

Introduction

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Abstract

This dossier, which emerged as the result of a session organized by Miller and Baines in the AAA/CASCA joint Conference in Vancouver, Canada, in 2019, brings together a collection of articles on Indigenous peoples, tribunals, prisons and legal and public processes, uniting scholars from Canada and Brazil. The dossier was widened to include more Brazilian anthropologists who work on these themes with indigenous peoples in politically engaged research, to introduce international comparative approaches to studies with indigenous peoples, as well as stimulating a broader exchange between social anthropologists in both Brazil and Canada, and examine the specific research issues in this area of studies in which they are involved in different national contexts. The intention is also to present in the English language some current research in these areas which is being carried out in Brazil to a wider international audience.

Key words: Indigenous peoples, tribunals, prisons, legal and public processes.

Introdução

Resumo

Este dossiê, que surgiu como resultado de uma sessão organizada por Miller e Baines na Conferência Conjunta AAA / CASCA em Vancouver, Canadá, em 2019, reúne uma coleção de artigos sobre povos indígenas, tribunais, prisões e processos legais e públicos, unindo acadêmicos do Canadá e do Brasil. O dossiê foi ampliado para incluir mais antropólogos brasileiros que trabalham nesses temas com povos indígenas em pesquisas politicamente engajadas, para apresentar abordagens comparativas internacionais para estudos com povos indígenas, bem como estimular um intercâmbio mais amplo entre antropólogos sociais no Brasil e no Canadá, e examinar as questões específicas de pesquisa nesta área de estudos em que estão envolvidos em diferentes contextos nacionais. A intenção, também, é apresentar, na língua inglesa, algumas pesquisas atuais nessas áreas que estão sendo realizadas no Brasil para um público internacional mais amplo.

Palavras-chave: Povos indígenas, tribunais, prisões, processos legais e públicos.

Introduction

Stephen Grant Baines

Bruce Granville Miller

The idea of organising this dossier emerged from the session entitled, “Indigenous Peoples, tribunals, prisons, and legal and public processes”, at the Canadian Anthropology Society/ American Anthropological Association (CASCA/AAA) joint Conference held in Vancouver in November 2019, co-organized by Bruce Granville Miller (Department of Anthropology, University of British Columbia - UBC, Canada) and Stephen Grant Baines (Department of Anthropology, University of Brasília - UnB, Brazil). It was one in a series of sessions in international conferences which we have co-coordinated since 2008, aiming to bring together scholars from Canada and Brazil who undertake field research with indigenous people in politically engaged research on this thematic, and introduce international comparative approaches to studies with indigenous people, as well as stimulating a broader exchange between social anthropologists in both these countries and examine the specific research issues in this area of studies in which they are involved in different national contexts (Baines, 2015).

The abstract of the theme of the session started from the open question as to whether state institutions and legal/public processes can properly serve the interests of indigenous peoples, which has been commonly answered in the negative by social scientists. Following from this position, the relevant questions were asked, as to why and when these institutions fail and if there are remedies. And to what point social science methods are capable of determining what the remedies might be. In the conference session, panel members presented research which foregrounds ethnographic methods in North and South America, with examples from studies of the British Columbia Human Rights Tribunal, including themes such as Treaty processes in Canada, indigenous people in Brazilian prisons, reconciliation processes, and the impacts of both national and international legislation, treaty and resource negotiations, among others and the role of the expert witness (Boxberger, 2004). This is a theme which Miller (2011) has focused on for many years in Canada, with his innovative research on how oral histories might be incorporated into the existing court system.

Research with indigenous people in prisons in Roraima state, Brazil, for example, reveals intercultural misunderstandings in tribunals, where the national penal code is used by law operators to judge societies with different cultural values, often imposing sentences which are not understood by indigenous people. The creation of indigenous internal regiments, in written form, by the Indigenous Council of Roraima (*Conselho Indígena de Roraima - CIR*), despite the many difficulties involved, is proving to be one way of resolving many cases within the communities to avoid sending indigenous people to jail, with alternative punishments which are contemplated in national and international legislation. Indigenous people in British Columbia face related problems in accessing and using the BC Human Rights Tribunal to address discrimination in hiring, access to services and other areas of life. Changes in rules of testimony and cross examination, document sharing, and time limits to enter the process can produce significant change. However, indigenous justice institutions themselves may provide more relief.

When our proposal to publish some of the articles presented at the 2019 CASCA/AAA session was accepted by the journal *Vibrant* of the Brazilian Anthropology Association (*Associação Brasileira de Antropologia - ABA*), recommendations were made by the editors, following the objectives of this journal, to include more Brazilian authors with the aim of turning this dossier into a comparative volume and presenting, in the English language, some current research in these areas which is being carried out in Brazil to a wider international audience. We present below, a short summary of each article in this dossier, keeping, as closely as possible, to the authors’ own words.

This dossier starts with Bruce Granville Miller's article which discusses his work as an ethnographer and an expert in the British Columbia - BC Human Rights Tribunal over the past fifteen years, which has led him to believe that these trials and hearing create fear and trauma for indigenous litigants and that reform of these legal and quasi-legal venues must be undertaken with this problem in mind. Miller argues that this is so, even though some cases end in potentially transformative rulings. These cases, however, also create fear in the indigenous complainants. His article aims to present some of the qualitative feel of the process in the hearings themselves through excerpts from his notes taken in the tribunal during hearings. Since the tribunal has no transcript, these notes remain the only source of insight into process as opposed to the published decisions which concern black letter law. He focuses on some specific cases (Miller, n.d.) to conclude that the trauma of the process, even in the case of victory, is severe. This author points out that perhaps the most significant feature was the fear experienced by the complainants bringing a suit, especially fear of police, concluding that the fear the process generates is perhaps the greatest weakness of the British Columbia Human Rights Tribunal and its capacity to serve indigenous people, and the deeply entrenched racism in Canadian society which permeates the thinking of the social agents.

The article by Stephen Grant Baines, on the criminalization of indigenous people in Roraima state, Brazil, and indigenous strategies to bring their rights into effect in the face of enormous injustices, inequalities and racism, reveals that the justice system throughout Brazil has no mechanisms to identify indigenous people and recognize their differentiated constitutional rights, reinforcing the inequalities and injustices for indigenous people, who are the most oppressed and discriminated segment of the population since colonial times (Baines, 2016). Over recent years, indigenous organizations in Boa Vista, the capital of Roraima state, have drawn attention to this problem and taken protagonist measures to try to change it. The Indigenous Council of Roraima (CIR), through their lawyer, Joênia Wapichana, elected, in 2018, as the first indigenous woman to become a federal deputy in Brazil, set up an innovative project to write down indigenous oral law so that it could be used locally as internal regiments to deal with criminal cases, encouraging indigenous communities to resolve disputes through councils of local leaders and thereby avoid indigenous people being handed over to the increasingly violent mainstream criminal justice system. Since this research project started, in 2008, the author observes a growing political awareness among some indigenous people of their differentiated rights leading to mobilizations among some prisoners, to demand that their rights be recognised and respected. Currently, the Macushi student, Léia da Silva Ramos, is doing research for her PhD within Baines's research team at the University of Brasília, on indigenous people in prison in her home state, Roraima, opening up new possibilities which aim to bring changes to the dire situation in which these people are in, since she is a school teacher who is well-known in the indigenous community in that state, and is personally acquainted with some of the indigenous people who are in prison.

The third chapter, written by Fumiya Nagai, examines the growing space for the United Nations Declarations on the Rights of Indigenous Peoples (UNDRIP) for protecting aboriginal rights and title in Canada. The 2014, Supreme Court of Canada's (SCC) landmark decision in *Tsilhqot'in Nation v. British Columbia*, in which the SCC recognised aboriginal title to a specific territory for the first time, along with specific aboriginal rights to hunt, trap, and engage in other practices, is examined by Nagai. In Canada, aboriginal title is a collective, inherent aboriginal right to land, mainly defined in the court, which emphasises specific practices of each distinctive culture and at the same time it also has unique features such as uniformity across Canada, applying to all indigenous groups. The *Tsilhqot'in*, like other Indigenous peoples in Canada, have engaged in negotiations with the federal and provincial governments, further defining their rights and resulting in several documents that have agreed to develop nation-to-nation relationships towards a lasting reconciliation. There is an increasing reference to not only domestic but also international human rights frameworks relating to indigenous peoples,

especially the UNDRIP, while in their fight against mining companies they have utilised the language and mechanisms of international human rights. Nagai examines the growing space for the UNDRIP in defining “generative” aboriginal rights and title.

Brenda Fitzpatrick’s article looks at anthropology, conflict transformation and cultural violence in environmental conflict from the example of the controversial Site C dam in the province of British Columbia, Canada. This author describes how ethnographic research that incorporated a conflict transformation perspective and included individuals from both sides of the issue highlighted both contrasting views on human-environment relations and the inequitable conditions under which they met through the Environmental Assessment (EA) process, discovering that opposing perspectives concerning human responsibilities to the environment and other humans motivated the conflict, and that notions of objectivity, progress, and technological potential operated as cultural violence, legitimizing the structural imbalance of the EA process, authorizing the extractivist violence of Site C. Fitzpatrick argues that anthropological research can uncover the cultural violence underlying unfair structures and suggest ways to address it and that challenging cultural obstacles to decolonizing state institutions is a role that feels especially appropriate for non-indigenous anthropologists.

The interaction between the criminal justice system and persons of the Xakriabá indigenous people facing criminal prosecution in the Manga district in northern Minas Gerais state, Brazil, is examined by Rodrigo Arthuso Arantes Faria, drawing on the material gathered in the fieldwork he carried out in the region in early 2020. He also bases his article on references to current legislation, selected jurisprudence from the Brazilian Supreme Court, and documents produced by the bodies responsible for the criminal and prison policies in Brazil. This author argues that the category of ‘indigenous person’ mobilized by state agents differs from that conceived by the Xakriabá themselves, and that this dissonance often implies the lack of ethnic recognition of these persons throughout the criminal process and the failure to record their presence in official documents. After reviewing Brazilian and international literature, analysing the domestic legislation and international framework in force, this author brings examples from the jurisprudence of the Supreme Court on this issue of ethnic recognition and the effective enforcement of indigenous rights in Brazil.

From his fieldwork experience in Minas Gerais, he argues that indigenous people are not recognized as such when they do not fit into the stereotype of ‘indians who are still indians’, leaving outside legal protection those indigenous people considered ‘acculturated’ or ‘integrated’, who are thus seen as outlaws. Arthuso Arantes Faria concludes that the judiciary and its ‘rule of law’, do no more than revive and update the manichaeic binarity of colonial, imperial, old republican and dictatorial times, and affirms that the judiciary wears with brand new discursively democratic clothes the pervasive coloniality that has always defined the relationship between states and indigenous peoples in Brazil.

The article by Frederico Oliveira examines indigenous legal resurgence as a path to reconciliation from three case studies in Canada. He affirms that the court system has been instrumental lately in dramatically enhancing the opportunity for recognizing indigenous rights, however, through an approach toward the indigenous which limits their autonomy and capacity to establish sovereignty on their own terms. Added to this is the fact that the Crown (the Canadian state and its government), in the Canadian case, has been consistently reluctant to implement court decisions which are favourable to native communities and nation-to-nation dialogues. The author presents three recent cases in the legal history of Canada that exemplify what he calls a revitalized movement in the affirmation of Indigenous rights, considering several societal aspects that have changed through colonization and, at the same time, asserting the connection with crucial practices in their cultures.

The author defends an individualized approach, which respects the particular history of each community and their relationship with colonial authorities and processes and asserts that the unifying element that connects them and many others around Canada is the protagonism taken by the community members to honour frequently neglected nation-to-nation agreements instead of waiting for the Crown to act. The strategy of blockades taken by the Wet'suwet'en, self-regulated fishery organized by the Mi'kmaq, and the Turtle decision, represent active stands that challenge legal regimes that have consistently failed indigenous peoples and have worked to reconstruct them in accordance with settler legislations and priorities.

Oliveira argues that for the courts to be used as a beneficial path to recognizing indigenous rights, new models must be constructed that modify the Canadian systems which needs to be addressed to suit indigenous cultures and prevent cultural degradation and support fair judicial trials, through the incorporation of indigenous judicial systems into the existing Canadian government. The author argues that these systems must work in a complementary fashion.

Historical justice and reparation for indigenous peoples in Brazil and Canada is the theme of the article by Ana Catarina Zema, Clarisse Drummond, Marcelo Zelic, and Elaine Moreira, in which they examine the struggle of indigenous peoples for historical justice and reparation which has gained visibility with the Truth Commission work both in Brazil and Canada. The final reports of these commissions confirmed the Canadian and Brazilian states' responsibility for the genocide of thousands of indigenous people. These authors aim to evaluate, from the Critical Studies of Transitions' perspective, the reconciling and reparative scope of the Truth Commissions of Brazil and Canada and to analyse the difficulties of implementing their recommendations, showing their inability to satisfactorily address the past and to stop the continuity of structural violence affecting them.

Ela Wiecko Volkmer de Castilho and Tédney Moreira da Silva examine the incarceration of indigenous people in Brazil in the light of Resolution No. 287 of the National Council of Justice of Brazil (CNJ), which came into effect in 2019. These authors analyse this Resolution which establishes special procedures for the treatment of indigenous people who stand as accused, defendants, who are sentenced or are deprived of liberty and shows the necessary process to ensure their rights within the Brazilian Judiciary Branch. The authors describe this Resolution as a surprising step by the CNJ to effectively recognize the cultural and ethnic plurality of indigenous peoples of Brazil, despite the fact that it retains contradictions inherent to the challenge of overcoming the assimilationist paradigm. Also, they point out that, given its resolute and administrative nature, the scope of this measure is limited to its role of challenging the institutional racism present in the Judiciary Branch. The authors recognise that the Resolution in itself is not enough, but can be a useful tool for indigenous people to make effective their rights.

João Francisco Kleba Lisboa, reflects on indigenous peoples and the judiciary in Brazil, makes an appeal for a Legal Anthropology approach, and discusses the possibilities of this branch of anthropological research in observing the relations of Brazil's Judiciary over the Indigenous Peoples. The author argues that legal forms and discourses, that constitute judicial acts and decisions, express a cultural and historically conditioned view from legal operators (judges, barristers, lawyers, etc.) about Native Peoples and their customs. This author argues that true anthropology occurs when one is willing to open oneself to the viewpoints of the interlocutor, and stresses the importance in research in Legal Anthropology to not be limited to intellectual debates around themes that are distant from the daily lives of both indigenous peoples and legal professionals.

The article by Gustavo Hamilton Menezes' discusses how Brazilian magistrates have begun to approach the realities of indigenous peoples through experiences in the elaboration and implementation of training courses for judges on the theme of indigenous rights. These courses are an important step toward a necessary curricular adjustment, with a corresponding impact on how magistrates understand the theme and in collective

efforts to develop a plural and multicultural justice. In this context, the author argues, anthropology assists magistrates in expanding their knowledge of indigenous societies in Brazil, particularly in what pertains to different peoples' conceptions of justice, thereby making intelligible the complex realities that typically unfold in interethnic situations. This author, an anthropologist who has a long experience working in the National Indian Foundation (*Fundação Nacional do Índio* –FUNAI) on cases of indigenous people in prison all over Brazil, draws on his own personal experience in giving courses on anthropology and indigenous peoples to Brazilian magistrates.

Ana Flávia Moreira Santos, analyses in the old administrative headquarters of the Indian Protection Service (*Serviço de Proteção aos Índios - SPI*), known as the Inspectorate of Indians, in Amazonas and Acre states, an Inquiry which was instituted in 1931 on the orders of the Federal Intervener of Amazonas state. In an approach to local and regional contexts, this article articulates the inquiry into land conflicts that occurred in the previous decade, around the imposition of a commercial monopoly on a resource that was historically configured as the “remedy for poverty” – the Brazil nut trees. The article demonstrates how the narratives about these conflicts are triggered, in the inquiry, according to the circular logic of detraction, aiming at the criminalization of indigenous people and SPI representatives, as a way of accumulating legitimacy for the extralegal exercise of power. Finally, it highlights the strictly symbolic character of the disputes, which sought to restrict the legal meanings of the “Indian” category, removing the legitimacy of the Inspectorate in acting among the so-called “semi-civilized”, and excluding indigenous people from access channels to the State.

The article by Felipe Pereira Jucá, an anthropological approach to indigenous people in prison in the city of São Gabriel da Cachoeira, Amazonas state, starts from a general view on prison conditions in Brazil, which have attracted the attention of social movements, the press, and researchers, marked by an increase in the prison population of 707% between 1990 and 2016, with no sign of slowing down. This article describes the relation between the judiciary and indigenous peoples, evincing yet another point of tension in interethnic relations. As such, this article analyses the current Brazilian legislation and the practices of the criminal justice system as an official means of prosecution, conviction, and sentencing in the town of São Gabriel da Cachoeira, in the northwest of the state of Amazonas, Brazil, and the impacts of state-imposed punishment on indigenous peoples. The article is based on the author's personal experience in São Gabriel da Cachoeira, when he was invited by the Public Defence Department of Amazonas State to work in São Gabriel da Cachoeira, to give juridical assistance to the poorest segments of the population, until a public examination was held and a public defender was nominated for this job.

The author argues that acts of the state that affect traditional populations should be analysed through a plural vision, taking into account the different local identities that exist in the Amazon region, so as to construct new juridical approaches that contemplate traditional peoples and contribute to the eradication of social evolutionist and racist ideas that this study has shown to be prevalent. This author expresses the hope that, with this new mechanism at the disposal of judges and other operatives in juridical field, that the rights of indigenous peoples be considered and guaranteed.

The final article in this dossier, by Antonio Hilario Aguilera Urquiza, Ariovaldo Toledo Penteadó Junior, and Caíque Ribeiro Galícia, examines the relation between the Brazilian State and the imprisonment of indigenous people in the state of Mato Grosso do Sul, reflecting on relations between the criminal justice system and indigenous peoples through a perspective that combines anthropology and criminology as complimentary theoretical lenses through which contemporary indigenous incarcerations can be understood. It charts relations between the historical constitution of the Brazilian criminal justice system and the ideas of “necropolitics” as a defining thread of policies that impact the conditions in which Indigenous peoples are incarcerated. The article considers some of the effects of the COVID-19 (SARS-CoV-2) pandemic on the prison system of the state of Mato

Grosso do Sul, where it is possible to evaluate the effects of measures undertaken by the National Justice Council to alter the levels of provisional imprisonment, even if the overall average of imprisoned Indigenous peoples continues to rise. To this end, survey and data processing were carried out using a deductive methodology, coupled with an outline of historical considerations.

We hope that this collection of articles will encourage reflections on the themes examined from an international perspective, taking into account the local and national contexts which are examined, and thereby lead to further research in this field, especially from a comparative perspective, which examines, from anthropological approaches, indigenous peoples, tribunals, prisons, and legal and public processes, in different national states, and look at the specific contexts which shape research in countries with very different histories, diverse ways of conceptualizing indigenous peoples who live within their borders and also transcend their national frontiers, different ways of understanding the national state, enormous cultural differences and varied legal systems. While the Brazilian legal system is based on a civil law tradition, with the Federal Constitution, in force since October 5th, 1988, being the supreme rule of the country, Canada is a bijural country, having both the British common law and French civil law systems. However, despite the enormous differences, the issues examined in this collection are also traversed by universal trends which unite them, including research undertaken by an increasing number of indigenous anthropologists and a dialogue on an international scale which has been brought into effect over recent decades by indigenous political movements contesting the aggressive capitalist global tendencies to attack indigenous peoples and their territorial rights with the aim of expanding agribusiness, ranching, logging, mining, and large-scale infrastructural development projects such as hydroelectric dams, oil pipelines and highways, a trend which is directly threatening indigenous peoples in various parts of the world.

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