

Relations between the Brazilian state and the incarceration of Indigenous peoples: a look at the situation in Mato Grosso do Sul in the context of the COVID-19 pandemic

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Abstract

This article reflects 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 a sketch of historical considerations.

Keywords: Criminal Justice System, Indigenous peoples, Covid 19 Pandemic, Incarceration.

Relações entre o estado brasileiro e o encarceramento de indígenas: olhares para a situação no Mato Grosso do Sul no contexto da pandemia de COVID-19

Resumo

O presente trabalho apresenta uma reflexão sobre o sistema de justiça criminal e os povos indígenas a partir de uma visão conjugada entre a antropologia e a criminologia como aportes teóricos para compreender o fenômeno do encarceramento indígena contemporaneamente. O propósito é traçar relações entre a formação histórica do sistema de justiça criminal brasileiro e as ideias de necropolítica como definidora de políticas que influenciarão a realidade dos indígenas que estão encarcerados. A abordagem apresenta algumas ideias em torno das consequências da pandemia de COVID-19 (SARS-CoV-2) nos dados do sistema penitenciário do Mato Grosso do Sul, onde foi possível identificar o impacto das medidas do CNJ na alteração do patamar das prisões provisórias, embora a média geral de indígenas presos continue em ascensão. Nesse sentido, foi feito levantamento e processamento de dados a partir de uma metodologia dedutiva com alguns contornos de reflexão histórica.

Palavras-chave: Sistema de justiça criminal, Povos indígenas, Pandemia de COVID-19, Encarceramento.

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Introductory remarks

This article investigates certain elements of the Brazilian criminal justice system in relation to Indigenous peoples by demonstrating how the historical constitution of the criminal justice system perpetuates colonial practices into the 21st Century. It reflects on how the process of the colonization of the Americas – which, at its core, is a denial of plurality – is axiomatic of the structure of the criminal justice system. The latter, revealing continuities and discontinuities with the process of colonization, largely continues to make use of the same devices in the exercise of punitive power.

This broad-stroked sketch of the context of the emergence of Latin American states aims to show how ideas that originated in Europe and were incorporated into the Brazilian bureaucratic structure. Thus, despite efforts to disengage from the metropolis, which ultimately resulted in the formal declaration of independence and in the birth of the Brazilian state, the fact remains that colonial relations did not disappear with the end of the colony.

This process has been seen through the lens of decolonial ideas (Quijano, 2005; Dussel, 1977) that aim to understand political action (and criminal selectivity) within the criminal justice system as it pertains to Indigenous peoples' through the concept of 'necropolitics'. The ideas developed in this study also seek to provide in-depth analyses of some of the contemporary consequences of Indigenous incarceration in light of the COVID-19 pandemic and the spread of the SARS-CoV-2 virus that causes it (Medeiros, 2020).

The first section of this article offers ideas concerning the establishment of the Brazilian state, with its Eurocentric and exclusionary origins, by focusing on the history of the two oldest law schools in the country (Recife-PE and São Paulo-SP) and the different ideas developed in each one. The academic trajectory for obtaining a bachelor's degree in law has been, and remains, directly tied to the occupation of spaces of power in the bureaucratic constitution of the state, and in the ability to guide public policies. These considerations are intended to present, in a synthetic manner, the bases of Latin American criminological thought, assisting in understanding criminal phenomena involving the Indigenous population.

¹ This is, no doubt, an extremely complex relationship, with different tensions, breakthroughs and setbacks. It is important to take note of the 2019 publication of Resolution 287/2019 by the Conselho Nacional de Justiça (Brasil, 2019), which regulates procedures for dealing with Indigenous people who are being criminally investigated or persecuted. In contrast, Bill 490, which alters the laws for the demarcation of Indigenous lands, including the "temporal marker" (which considers Indigenous land only the ones in fact occupy by the year of 1988), and removes rights of exclusivity over Indigenous lands, among other proposals, is yet to be voted.

In the second part of the article, the concept of ‘necropolitics’, developed by Achille Mbembe, will be linked to the contemporary character of the relation between the Brazilian state and Indigenous peoples. I will present a brief analysis of data on incarcerated Indigenous people in the Brazilian state of Mato Grosso do Sul (MS), which is the state with the largest numbers of Indigenous peoples in the custody of the prison system.

To this end, I surveyed and analysed the data available in the databanks of the Ministério da Justiça e Segurança Pública (MJSP; Ministry of Justice and Public Safety), through the Departamento Penitenciário Nacional (DEPEN/MJSP, National Prison Office) and the Agência Estadual de Administração do Sistema Penitenciário (AGEPEN, State Agency for the Administration of the Prison System) of the state of Mato Grosso do Sul. This analysis is contextualized by a bibliographical review which provides the theoretical basis for understanding the situation of Indigenous peoples in prison.

1. The bureaucratic construction of the Brazilian state and the criminal justice system: reflections on the emergence of Latin American criminological thought

The 21st Century criminal justice system runs on the same machinery as the European-medieval model. We are hence not dealing with a returning past, but, indeed, with a past that has never actually passed: a punitive power with a vertical structure and a tendency to expand with lethal results (Zaffaroni, 2012: 36). This premiss is buttressed by the fact that we are a product of that very same punitive power that enabled European colonizers to invade the territories of the Americas, Africa, and Oceania in order to enslave and decimate autochthonous peoples (Quijano, 1992: 13), making headways into the world by way of colonialist and neo-colonialist massacres and depredations.

To this fact we must add a consideration of internal colonialism, national patterns that reproduce the structures of (internal) domination and exploitation of heterogenous social groups in plural societies (Quintero, 2018). Dominant classes or groups “exercise colonial-type control over the social groups that pre-existed the historical establishment of the nation-state” (Quintero, 2018), reproducing the legitimizing discourse of punitive power in collusion with the age-old tendency to carve out increasingly wider spaces and to free itself of all of the shackles that limit its scope (Zaffaroni, 2012: 36-37).

The structure of state-sanctioned punitive power was the instrument of social verticalization that enabled Europe to colonize different territories, homogenizing a religious rhetoric that benefited the functioning of the apparatus of justice², and hence of social control, through the systematic negation of the Other (Fanon, 1965: 133). The rise of the modern state out of ideas for new ways to organize “bureaucracy”³ during the 18th Century was founded on a range of different theories, including contractualism, rationalism, positivism, among others. It had a direct impact and the political, social, and economic reorganization of the Americas, materialized in the “liberal revolutions” which conducted various processes of political “autonomy” (Anitua, 2008: 148).

One cannot lose sight of the central fact of these historical processes: the ethnocentric view of society – the negation of difference – was “scientifically” justified by recourse to “evolutionary” processes. Its consequence for the justice system at that historical juncture included the emergence of a humanizing guarantee of right to trial, based on the work of Beccaria and resulting from a blend of English empiricism and French rationalism (Anitua, 2008: 160).

² It is important to note that the origins of the inquisitive justice system blur historically into the Middle Ages, and its characteristics remain present in the forensic practices of Latin America

³ For Quijano, the process of the colonization of the Americas reveals certain ideas that contest the creation of the nation-state, including how the power structure that is reproduced by those which did not truly participate in the democratic distribution of this power (Quijano, 2005: 130).

The old regime's punitive logic, founded on vengeance, was ultimately "humanized" by a model that sought to set penalties of a preventative-utilitarianist character limited by the rule of law. In a general way, and with a few adaptations, this is the formula that persists today, since each national system implements a punitive method that corresponds to its relations of production (Rusche & Kirchheimer, 2004: 17-23). In other words, the objectified justice of punitive processes is not dissociated from the relations of production. It is precisely here that the filter of decolonial thought intercedes, assisting us in understanding punishment beyond the limits of its ideal bureaucratic structure in the modern state.

It is necessary to investigate oppression along ethnic, racial, and gender lines (Ballestrin, 2013: 90) which is characteristic of the criminal justice system in Latin America. This is a key to "comprehending and acting on the world, marked by the permanence of global coloniality at different levels of personal and collective life" (Ballestrin, 2013: 90), a position which is known as the 'decolonial option'. I thus investigate the criminal justice system and its relation to Indigenous people as part of an effort to overcome the epistemic, theoretical and political origins of Eurocentric thought.

In what pertains to limitations on punitive power, the purported tranquillity that the "humanizing guarantee of right to trial" afforded the criminal justice system was eroded with the emergence of Latin American states. The early structure of the Brazilian state is a telling example, since the central political figure of its "independence" (1822) was the heir to the metropolitan throne. Furthermore, the quest to attain legitimacy as an independent state required not only the elaboration of new laws, but also a new "conscience" bereft of cultural ties to the metropolis (Schwarcz, 1993: 185-186).

Hence the creation of two law schools in the provinces of Pernambuco and São Paulo in 1828. The format of their degree courses, based on study toward bachelor's degrees, conferred symbolic prestige on its students which bolstered political careers (Schwarcz, 1993: 185-186). It is noteworthy that the São Paulo law school was influenced by the liberal political model, while the one in Recife focused on racial issues through analytical models derived from social Darwinism and evolutionism (Schwarcz, 1993: 209).

In consonance, Recife developed criminological studies, influenced by the ideas of Lombroso, Garófalo, Ferri, and Benedikt (all European authors), which established the figure of the "natural born criminal" and investigated the influence of physical/ethnic characteristics in criminal practice in contradistinction to the notion of 'free will' (Schwarcz, 1993: 216). In contrast, São Paulo, which was much closer to the national capital at the time, began to delineate a tradition of "civilizational progress" and a model of freedom which was not only conservative, but also elitist and anti-popular (Schwarcz, 1993: 233-238).

There used to be a tendency to see the Recife school as a producer of scientific knowledge, while the São Paulo school was a centre for political practices that were converted into laws and concrete measures (Schwarcz, 1993: 240). It is worth highlighting the laws for controlling immigration, which were burdened with stereotyped and ethnocentric views, justified by eugenic criteria, particularly with regards to Asians and Africans (Schwarcz, 1993: 241). This is at the root of the decision to use this pretence science in the realm of punishment, as a means for an emerging bourgeoisie to deal with social problems through mechanisms of control (Olmo, 2004: 157).

These considerations on law schools and the training of bureaucrats are relevant to the present discussion insofar as the theories developed by these schools and the curricula of their degree courses were based on the European model, specifically the Portugal/Coimbra model (Schwarcz, 1993: 189). This fact reveals what decolonial thought frames as the "coloniality of power", so that the "relations of coloniality in the economic and political spheres did not end with the destruction of colonialism" (Ballestrin, 2013: 99).

Stressing, from the outset, that decolonial thought incorporates a particular complex of ideas and epistemological consequences, particularly when it is used in scientific approaches, in this article I will mainly use the idea of the 'coloniality of power', as referred to above. This idea manifests itself in three dimensions

(power, knowledge, and being) that are important elements in connecting the other ideas which I will develop in the article, as well as in linking the criminal justice system to Indigenous peoples in Brazil.

The punitive model is thus forged in the dichotomous context of the colonizer and the colonized, and it is slotted into the bureaucratic structure of the emerging Brazilian state through formal knowledge produced in law schools. To this day we find a significant breakdown in the relations between the formalism of law degrees, forensic practices, and criminal phenomena. In the words of Lima, “the process in search of a SINGLE [sic] truth places greater value [...] in the logic of arguments from authority than on the authority of the arguments” (Lima & Baptista, 2014: 12).

It should be added that European thought, particularly positivist, liberal and rationalist thought, was largely accepted outside of the contexts in which a critical conscience of the scientific method was developed, resulting in a “scientific scholasticism” (Olmo, 2004: 160). The importation of ideas was largely accepted with no discussion and without a structured system of critical thought, thus creating a deformed and artificial Latin American variant which was often disconnected from regional realities, but which “was suited to local needs and, indeed, had to be deformed so as to be rational within the Latin American context” (Olmo, 2004: 161).

In this context, the groundwork has been laid for the adoption of a criminological model highly dependent on European ideas and incorporated by a dominant elite in peripheral countries, in such a way that: (a) it functions, on an international level, as a superstructure that legitimizes the relationship between the local dominant class and dominant international centres; (b) it can internally represent the legitimacy of the dominant position, by functioning as an instrument of domination and a means for distinction from subordinate classes and groups (Olmo, 2004: 162). Latin American criminology consolidates itself with these imports from positivist philosophy and liberal ideology as routes toward order and progress, but, mostly, as means to carve a path toward “the process of implementing capitalism as a dominant mode of production” in the region while conferring legitimacy on the ascendant position of oligarchic groups implicated in relations of domination/subjection of the social makeup (Olmo, 2004: 162-164).

Criminal policies consist of a “programme which establishes the conduct that should be considered criminal and the public policies for repressing and preventing criminality and controlling its consequences” (Dieter, 2013: 18), expanding into a “project of governance”. This project is, to a large degree, intrinsically linked to the maintenance of the ethnocentric model via the formal instances for the control of violence (the police, Attorney General, the Judiciary, etc.) and the triage of those who enter the criminal system as “criminals”.

Thus, accepting the limitations and simplifications required by the scope of this article, certain premises according to which the Brazilian criminal justice system is structured can be sketched: a verticalized punitivist model at the service of government projects for the control over selective violence toward populations that have, historically, been kept apart from the socially hegemonic arena. Indeed, reflections on criminality are not – nor could they be – a unified and hermetic discourse, but multiplicities that assist us in examining the criminal phenomenon in contemporary reality.

Sharing his own reflections on verticalized and colonialist destructive punitive power, Zaffaroni claims that we have heard much from people in the academy, legislatures, the police, etc., but that the only pertinent voice in criminality is the “word of the dead” (Zaffaroni, 2012 20). Starting from this observation, I will reflect on what our dead have to say. The question I pursue in the next section is: how can this model of monocratic and Eurocentric justice account for the pluralism and specificities of traditional peoples, and in specific Indigenous peoples?

2. Necropolitics and relations with incarcerated Indigenous peoples in Brazil

The theoretical framework outlined in the previous section provided some of the elements of the context in which the criminal justice system was elaborated, and the ethnocentric way it creates incriminating norms and criminal selectivity. Although we must demarcate the many theoretical positions on the functions and consequences of penalties, it is a moot point that the experience of incarceration is a process of acculturation (Dieter, 2013: 98) resulting from the exercise of punitive power.

Both violence and power are hence strategies for the neutralization of alterity (Han, 2017: 140), which is why, according to Ailton Krenak, Indigenous peoples have resisted for over 500 years by expanding their subjectivity, refusing the idea that they are all equal (Krenak, 2019: 31). Indeed, the notion of ‘equality’ has been used historically as a differentiating criterion of the Other through which it is possible to select “friends or enemies” of the state within the criminal justice system.

Within this context we can understand the observation that, since the formation of the Brazilian state, the lack of alterity is directed toward socially, culturally, and economically marginalized people (Aguilera Urquiza; Prado, 2016: 13-16). The workings of the criminal justice system are, above all, ethnocentric and, therefore, negate the Other toward whom punitive power (and, in its wake, violence) is directed.

These reflections are interconnected. Punitive power refers to and produces the state of exception, and with it the very emergence of the idea of the ‘enemy’⁴, thus seeking legitimacy for its acts within this “link of enmity” (Mbembe, 2018: 17). The notion of biopower operating as “the capacity to dictate who is able to live and who must die” derives from this reflection, through the separation of the human species into groups or “races” (Mbembe, 2018: 17), wherein instances which control power will act.

The right to kill and the mechanisms of biopower are hence at the origin of the modern state and are constitutive elements of this power in modernity (Mbembe, 2018: 19). In the Latin American context, where the plantation model and use of enslaved peoples drove the start of commercial exploitation, we can ponder the loss of a “home”, of rights over the body, and of political status. The result is domination through alienation from birth to social death, a true “living death” (Mbembe, 2018: 27).

Accepting the difficulty in applying necropolitics to the Brazilian reality, Mbembe coins the concept of ‘necropower’, associated with territorial fragmentation in the form of “scorched earth policies”⁵ (Mbembe, 2018: 46-47). Having been historically denied their territoriality, Indigenous people were systematically included in the “great enclosure of peace” (Souza Lima, 1995) by being actually enclosed in “reservations” (Amado, 2019: 79), bringing full circle the cycle of biopower exercised over them. Their rights to cultural diversity, language, religion, knowledge, and, above all, to their traditional territories and self-determination, were all denied.

In the same line of reasoning, the “dead” tell us that the relationship between the Brazilian state and Indigenous peoples has promoted the systematic destruction of ways of life and thought, configuring what is generally called ‘ethnocide’⁶ (Clastres, 2004: 56). Government acts institutionalized by the Serviço de Proteção

4 As a matter of fact, the concept of the ‘enemy’ adapts and finds plenty of room for expansion in the verticalized punitive model of Latin America. Yet it is worth observing the complexity of this theme in light of its adaptation to a rhetoric that purportedly takes aim at the “owners of power”, and which garners followers during the 21st Century. Their target are themes such as “combating” corruption (a bellicose concept, which necessarily assumes enemies that must be engaged), organized crime, drug trafficking, etc. Under the cover of this rhetoric we find the foundation for spaces of discretion in which the state acts against the usual suspects: social movements, Indigenous peoples, maroons, etc. On this issue, Zaffaroni observes that the “authoritarian disaster answers to no ideology, because it is not conducted by any idea, but rather by its polar opposite: it is devoid of thought” (Zaffaroni, 2014: 79).

5 The international press has for some time drawn attention to the “Indigenous issue” and to conflicts in Mato Grosso do Sul (Brazil indigenous group Guarani-Kaiowa ‘attacked’). Available in: <<https://www.bbc.com/news/world-latin-america-34166666>> accessed: 12th August 2021). More recently, the incident in which farmers used a “Caveirão” (literally “Big Skull”, a motorized and bullet-proof tractor) to intimidate Indigenous peoples, was widely reported in the national press (Salani, Fabíola. 2020. Fantástico mostra “caveirão” construído para “atropelar” indígenas no MS. Revista Fórum. Available in: <<https://revis-ta-forum.com.br/noticias/fantastico-mostra-caveirao-construido-para-atropelar-indigenas-no-ms/>> accessed: 12th August 2021).

6 A highly relevant recent development was the formal indictment of the Brazilian government by the Articulação dos Povos Indígenas do Brasil (Articulation of the Indigenous People of Brazil, APIB) on charges of genocide, as stipulated by the Roma Statue, at the International Court of Justice (ICJ) at the Hague (Pela primeira vez na história, povos indígenas vão diretamente ao tribunal de Haia, com seus advogados indígenas, para lutar pelos seus direitos. Available in: <<https://apiboficial.org/2021/08/09/inedito-apib-denuncia-bolsonaro-em-haia-por-genocidio-indigena/>> accessed: 12th ago 2021).

aos Índios (Indian Protection Service, SPI) and, later, by the Fundação Nacional do Índio (National Indian Foundation, FUNAI), left their mark, encouraged by a wide scope for action during the military dictatorship in Brazil (1964-1985), in which it is estimated that some 8,350 Indigenous people were killed “as a direct result of government agents or their omission” (Brasil, 2014).

This violence, sponsored in the name of a “civilizational process”, made emphatic use of the prison system to deal with Indigenous people that had been removed from their lands. We can discern a punitive chronology of the autochthonous people of Brazil, spanning the period from the creation of the Indigenous Post of Icatu in the interior of São Paulo state, at the start of the SPI, to the Krenak Reformatory and the Fazenda Guarani (Guarani Farm), along with other spaces built to the same end, spread throughout the national territory, whose functioning was always assured by the Brazilian state.

As if this were not enough, we must not lose sight of acts that make evident the state’s lack of commitment to the health of Indigenous people, including those that should fall to FUNAI (Valente, 2017: 205-212), which has become even more blatant in the context of the COVID-19 pandemic.

It is thus once again necessary to return to the words of the dead to make sense of the criminal justice system. At the dawn of the 21st Century, the COVID-19 pandemic has surely left its mark on relations between the state and society. In August 2021, Brazil had 565,748⁸ confirmed deaths from the disease, at least 1,128 of which were Indigenous peoples. Various different peoples were affected and there are 58,142 confirmed cases of infections according to data gathered by the Comitê Nacional pela Vida e Memória Indígena (National Indigenous Life and Memory Committee), established by the Articulação dos Povos Indígenas do Brasil (Articulation of the Indigenous People of Brazil, APIB)⁹.

In this context, a matter of great concern¹⁰, particularly in Mato Grosso do Sul, is the presence of Indigenous persons in the prison system, as they were at high risk of contagion due to the precarious sanitary conditions of these facilities. According to data from the Departamento Penitenciário Nacional (National Penal Department, BRASIL/MJSP/DEPEN), there were 1,167 imprisoned Indigenous people in Brazil in June of 2020 (Brasil, 2020). Mato Grosso do Sul had 380 Indigenous inmates (in closed, semi-open, and open regimes), according to data that stretches to October of 2020 (Mato Grosso do Sul, 2020). This is the largest Indigenous inmate population of any Brazilian state.

Faced with this scenario, the Conselho Nacional de Justiça (National Justice Council, CNJ) reacted to the pandemic by producing the CNJ Recommendation n° 62, (Brasil, 2020) formalized in March of 2020¹¹, which proposed to review verdicts of temporary imprisonment or custody in both common and juvenile criminal justice in order to reduce “epidemiological risk”. This was yet another effort at putting into practice what was already normatively anticipated and which should have been the general rule in the criminal justice system: incarceration as the last measure to be imposed. The Penal Code, which is intended to restrict the state’s actions in the criminal sphere, establishes freedom as the rule and imprisonment as the exception, particularly when there are appeals available before final sentencing.

7 As I have stressed elsewhere: “The Icatu Indigenous Land was the protagonist in a punitive meshwork that lasted for over 30 years during the Republic. Here, through the analysis of available documents, we identified 64 possible transferrals under the label of ‘doing time’, among which we pinpointed 50 names and some pictures in the few documents available, which prevented them from being erased from history” (Pentead Junior & Aguilera Urquiza, 2019: 529).

8 BRASIL. Ministério da Saúde (MS). 2021. Coronavirus Panel. Available in: <<https://covid.saude.gov.br/>> accessed: 12th August 2021.

9 Articulação dos Povos Indígenas do Brasil (APIB). 2020. *Emergência Indígena*. Available in: <https://emergenciaindigena.apiboficial.org/dados_covid19/> accessed: 12th August 2021.

10 The document produced at the end of the Acampamento Terra Livre 2020 (Free Land Camp 2020), resulting from the Grande Assembleia Nacional (Great National Assembly), pointed to a range of measures for dealing with the COVID-19 pandemic (Available in: <<https://cimi.org.br/2020/04/povos-indigenas-documento-final-atl-2020/>> accessed: 12th August 2021).

11 Later changed by CNJ Recommendation n° 68/2020 and CNJ Recommendation n° 78/2020.

However, regardless of what the norm restricts, the agents who operate the machinery of the state are the truly fundamental pieces of the justice system. Under the guise of an illusory and unreal ‘impartiality’, the historical agents acting within Brazilian society power the judicial machine, often perpetuating the same structures that crush Indigenous bodies.

Stephen Grant Baines revealed an “ethnic de-characterization of Indigenous peoples by the brokers of the state”, generating their “legal invisibility” as right-bearing subjects (Baines, 2015: 3). As we have elsewhere stressed, “making penitentiary procedure brown and uniform, states have failed to reveal the insufficiency of penitentiary institutions in applying the principal of individualization in sentencing” (Penteado Junior & Aguilera Urquiza, 2020: 92)¹².

Complementarily, the distance between official discourse (resocialization) and actual penal practices that affect communities as a whole is considerable. In the case at hand, the actions of the state – as a punitive power – has an unequal effect on Indigenous communities resulting from the shock and cultural violence that such actions provoke (Osório, 2020).

In the state of Mato Grosso do Sul, which has one of the largest Indigenous populations in the country, the agents who occupy positions of power in the bureaucratic structure of the state (the executive, legislative, and judiciary branches) almost never represent the interests of Indigenous peoples. What we noted above regarding necropolitics applies here, as legal decisions are made by agents with no relation of alterity to the Indigenous population, with no recognition of their unique ways of relating to the world. Frequently, the positions in which power is exercised are occupied by agents that are directly or indirectly involved in land disputes over Indigenous territories.

The 1988 Federal Constitution confers a unique juridical status on Indigenous peoples (Article 231). Judgements on matters related to “disputes over Indigenous rights” falls in the jurisdiction of Federal Courts (Art. 109, XI, CF/88). However, interpretations of this rule were considerably changed by the Court of Appeals through the discussions that led to Summary nº 140¹³, which divides the collective stewardship of Indigenous rights (jurisdiction of the Federal Courts) to the individual stewardship of Indigenous persons (State Courts), an arrangement that favours the perpetuation of the interests of traditional elites (Oliveira & Tenório, 2020). The impact of this shift on legal practices is immense, considering that, typically, State Justice is closely aligned to local interests (considering the agents involved in operating it), much more so than the Federal Courts.

This fact plays an important role when we compare the average of incarcerated Indigenous peoples in the period from 2018-2021¹⁴ that resulted from cases tried in Federal and State Courts. Graph 01 results from the compilation of data on incarcerated Indigenous people plotted against the jurisdiction in which cases were tried (Federal or State), taking into account both those who are under provisional arrest (temporary incarceration or custody) and those who are doing time (*res judicata*).

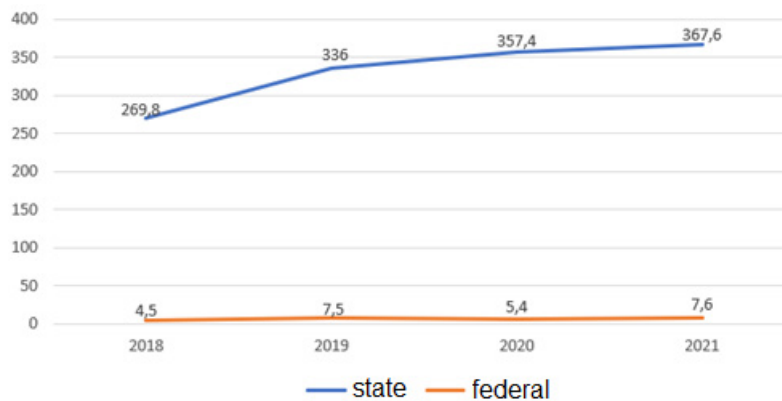
Since 2011, the AGEPEN/MS makes available data on Indigenous people arrested in Mato Grosso do Sul, providing an important source for scientific research on the theme. However, it does not reveal the methodology used in producing the data, thereby creating barriers against more in-depth analyses on the situation of incarcerated Indigenous persons. In relation to the distribution of cases between Federal and State Courts:

12 A number of researchers have observed that, in Brazil, many Indigenous people come to be counted as ‘brown’ (*pardo*) once they enter the prison system. (Baines, 2015)

13 Summary nº 140 of the Court of Appeals: “It is the jurisdiction of State Courts to try and judge crimes in which Indigenous persons feature as culprits or victims”. (Available in: https://www.stj.jus.br/docs_internet/revista/eletronica/stj-revista-sumulas-2010_10_capSumula140.pdf accessed 12th August 2021).

14 The 2018–2021-time frame was chosen because data on Indigenous people incarcerated according to the jurisdiction that emitted their arrest warrants was only made available by the AGEPEN/MS in 2018.

Graph 01: distribution of cases between Federal Courts and State Courts (2018-2021)¹⁵

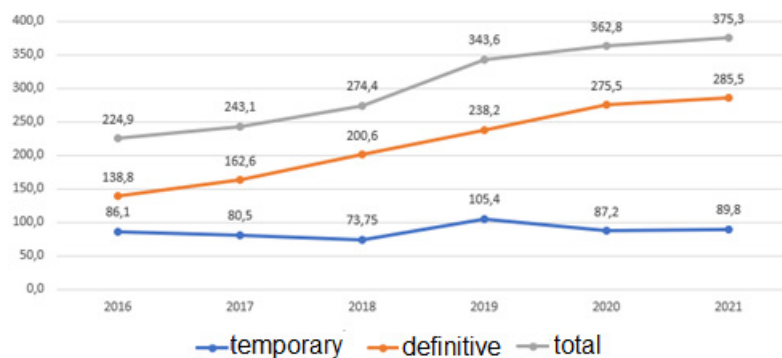


Taking the above considerations into account, we examined the number of Indigenous people incarcerated in Mato Grosso do Sul between 2016 and 2021 in relation to nature of their status in the prison system: temporary or definitive custody (Mato Grosso do Sul, 2020). Our aim is to identify possible variations in these numbers in light of the recommendations of the National Justice Council (CNJ) concerning imprisonment in the context of the COVID-19 pandemic, considering the period between March 2020 and June 2021.

Allowing that the measures for reviewing sentences according to the guidelines of the CNJ in the context of the pandemic specifically targeted Indigenous people (to a degree), this may indicate changes in the general trend of imprisonments. The available data was thus plotted in terms of the nature of imprisonment.

For this data to be measured against the general analysis, we calculated the averages corresponding to the total number of prisoners in monthly intervals for each year. The averages also take into account the lack of data for certain months. In general, however, we can discern the following behaviour:

Graph 02: average of Indigenous peoples incarcerated according to the nature of their imprisonment (temporary or definitive custody) from 2016-2018¹⁶



¹⁵ All data is publicly available at the AGEPEM/MS website. There are no observations concerning the methodology used for data collection; certain ambiguities may arise from discrepancies between self-identification and alter-identification of incarcerated peoples. However, the numbers are official, which makes them highly relevant for scientific research as a reflection of public policies (Available in: <<http://www.agepen.ms.gov.br/informacoes-penitenciaras/>> accessed: 12th August 2021).

¹⁶ Data analysed by the authors based on the AGEPEM/MS database (Available in: <<http://www.agepen.ms.gov.br/informacoes-penitenciaras/>> accessed 12th August 2021).

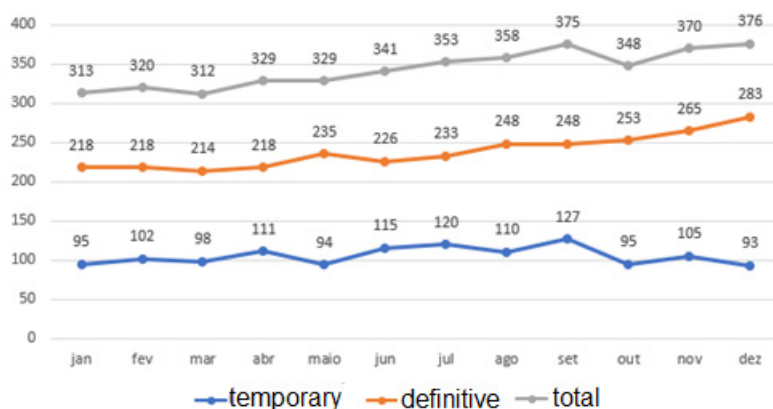
Although the average of definitive incarcerations has been growing, it is thus possible to identify a significant dip in the average for 2020, a fact that has, until now, been consistent with the data consolidated up to June 2021.

Concerning the specific measures adopted by prison facilities in Mato Grosso do Sul as a consequence of the COVID-19 pandemic, we know that part of the Indigenous population incarcerated in the city of Campo Grande was vaccinated, although we lack official numbers¹⁷.

The matter is complex and involves diverse factors that influence a range of research hypotheses. Furthermore, as even the National Immunization Plan (Plano Nacional de Imunização (PNI)) accepts, along with a higher risk of death from the disease, there is likewise greater impact of the pandemic on vulnerable populations (Brasil, 2021: 17).

For the purpose of comparison, taking into account the context of the pandemic, this is the graph for temporary and definitive custody for 2019:

Graph 03: data on temporary and definitive incarceration of Indigenous people in 2019¹⁸



It is clear that the blue line shows greater fluctuations, perhaps because provisional decisions can be more easily revised. The graph shows that the number of incarcerated Indigenous people rose steadily, carried mostly by the number of those in definitive custody. The dip in total numbers between September 2019 and November 2019 may be linked to the decrease in temporary detainments, which, in turn, may be related to different preventative actions of the CNJ¹⁹ concerned with cautionary measures. Confirming this, however, would require a different study.

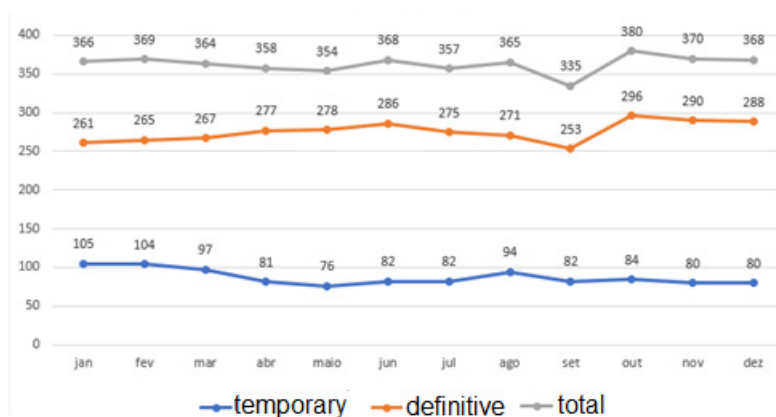
Concretely, the COVID-19 pandemic, which officially began in Brazil in March of 2020, resulted in measures concerned with the incarceration of Indigenous people. As mentioned above, the CNJ established guidelines for legal procedure, aiming to avoid incarceration by considering the fragile biosecurity conditions in prison facilities. The variations in 2020 are plotted in Graph 04:

¹⁷ Available in: <<https://www.agepen.ms.gov.br/vacina-contracovid-19-comeca-a-ser-aplicada-em-reeducandos-da-capital/>> accessed 12th August 2021.

¹⁸ Data analysed by the authors based on the AGEPEN/MS database (Available in: <<http://www.agepen.ms.gov.br/informacoes-penitenciarias/>> accessed 12th August 2021).

¹⁹ A structure that is still being implemented in what concerns, for example, hearings on the nature of custody and their regulation, which only came to be integrated into Brazilian juridical order in 2019, although its foundation harks back to the American Convention on Human Rights of 1969. This makes evident the need to tackle normative provisions with concrete public policies for the operationalization of rights.

Graph 04: data on temporary and definitive incarceration of Indigenous people in 2020²⁰



Graph 04 shows a stabilization of the total number of incarcerated Indigenous persons (2019-2020) when the variable factor (the COVID-19 pandemic) is taken into account. What we would like to highlight is the downward tendency that begins in March 2020, achieving a relative stability at the level of between 50 and 100 people, a fact that may result from the measures, mentioned above, of the CNJ in regards to provisional custody. In contrast, Graph 03 (referring to 2019) has a variation of between 100 and 150 Indigenous persons in temporary incarceration. The same level of variation of between 50 and 100 people is being repeated in 2021, although we do not want to make final claims regarding this period in the absence of consolidated data.

Complementarily, the AGEPEN/MS database does not present data on the ethnic configuration of incarcerated Indigenous persons, which point to certain provisional conclusions on the invisibility of these communities as bearers of specific characteristics.

However, in reply to a legal request from Observatório Sistema de Justiça Criminal e Povos Indígenas²¹ (Observatory of the Criminal Justice System and Indigenous People), the Departamento Penitenciário Nacional (National Penitentiary Department, DEPEN) presented notice n° 45/2021²². This notice attests that, of the total number of incarcerated Indigenous persons in Mato Grosso do Sul, 349 people informed their ethnic identity. It is thus possible to identify that, at present, the prison system has custody of people of the following ethnicities: “Guarani Kaiowá, Kaiowá, Guarani, Terena, Guarani Caiowá, Kadiuwéu and Kadiwéu”(sic)²³.

No standard approach is available for identifying ethnic affiliations. In the official notice mentioned above, there is no data concerning the methodology used to identify ethnic affiliation, although we can assume that it is based on self-declared statements by detainees.

There is no simple or easy solution; perhaps there is no solution at all. However, it should be remembered that incarceration implies a variety of collateral damages that transcend the individual who is in the custody of the prison system, directly affecting his or her family and community (Ferrecchio, 2017: 22)²⁴.

²⁰ Data analysed by the authors based on the AGEPEN/MS database (Available in: <<http://www.agepen.ms.gov.br/informacoes-penitenciarias/>> accessed 12th August 2021).

²¹ Available in: <https://apiboficial.org/observatorio-de-justica-criminal/> accessed: 16th August 2021.

²² Notice n° 45/2021/DIAMGE/CGCAP/DIRP/DEPEN (process n° 08016.006910/2021-71).

²³ We have chosen to maintain the orthography of de DEPEN document. The lack of standardization in writing the names of ethnicities in official documents may reflect a defect of technical training in identifying these subjects and their respective ethnic identities (Notice n° 45/2021/DIAMGE/CGCAP/DIRP/DEPEN; process n° 08016.006910/2021-71).

²⁴ It should be noted that, according to the Attorney General Marco Antonio Delfino de Almeida, the “Kaiowá and Guarani are over-represented in the prison system, with an average of 520 detainees out of 100,000 citizens, double the national average, three times the world average, close to the American average” (Penteado Junior & Aguilera Urquiza, 2020: 96).

When Indigenous peoples are considered, and the reproduction of the logic of ethnocentric coloniality is taken into account, there is a tendency to perpetuate domination of Indigenous bodies. As if this were not enough, after incarceration Indigenous persons are not provided with interpreters, anthropological expertise, assistance from FUNAI, juridical support, or the means for reproducing their cultural practices (Penteado Junior & Aguilera Urquiza, 2020: 93–113).

Beyond existing norms, society must establish ties of alterity to understand the issue in relation to the criminal justice system and Indigenous peoples. We must move beyond the aseptic frigidity of bureaucratic structure, turning our attention to understanding and recognizing the specific and unique forms of social organization of the different Indigenous nations. Listening to what “the dead” tell us, we can at least try to better understand them, and to elaborate public policies that will effectively protect incarcerated Indigenous persons.

Final Thoughts

The bureaucratic structure developed in Brazil during the 19th Century is based on the ethnocentric thought that flourished in European centres of knowledge and was consolidated in the colonies. Political emancipation did not profoundly change colonial thought, which practically reproduces the same logic into the 21st Century. Punitive power is exercised vertically, geared toward the social control of those who have been marginalized.

We cannot engage the prison system without the filter of colonial thought, without what is called the ‘coloniality of power’. We find, here, a complete disregard for the Other coupled with the establishment of spaces of conflict between those who make up the elite and those who suffer the wages of power.

The Indigenous issue is no exception. In 2020, in the context of the COVID-19 pandemic, the actions and omissions of the Brazilian state in relation to Indigenous people became more evident. It is necessary to break with the view that only normative provisions will solve social problems by accepting that the actors involved in the process of criminalization, from police officers to members of the judiciary, must tackle the system from its true basis and thereby to create ties of alterity.

Incarceration can be seen to increase constantly by incorporating marginalized populations (Harvey, 2014) or outsiders (Becker, 2008), or as a substitution for the welfare state (Wacquant, 2003, 2004) against noxious individuals, designated enemies of society (Zaffaroni, 2014). In Mato Grosso do Sul, the home of Brazilian agribusiness, the consolidated data show that, despite administrative measures intended to review decisions to keep Indigenous peoples incarcerated, during 2020 the total number of Indigenous peoples in the prison system remained steady.

For years the state has topped the Brazilian ranking for the incarceration of Indigenous peoples, in blatant disrespect for constitutional clauses, such as Article 231 of the Federal Constitution of 1988, which recognizes rights to Indigenous social organization, customs, languages, beliefs, and traditions (Brasil, 1988), and international treaties such the United Nations Declaration on the Rights of Indigenous Peoples (UN 2008: articles 5 and 34) and or the Indigenous and Tribal Peoples Convention (ILO 1989: arts. 8^o, 9^o e 10). To these should be added Resolution no 287/2019 (Brasil, 2019) of the CNJ and Resolution no the National Council for Criminal and Penitentiary Policy (Conselho Nacional de Política Criminal e Penitenciária (CNPCP), which establish specific measures for incarcerated Indigenous people or those undergoing trial.

Finally, the past is more present than ever. Indigenous people are incarcerated in increasing number and, now, during a pandemic, the cycle of extermination persists, reminiscent of the high rates of lethality of the Spanish flu epidemics in the last century.

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