	I	I	O	I
GOV	I	I	I	I	I
KKT	I	I	O	O	I
JSD	I	I	I	O	I
PKR	I	I	O	O	I
XCR	I	O	I	O	I
NRA	O	I	O	O	I
BOV	I	O	I	O	I
SEE	O	I	O	O	I
KAX	O	I	O	O	I
ARG	I	O	O	O	I

continua

CASES	CONF	INEF	DESIN	MTEMP	RES
APY	I	O	I	O	I
KYP	I	I	O	O	I
MKN	O	I	I	O	I
RSS	I	I	I	I	I
RIG	O	I	O	O	I
VSE	O	I	I	O	I
KON	O	I	O	O	I
ILL	I	O	O	I	I
XPC	O	I	O	O	I
AB	O	I	O	O	O
CP	O	O	O	O	O
CL	I	I	I	O	O
JT	I	O	O	O	O
MD	I	I	O	O	O
BC	I	O	I	O	O
XP	I	I	I	O	O
XPC	I	I	I	I	O
RC	O	O	O	O	O
GT	I	I	I	I	O
YL	I	I	O	O	O

continua

CASES	CONF	INEF	DESIN	MTEMP	RES
C1	1	1	1	0	0
IW	1	1	0	0	0
UW	1	1	0	0	0
TD	0	0	0	0	0
GB	0	0	0	0	0
XC	0	1	0	0	0

SOURCE: DATASET.

The table above was processed using fsQCA version 3.1b for the Windows operating system. We established a minimum threshold of 0.75 for assigning cases to the formulas, as recommended in the literature for crisp-set QCA. Boolean logic minimization generated the tables presented in the following section.

3. Why Indigenous Lands Reached the Supreme Court

The QCA research protocol indicates that presentation of results should include complex, parsimonious, and intermediate solutions. However, the interpretation must be restricted to the intermediate model. Tables 2-4 show the solutions.

TABLE 2 – Complex solution

• Frequency cutoff: 1 / Consistency cutoff: 0.777778

SOLUTIONS	RAW COVERAGE	UNIQUE COVERAGE	CONSISTENCY	CASES
CONF*~INEF	0.362069	0.241379	0.913043	KA, AK, BU, GY, JG, SBR, TKT, NW, XNG, ZR, PAR, JAP, XCT, KAY, BV, CJP, XCR, BOV, ARG, APY
CONF*MTEM P	0.310345	0.189655	0.947368	GK, AK, GY, JT, SCR, SBR, PBB, PAR, EWN, ESC, MWT, PEQ, VGP, KAY, BV, GOV, RSS, ILL, GT
~CONF*INEF*~MTEMP	0.172414	0.172414	0.833333	JR, KPT, ARN, VJA, KAX, MKN, RIG, VSE, KON, XPC, AB, XC
~INEF*~DESI N*MTEMP	0.0862069	0.0172414	1	AK, GU, SBR, PAR, ILL
solution coverage: 0.741379/ solution consistency: 0.895833				

SOURCE: DATASET.

TABLE 3 – Parsimonious solution

• Frequency cutoff: 1 / Consistency cutoff: 0.777778

SOLUTIONS	RAW COVERAGE	UNIQUE COVERAGE	CONSISTENCY	CASES
MTEMP	0.327586	0.206897	0.95	GK, AK, GU, GY, JT, SCR, SBR, PBB, PAR, EWN, ESC, MWT, PEQ, VGP, KAY, BV, GOV, RSS, ILL, GT
CONF*~INEF	0.362069	0.241379	0.913043	KA, AK, BU, GY, JG, SBR, TKT, NW, XNG, ZR, PAR, JAP, XCT, KAY, BV, CJP, XCR, BOV, ARG, APY
~CONF*INEF	0.172414	0.172414	0.833333	JR, KPT, ARN, VJA, KAX, MKN, RIG, VSE, KON, XPC, AB, XC
solution coverage: 0.741379 / solution consistency: 0.895833				

SOURCE: DATASET.

TABLE 4 – Intermediate solution

• Frequency cutoff: 1 / Consistency cutoff: 0.777778

SOLUTIONS	RAW COVERAGE	UNIQUE COVERAGE	CONSISTENCY	CASES
CONF*~INEF	0.362069	0.241379	0.913043	KA, AK, BU, GY, JG, SBR, TKT, NW, XNG, ZR, PAR, JAP, XCT, KAY, BV, CJP, XCR, BOV, ARG, APY
CONF*MTEM P	0.310345	0.189655	0.947368	GK, AK, GY, JT, SCR, SBR, PBB, PAR, EWN, ESC, MWT, PEQ, VGP, KAY, BV, GOV, RSS, ILL, GT
~CONF*INEF*~MTEMP	0.172414	0.172414	0.833333	JR, KPT, ARN, VJA, KAX, MKN, RIG, VSE, KON, XPC, AB, XC
~INEF*~DESI N*MTEMP	0.0862069	0.0172414	1	AK, GU, SBR, PAR, ILL
solution coverage: 0.741379/ solution consistency: 0.895833				

SOURCE: DATASET.

4. "We Are the Legitimate Owners Here": Land and Economic Conflicts at the Root of the Judicialization of Indigenous Lands in Brazil

The analysis of the results demonstrates that land and economic conflicts are at the root of the judicialization of Indigenous Land demarcation processes in Brazil, corroborating our working hypothesis. Although this claim may appear intuitive, we provide empirical evidence to substantiate it, which is supported by the literature that formed the basis for our hypothesis and the causal conditions we identified.

Thus, the formula **CONF*~INEF** (presence of land and economic conflicts in the absence of state inefficiency) is associated with the occurrence of judicialization of a given traditional territory. This causal condition accounts for the cases: KA, AK, BU, GY, JG, SBR, TKT, NW, XNG, ZR, PAR, JAP, XCT, KAY, BV, CJP, XCR, BOV, ARG, APY. In other words, the strong term in the equation—conflict—covers no less than twenty cases, which represent 32.78% of total judicializations.

It is also worth noting that the absent condition is not insignificant for the analysis presented here. One possible interpretation is that economic and land conflicts have their own dynamics and tend to act independently of "judicializable loopholes" arising from the various failures that may occur on the part of government actors involved in complex procedures that involve multiple political, economic, and bureaucratic variables simultaneously.

In other words, despite the government's careful efforts to carry out demarcation procedures free from administrative defects and with no major issues of federative coordination, some judicialization will still occur. This is because they are primarily driven by the intentions of certain political and economic actors who are determined to obtain rights over Indigenous Territories through judicial means, rather than by a genuine perception that they have been wronged by some improper element of the state. Ultimately, we are dealing with a structural characteristic of the Brazilian state—namely, the immense concentration of land in the hands of a few landowners, who in turn seek to expand their various economic activities at the expense of protected territories.

5. "Here, There Were Never Any Indigenous Peoples": The "Essence" of the Temporal Framework Thesis as a Judicialization Factor

Analysis of the results also makes it clear that land and economic conflicts are amplified when combined with the Temporal Framework Thesis, accounting for nineteen cases, or 31.14% of all judicializations: GK, AK, GY, JT, SCR, SBR, PBB, PAR, EWN, ESC, MWT, PEQ, VGP, KAY, BV, GOV, RSS, ILL, and GT.

It is important to highlight that during our analysis of the cases, our team concluded that, although the term "Temporal Framework" became prominent in the Raposa Serra do Sol case, the concept behind the thesis had been debated in legal circles for much longer. In its simplest form, the idea could be summarized as follows: "If there were no Indigenous peoples here before, why should this land be demarcated?"

The use of this argument within disputes significantly increases the judicialization caused by economic and land conflicts, rising from twenty to thirty-nine cases—a striking increase of nearly 100%. This demonstrates that the gradual incorporation of the Temporal Framework idea had been "disrupting" demarcation processes long before it emerged in the aforementioned court ruling. Subsequent research would be valuable if it could deepen the study presented here by incorporating an analysis of any ongoing judicialization cases in lower federal courts, to map the real influence of the Temporal Framework Thesis on the decisions of federal judges.

Moreover, the thesis's appearance alongside the factor "economic and land conflicts" reveals its instrumental nature for private economic actors involved in disputes over territory ownership. The supposed "legal security in the countryside" argument, often touted by the thesis's defenders, falls apart, revealing that the Temporal Framework Thesis is, in reality, a construction aimed at challenging the legitimacy of established constitutional rights in the name of economic interests.

Finally, when used in isolation, this causal condition can also lead to judicialization, as demonstrated by the formula **~INEF~*DESIN*MTEMP**, which accounts for five cases: AK, GU, SBR, PAR, and ILL.

One strong interpretation we can make in this case is that when viewed from a global perspective, the factor "Temporal Framework Thesis" has a high probability of leading to judicialization if it is invoked in a dispute over a particular demarcation of Indigenous Land. Thus, it is reasonable to assume that if this concept were validated by any of the three branches of government, it could lead to a significant quantitative increase in the number of judicialized ITs. This, in turn, could further burden the courts with more cases for the judges to handle, and it could also increase the vulnerability of Indigenous Territories to various forms of violence.

6. "Butting Heads": The Brazilian State Sows Inefficiency and Reaps Judicialization

Finally, the third "causal constellation" that points to factors leading to the judicialization of Indigenous Lands primarily revolves around the inefficiency of the Brazilian state. According to the formula **~CONF*INEF*~MTEMP**, in the absence of economic conflicts (with or without the application of the Temporal Framework Thesis), state inefficiency is the driving force behind thirteen cases under analysis: JR, KPT, ARN, VJA, KAX, MKN, RIG, VSE, KON, XPC, AB, XC, or 21.31% of the sample.

As discussed earlier, this causal condition refers to various bureaucratic conflicts, poor quality of inter-federative coordination, poor governance in land management, corruption, and procedural inconsistencies resulting from poor political choices. One of the clearest examples of this last element was the issuance of property titles to settlers encouraged by the Brazilian government between 1930 and 1970 to occupy lands in the states of Mato Grosso, Mato Grosso do Sul, and Roraima—areas where there have been serious conflicts over Indigenous Land disputes. Granting legal possession of lands later recognized as traditional Indigenous Lands to such settlers evokes the idea of double injustice: on the one hand, settlers were incentivized by the Brazilian state and may have genuinely occupied certain lands with the intent to produce and settle;

on the other hand, Indigenous peoples resided in these territories and were displaced by violence.

In these and many other cases, we argue that the Brazilian state "sows inefficiency and reaps judicialization." A recent example of this disturbing pattern of institutional behavior was witnessed when the Bolsonaro government decided to alter the property registration process affecting Indigenous Lands, allowing the "legalization" of a series of irregular and bad-faith occupations.[12] It would not be surprising if, in the near future, landowners who benefited from this resolution and who are challenged by other federal administrations judicialize the issue.

Final Considerations

To understand the causes of the judicialization of Indigenous Land demarcation in Brazil, this article tested four causal conditions across a set of 74 cases using the QCA approach in its crisp-set modality. In concluding this work, we would like to address some potential objections in advance and highlight the findings we consider relevant.[13]

First, an interested reader might raise the objection that we selected variables with strong structural characteristics, which would inevitably lead to the discovery of an equally structural solution, as evidenced by the result regarding land and economic conflicts. We emphasize that the causal conditions analyzed here stem from our interpretation of the literature on the judicialization of Indigenous Lands, which we compiled during the research process. This gives rise to at least two implications. First, our interpretation may be questioned and is not intended to be exhaustive of all the real-life intervening variables, as there is always the risk of omitted variables. Second, the actual predominance of these elements may be related to the still limited literature on the role of Indigenous peoples, their movements, organizations, and allies in using the courts as a strategic resource to enforce their rights, including the recognition of their traditional territories. In both cases, we encourage the reader to consult our work on the variables considered here, be it to expand or challenge it (Soares *et al.*, 2022).

Second, it could be argued that the research results would have been different if judicialized demarcation processes from the Superior Court of Justice and the Regional Federal Courts had been included. As is well known, since the seminal work of King,

12. We are referring here to Normative Instruction No. 9, issued in 2020, which allowed the certification of thousands of hectares of irregular properties in ITs that had not yet been ratified. This measure was reversed by Normative Instruction 30 of 2023 (Brazil, 2023), with effects yet to be assessed.

13. We would like to thank Professor Fabiana Luci, from the Federal University of São Carlos (UFSCAR), for encouraging us to clarify these points.

Keohane, and Verba (1994), increasing the number of cases to strengthen causal inferences in small-N research designs is always welcome, and this case is no exception. Unfortunately, financial, staffing, and time constraints prevented us from undertaking a more comprehensive study of the Brazilian judicial system, a task that would have required a much greater institutional capacity than we had available during our research. However, in our view, such an expansion would be unlikely to significantly alter the findings presented here, as it is reasonable to assume that lower courts either refuse to judge cases they consider under STF jurisdiction or are more vulnerable to political and economic pressures than the justices of the Supreme Court.

Third, some may contest that using the fuzzy set rather than the crisp set would have yielded more insights into the phenomenon under study. Indeed, the first modality allows for finer calibration of causal conditions, enabling more nuanced readings. Our primary challenge with this endeavor, however, relates to the quality and heterogeneity of the available data, which necessitated methodological choices aimed at simplifying the analytical process, as presented here.

In terms of our substantive findings, we highlight the predominant role of land and economic conflicts in the judicialization problem at hand, with these conflicts largely arising from various forms of state inefficiency. Additionally, we observe the importance—if not of the Temporal Framework Thesis as we know it today—at least of its guiding idea in judicialized cases. The institutional design of the public policy for recognizing traditional Indigenous Lands, in turn, does not appear to be a particularly relevant element for explaining the phenomenon under study.

As for the most relevant causal configuration for our discussion—namely, the pernicious interplay between land and economic conflicts, which are fueled by omissions and historical "blunders" of the Brazilian state concerning Indigenous peoples—it is important to recognize that we are ultimately facing an extremely concentrated landholding structure that dates back to the earliest days of the Portuguese colony in the tropics. Designating a portion of national territory as traditional Indigenous occupation, as public patrimony for the exclusive use of Indigenous peoples, seems almost sacrilegious in a country historically built on large landholdings concentrated in the hands of a few. Addressing the significance of the category "land ownership" for understanding the dynamics of Brazilian politics seems to be a pressing issue in our field. Thus, our findings remind us of Milton Santos's (2011, p. 20) observation that "political science that is not based on the functioning and dynamics of territory can hardly offer an empirical contribution to solving national problems" (translated).

Second, while we cannot definitively demonstrate the exact moment when the Temporal Framework Thesis emerged, we found significant evidence that the idea behind

it is much older, dating back to the pre-1988 Constitution period. Its most well-developed codification, found in the final ruling on the Raposa Serra do Sol case, is not its beginning, but its apex—similar to a subcutaneous infection that, after some time, finally erupts at the surface. Even though the thesis was struck down by the STF, this does not mean that its proponents have abandoned the idea of introducing it into the national legal framework by other means.

In this regard—and we wish to be explicit here—our findings suggest that use of the underlying ideas of the Temporal Framework Thesis in judicial disputes has the potential to increase the number of judicialized ITs in Brazil. In short, the interpretation we offer here can be understood as a set of empirical evidence supporting the concerns of Indigenous leaders and their allies, legal professionals, and observers of Indigenous policy in Brazil that the potential legislative or judicial validation of this thesis could cause a "surge" in the number of judicialized ITs. However, more empirical investigations are needed to confirm or refute this assertion.

In conclusion, our research suggests that the factors identified here as particularly relevant to the issue at hand are primarily structural, rather than circumstantial or incidental elements. This means that judicialization of Indigenous Land demarcation is rooted in the "congenital" characteristics of the Brazilian state's formation, and therefore, is not likely to be resolved in the short or medium term. This does not mean that judicialization of Indigenous Land demarcation and its presumed effects on the process of recognizing Indigenous Lands cannot be resolved, but rather that these solutions will require more than just technical fixes and adjustments to public policy instruments.

The expansion of the number of cases studied and the use of causal conditions that reflect social processes may give the false impression that the role of Indigenous peoples in these processes is evanescent. Nothing could be further from the truth. It is important to emphasize the role of Indigenous communities in the judicialization processes under consideration. After all, these are cases in which entire peoples are involved, not just individuals. Thus, decisions to appoint Indigenous lawyers to cases in which communities are either the passive or active party in the dispute are made collectively. As we have stated in a previous work, it is the mobilization of Indigenous peoples, in its various forms, that has been the main driver of their historic achievements over the past decades in Brazil (Soares *et al.*, 2024).

Finally, we want to emphasize that this study aims to provide a concrete empirical contribution to understanding the phenomenon of judicialization in the demarcation of Indigenous Lands in Brazil. The findings presented here may have repercussions on future decisions by Brazilian judges who consider this matter. For example, economic agents who repeatedly challenge Indigenous territorial rights based on dubious arguments

could be considered bad-faith plaintiffs, reducing their chances of success in their claims. Furthermore, clarifying the importance of the timeframe thesis for the judicialization of Indigenous Lands can serve as a basis for judges to inform their understanding of concrete cases. Our goal, after all, was to shed light on the causes of this phenomenon, informing better decision-making by the actors involved in public policy on demarcating traditional territories.

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AUTORIA

LEONARDO BARROS SOARES Doctor and master in Political Science from the Federal University of Minas Gerais (UFMG). Assistant Professor at the Department of Social Sciences, Federal University of Viçosa (UFV).
Lattes: http://lattes.cnpq.br/5693981542523303.
leonardo.b.soares@ufv.br

CATARINA CHAVES COSTA Doctorate student in Political Science from the University of São Paulo (USP). Master in Political Science from the Federal University of Pará (UFPA). Lattes: https://lattes.cnpq.br/7714221204244549.
catarinachaves26@gmail.com

GIOVANNA DUTRA SILVA VALENTIM Doctorate student and master in Political Science from the University of São Paulo (USP). Lattes: http://lattes.cnpq.br/1186777300222130.
giovannadvalentim@gmail.com

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CONTRIBUIÇÃO DE AUTORIA

LEONARDO BARROS SOARES
Conceptualization; data curation; formal analysis; funding acquisition; investigation; methodology; project administration; resources; software; supervision; validation; visualization; writing – original draft; writing – review & editing.

CATARINA CHAVES COSTA
Conceptualization; data curation; formal analysis; investigation; methodology; software; validation; visualization; writing – original draft; writing – review & editing.

GIOVANNA DUTRA SILVA VALENTIM
Conceptualization; data curation; formal analysis; investigation; methodology; validation; visualization; writing – original draft; writing – review & editing.

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