

“We’re Totally Worthless” – An Anthropological Approach to Incarcerated Indigenous Persons in the City of São Gabriel da Cachoeira, Amazonas

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Abstract

Prison conditions in Brazil have attracted the attention of social movements, the press, and researchers. The prison population grew 707% between 1990 and 2016, with no sign of slowing. This article does not seek to investigate the causes of this dramatic increase — a statistic that is nonetheless worth highlighting — but rather to describe the relation between the judiciary and a specific segment of society, indigenous peoples, evincing yet another point of tension in inter-ethnic relations. As such, this article analyzes the available Brazilian legislation and the practices of the criminal justice system as an official means of prosecution, conviction, and sentencing in the City of São Gabriel da Cachoeira, in the northeast of the state of Amazonas, Brazil, and the impacts of state-imposed punishment on indigenous peoples.

Keywords: Incarceration; Criminal justice; Indigenous peoples; Democratic state; Pluralism.

“Nós não valem nada” – Uma abordagem antropológica dos indígenas em situação de prisão na cidade de São Gabriel da Cachoeira/Amazonas

Resumo

A situação prisional no Brasil tem chamado a atenção de movimentos sociais, da imprensa e de pesquisadores. O crescimento da população carcerária chegou a 707% entre os anos de 1990 e 2016, sem demonstrar sinais de contenção. Este artigo não busca investigar as causas desse aumento vertiginoso - que é digno de realce enquanto dado quantitativo - mas descrever a relação do Estado-juiz com um segmento social determinado, qual seja, os povos indígenas, evidenciando mais um ponto de tensão nas relações interétnicas. Com isso, analiso a legislação brasileira disponível e as práticas do sistema de justiça criminal enquanto meio oficial de processar, julgar e executar penas na cidade de São Gabriel da Cachoeira, no noroeste do estado do Amazonas, Brasil e os impactos da punição estatal sobre os povos indígenas.

Palavras-chave: Encarceramento; Justiça criminal; Povos indígenas; Estado democrático; Pluralismo.

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Introduction

Recent legislative attempts to reduce incarceration in Brazil have not yielded desired outcomes. In 2006, Law 11.343/2006 — known as the “drug law” — entered into force, distinguishing the crime of drug trafficking from drug possession for personal use, thus absolving drug users from arrest. In 2011, Law 12.403/2011 established various preventative measures in attempt to surveil and control accused individuals without necessarily using preventative detention. Notwithstanding the significant changes that these laws brought about, the effect was an exponential rise in the number of incarcerated individuals. In this social context marked by a resurgence of punitive policies, the problem of incarceration — which is excessive, and in most cases, unnecessary — has affected indigenous persons, leading to the emergence of a new lexicon with significant symbolic weight: *accused, suspect, defendant, convicted*.

In 2018, in a historic decision, the Federal Supreme Court declared an “unconstitutional state of affairs” with regard to Brazil’s prison system. Minimum standards of hygiene, adequate food, medical care, physical health, and legal aid are not respected. It becomes impossible to observe human dignity in the carceral environment. Yet more, dominant legal practices are alien or unfamiliar to indigenous persons, who typically know little or nothing of the functioning of the criminal justice system practiced by non-indigenous people. This article seeks to describe acts of criminal justice applied to indigenous persons such to put into evidence practices of the state exercised through the judiciary in view of legal pluralism, spurring debate between the theoretical camps of criminal law and anthropology and sharing some of concerns of legal experts and anthropologists.

Rise in prison population between 1990 and 2016



Source: Ministry of Justice and Infopen (for data after 2005)

Police station holding cell in São Gabriel da Cachoeira



Photo: Felipe Jucá, 2018

To do so, methodologically, I make use of my position as a criminal defense lawyer for a number of indigenous persons, allowing access to cases before the judiciary, as well as documents that comprise legal proceedings and court decisions. Additional sources include information collected by police and statistics from the National Penitentiary Department (DEPEN). As a researcher, I also employ in-situ observational methods beyond journalistic approaches, including narratives and impressions of justice of incarcerated indigenous persons in view of the reciprocal relationship that I have forged with social agents participating in this study over the course of several years wearing two hats — as a lawyer (both public and private) and as a researcher — always seeking to remain attentive to their legal aid needs in both capacities.

“The precinct creates more anger”

Since 2011, I have worked as a criminal defense lawyer on behalf of indigenous persons belonging to different peoples and ethnic groups in the state of Amazonas. This position has permitted me access to the prison system, court cases, legal proceedings, and the narratives of indigenous persons affected by these government authorities. In 2020, I was sought out by two leaders of indigenous communities in the Upper Rio Negro, where dissatisfaction with the justice system was notorious in view of the incarceration of members of their communities with whom they have close ties and who, in many cases, are family members. In 2020 I was also sought out by two indigenous women who had been convicted at trial but were not in custody. They needed to appeal the verdict, or else risk detention. In accordance with ethical considerations and for reasons related to my legal practice and research, the real names of the people involved have been omitted to protect the privacy to which they are entitled. Here, I will present a descriptive narrative of one of these events, illustrative of a pattern of maltreatment and practices of violations of the rights of indigenous persons observed in other cases over the years.

In March 2020, a resident of the Yanomami indigenous reserve — who I will refer to as Fábio — was incarcerated. The aforementioned community leader reached out to me in São Gabriel da Cachoeira, accompanied by an employee of the National Indian Foundation (FUNAI), who I have known for some time and interviewed for my master’s research. When I learned of his detention, Fábio had already been in custody for over one month with an arrest warrant in his name, as displayed on the website of the Government of the State of Amazonas,¹ which published news of his arrest and the serious allegations against him.

According to the investigative proceedings, to which I had access, the Civil Police sent a letter to FUNAI requesting that the entity responsible for indigenous affairs serve the criminal summons in order to interrogate the indigenous man in question. FUNAI responded negatively on February 5, 2020 in a letter that included the following extract:

“The Regional Coordination of the Rio Negro (CR – RNG) respectfully informs you that in accordance with report n. 113/2013/PFE-FUNAIJPGF, FUNAI is not required to serve summons or ensure the appearance of indigenous persons in court, per guidance note n. 2/2020/CGPDS/DPDS-FUNAI (SEI n. 1928725), Case: 08780.000037/2020-61. As such, the Regional Coordination of the Rio Negro is unable to summon the indigenous man [Fábio], who according to our information resides in the [REDACTED] community in the Yanomami indigenous reserve, to the precinct.”

With the indigenous affairs bureau’s negative response, the Civil Police issued a request for pre-trial detention of the man under investigation without questioning him, which was granted by a local judge. After receiving information that Fábio was in the city, the warrant was carried out and he was detained.

I immediately asked the FUNAI employee to follow, with me and Tuxaua (the community leader) in the agency’s car, in order to deal with other matters. Upon our arrival at the police station, we requested permission to speak with Fábio and were granted access in a few minutes. Handcuffed, he was taken to a room near the holding cell so that we could speak, but not without the presence of a military police officer stationed at the cell’s only door, allowing him to hear part of our conversation. Amongst themselves, Fábio and Tuxaua spoke in the Yanomami language, only using Portuguese when including me in the conversation. I became aware of the situation and heard Fábio’s version of the story, agreeing to help him appeal the pre-trial detention order and leaving him more or less aware of how these accusation proceedings work. I considered that his detention was technically illegal since the deadline to conclude the investigation with a suspect in detention had expired and a formal charge had not yet been filed with the Public Prosecutor’s office, thus constituting an unlawful deprivation of liberty. Fábio said that a lawyer was already on his case. I contacted them, making

¹ <http://www.amazonas.am.gov.br/2020/02/policia-civil-prende-homem-por-abusar-sexualmente-da-propria-filha-em-sao-gabriel-da-cachoeira/>

myself available to assist with the defense and leaving legal measures to be handled by the lawyer assigned to the case. Approximately one week later, the judge scheduled a hearing with Fábio (accompanied by the lawyer who his brother had contacted before me). Fábio was released five days later and returned to his community.

The day after we saw Fábio at the precinct, I was able to speak privately with the community leader Tuxaua. When I asked him what he thought about detention, his impressions of his non-indigenous practice, he replied: “I’ve thought about doing this, detaining people, back in the community... but it’s not good...” Regarding the situation of indigenous persons arrested in criminal cases, he said, “no, the precinct isn’t good... it creates more conflict, more anger between one another.”

In August 2020, living in Manaus, I spoke with Fábio via an online messaging app. He has remained in his community and said that he plans to travel to Manaus soon. I asked him if he knew the status of his court case, to which he responded that the judge had “closed the case.” However, in addition to this allegation, there was another relating to threats and domestic violence against his ex-wife, which gave rise to another court case.

In our conversation, Fábio spoke about his experience in jail: “Being Yanomami, I experienced feeling small, belittled... my life was at risk, I was almost abused, I was very humiliated...” He also said that he was suing the state and a television network that exposed him on the news.

Fábio’s narrative corroborates that of many other indigenous persons whose stories I’ve heard over the years and who participated in my master’s research. These narratives point to practices ranging from aggression in police searches to torture in police precincts, on top of the tensions between inmates who share extremely close quarters.

While he is not currently in custody, Fábio is still being indicted, as though the state were pursuing a less grave accusation as an alternative to that on which he was acquitted. As Fábio recounted, he was absolved in the case in which he was accused of sexually abusing his own daughter, for which he was arrested. The decision stated that the very government entity that denounced the alleged crime, the Public Prosecutor’s Office of the State of Amazonas, requested to drop the case for lack of evidence, ultimately resolving the imbroglio, but not without causing trauma and harm for the defendant.

As previously mentioned, these stories of these cases involving indigenous persons who were arrested or tried in 2020 bear similarities to countless other situations of state violence, whether physical or symbolic, in which indigenous persons are subject to arbitrary and racist treatment until proven innocent. In 2014, a Tukano indigenous man was arrested by military police officers in São Gabriel da Cachoeira, accused of international drug trafficking, and brought into custody for pre-trial detention. A couple, friends of the detainee, called me as no one had heard the news yet. Upon arriving at the precinct, I was granted access to the detainee and noticed the various illegalities of his detention. With no real evidence, the police tried to legitimate the indigenous man’s detention by claiming that drugs found on a boat belonged to him. We took that opportunity to successfully release him from unlawful detention. However, with the continuation of the investigation, the case was transferred to federal court in the capital city, Manaus, where the pre-trial detention order was issued. The detention order was again served and the man was transferred to a jail in Manaus. After six months in custody, he was absolved in view of the unlawful detention initially identified. It’s worth highlighting his deposition, in which he said:

On Wednesday, DSEI [the Special Indigenous Sanitary District unit] took a motorboat, saw some drugs, and handed them over to them [military police officers] and went directly for him. They came without a warrant, without anything, saying ‘let’s go, you’re under arrest.’ That boat that they found is white, while his is red. They took him right away, put him in front of the table to take a photo with the drugs, with nothing, already saying that those drugs were his. When he tried to speak with the federal police officer, the major put him in the cell and told him to shut up.

On another occasion, I defended an indigenous client of the Warekena people who was arrested in his community under federal warrant. The following is a partial transcription of one of the interviews carried out during field work:

I was arrested for being accused of... pedophilia, right!? Pedophilia meaning that, I committed I crime that I didn't know, that I wouldn't have thought I would be arrested the way that I was, I was arrested by the federal police along with the army here in São Gabriel. And... they went to find me in the village, we were at a community meeting with various leaders from other communities to build a house. I knew that they were looking for people, there was a [police] operation here in São Gabriel, but I never imagined that I was part of it and that day the police arrived looking [for me]. I was working in the interior of the Amiú community, in the Upper Rio Negro, which is a different people than my people, people of the Baré ethnic group and so... When they arrived there, I didn't think, in no way did it cross my mind to run, I wasn't thinking about anything. The police arrived there yelling, saying that I had to go to São Gabriel, to resolve something in São Gabriel... and they took me. When I arrived in São Gabriel, the officer asked if I had a firearm, or any type of weapon in my house, and then he said that if I did have one to tell him the truth. Up until then, I thought that I was being arrested for some kind of weapon, something that crossed my mind, and I was being arrested for something else than what I was actually arrested for. When I got home, they started to search through my things, turning my cabinets, closets, and my clothes upside down, and they didn't find anything. When we got back to the precinct, to... the federal police station, we arrived and then the officer went to inform, he went to say that I was, that there was a girl accusing me of being a child trafficker, of selling sex, that I paid for this and I needed to clear it up in Manaus, then, the boy... The officer said that I would go to Manaus on Sunday and I would be back by Tuesday at the latest, and then I got scared when I asked if I could stay at my house. Until then, I didn't know if I was going to be arrested, if I was under arrest. He said "no," that I couldn't wait at my house, that I had to be there at the station, and then they left me at the station here in the city. I was held there for one day and one night.

Felipe: Did they contact your parents, your family?

Yes, they did. Actually, when they searched the house, my parents were already afraid, right — this was something that had never happened before so they already started to follow [the situation]. The police entered, they invaded [the house] there without... I didn't know what was happening or even what they were looking for. When I was at the precinct, I started thinking about what was happening, and it started to sink in, that I didn't really know what I was being accused of, why I was under arrest, because no one had told me. When I arrived in Manaus, Officer Pessoa — I remember his name clearly — Officer Pessoa... He started to ask questions, right? He asked if I bought, if I paid to have sex with girls. I said no way, I had never done that. So, he started to yell, the officer saying that... He used the following phrase: "You think I'm a fool? What do you think you're doing here — you think you're here on vacation?" I started to get scared because before that, the officers weren't yelling. The officer started yelling at me, like he was yelling at a child. When they yell at us indigenous people it's an absurd thing because we don't grow up hearing shouting, we don't grow up yelling. Of course, we have our misunderstandings, but everything is usually resolved in conversation, so when people yell at us — especially when a white person yells at us — we become... uncomfortable. So, he started to talk, he started to read the testimony saying that I had been involved with a girl named Diana and someone named Michele. So, I said to him, "Sir, I don't know any Michele," and he started yelling again, pushing me to confess. He said the following, which I will never forget, he said just like this: "If you want to return to São Gabriel, you have to tell me everything, admit everything," he said. "That way you can return to São Gabriel on Tuesday," he repeated again. So, thinking that this was true, I said, "No, sir, I was involved with Michele as well." Then he stopped the interrogation. Except for then they left me in a cell at the federal police station in Manaus for another day and another night. The next morning, they said that I was going to be transferred... up until then, I thought I was going to be transferred, like to São Gabriel... to go back. Then they told me that... The following morning, they told me that I had to serve a 30-day sentence and took me to a jail, the Raimundo Vidal jail.

In this case, the indigenous man also did not have the opportunity to speak in his own language at any stage of the legal process, confessing to me the difficulty and insecurity he experienced expressing himself in Portuguese before the judge, risking both misunderstanding and being misunderstood. Despite being Warekena on his father's side, he considers Nhengatú to be his native language — which is predominantly spoken by the Baré, to which his mother belongs.

In the hearing room, the Warekena man remained at my side, shy and silent, at a four-person desk. Two tables of the same size were placed in a T-shape, where the judge and prosecutor sat side-by-side facing everyone else. To their side sat the court reporter who types up the statements of those who have the power to intervene — that is, everyone in the room, except for the defendants and witnesses. A public defender who had previously worked in the city and left due to intimidation after receiving threats was present exclusively to accompany the case's proceedings, which carried on for practically the whole week.

Despite identifying as an indigenous member of the Warekena people, recounting that he was gathered in the community preparing for a cultural event specific to his people at the time of arrest, and that while his relationship with the alleged victim, while brief, was perfectly acceptable among other indigenous persons, no specific right was guaranteed under these circumstances.

From his narrative, it's possible to perceive a great asymmetry in the relationship between indigenous persons and the criminal justice system. This impression was shared by an incarcerated interlocutor, expressing himself in the Tukano language: *"We are considered indigenous by them [authorities]. In our Tukano language, we would say 'pohsá.' This is what happens to us here. (...) We're totally worthless."* Pohsá is a strongly derogative term used by Tukano indigenous people to refer to someone,² typically members of the Hupdah people, who have less contact with Brazilian society and are considered hierarchically inferior in inter-ethnic relations with indigenous peoples of the Eastern Tukano linguistic family who have had contact and relations with non-indigenous people for a longer period of time.

Social Context of the Study

To better understand the ethnographic context in which the study was carried out, it's worth highlighting the mobility of indigenous persons from São Gabriel da Cachoeira and describe local social dynamics. The 23 indigenous peoples with a presence in the municipality frequently travel between their communities and the municipal seat by canoe or by small inboard or outboard motorboats, generally docking them at the port nearest to the city center or on the beach. These trips take place for various reasons, primarily in pursuit of access to public services (schools, hospitals, social security) and commerce. According to the most recent census carried out by the Brazilian Institute of Geography and Statistics (IBGE) in 2010, the population of São Gabriel da Cachoeira was 37,986 — 76.6% of whom (29,017) are indigenous. From census figures and information contained in the text that follows, there are at least 11,918 indigenous persons residing in the municipality's urban area, corresponding to 57.8% of the population. Based on conversations with residents of the city, it is worth mentioning that only people who arrived from other places not linked to indigenous territories are excluded from the indigenous population count. The municipality is located in the northwestern Amazon region at the Colombian and Venezuelan border. The Xié, Içana, and Uaupés rivers, affluents of the Rio Negro, mark this mythical and ancestral territory occupied for over 3,000 years.

² Loosely translated by indigenous coworkers who speak Tukano from an interview carried out in 2017.

With the expansion of the Brazilian state to its borderlands, the government increasingly present in places that are currently predominantly inhabited by traditional communities. The repressive state apparatus — the system of public security — is present in the form of a police precinct with five civil police officers and sixteen military police officers, in addition to a federal police station with agents who frequently rotate with others stationed in Manaus. In Brazil, the military police force is responsible for preventative policing, patrolling the streets. Civil and federal police forces, referred to as judicial police, are responsible for carrying out official procedures when crimes are committed, as well as investigations, such to gather evidence to be examined by the judiciary. Without consultation or participation, this system is arbitrarily applied to indigenous peoples residing in this region for whom contact with official institutions has not been solicited but imposed. While there are indeed indigenous persons who report crimes to the police, as well as indigenous police officers, this does not mean that indigenous peoples totally accept the procedures and forms of punishment of the non-indigenous justice system — nor does this negate the coercive character of *de jure* imperial domination that directly affects indigenous peoples.

It is worth emphasizing the frequent complaints that I observed from police officers who often requested to recant their reports, regretting having called the police and initiating accusation proceedings (despite legislative changes that impede police authorities from doing so). The legal explanation for this is that the punitive action that was previously private had become public — in other words, an investigation initiated at the victim's will in connection to their interests alone was transformed into the interest of society and of the state in an effort to curb gender violence. It happens that, in most cases, the victim does not intend for their report to result in a prolonged detention — imprisonment as a punishment — but rather seeks to put an end to the abuse or the direct cause thereof. This fact is frequently attributed to the lack of means to support their families in their partner's absence. However, it would be prudent to carry out an anthropological analysis considering the point of view of indigenous persons, as well as the implications of incarceration, in view of the divergence with non-indigenous understandings of serving justice, which privileges the practice of imprisonment as *punishment*.

I recall that at the beginning of my observations, in 2011, it was important to note that when indigenous persons spoke of prison in their own languages, they would borrow the term from the Portuguese language, as there is no equivalent word for the imposition of such a form of punishment. Yet more, visiting localities that did not seem to lack policing or criminal laws, in which the nearest stationed officer was only to be found hours or even days away down the river, it would be naïve to say that social control over an area the size of São Gabriel da Cachoeira, extending 109,185 square kilometers, is guaranteed by the state's preventative and repressive police forces.

The incarceration of indigenous persons is carried out in a way that violate Brazilian legislation as sentences are served in holding cells in police stations. In other words, a physical environment intended for spending mere hours or days is utilized as a space for serving entire prison sentences, which can be six or more years. Exceptions to this practice are rare and typically occur when sentences are sufficiently long to warrant transfer to the capital city, Manaus, where there are prisons. The São Gabriel da Cachoeira police station has one jail block with eight cells. Three cells border the back of the building and are larger than the other five. The larger cells are approximately 10 square meters, while the smaller are no more than six square meters. Thick walls divide the block into these tiny compartments, equipped with iron bars as doors. The cells block is fenced off by a gate in the center, where a large lock is placed. The keys remain the responsibility of the Civil Police after disagreements regarding the treatment of inmates.

This may indicate that social practices instilled by non-indigenous society are naturalized — the police or prison, for example — and are even present in indigenous communities of the Upper Rio Negro, with the exception of those occupied in part by the Brazilian Army, justified by the government as necessary for national security. Alternatively, this underscores the prevalence of other forms of social control dissociated from centralized authorities. Such questions were the object of analysis of 20th century scholars.

With regard to cultural dimensions, Robert Shirley synthesizes: “It seems undeniable that nearly all societies have some form of legal culture, that is, a view of what constitutes appropriate conduct and an idea of justice” (Shirley, 1987, p. 43). Moore (2005), in turn, in an illuminating text refers to the intellectual advancements that span this field, noting the contributions of Geertz, Habermas, Bourdieu, and Weber, among others. The author succinctly introduces law from an anthropological perspective: law as culture, law as domination, law as problem-solver.

For Davis, one of the propositions on law on which anthropologists are in agreement is that “in every society, there exists a body of cultural categories, of rules or codes that define rights and legal obligations among men” (Davis, 1973, p. 10).

Now, from the outset, law school teachings are universalizing. From the student’s first semester to their professional qualification, they are taught and inculcated with the idea that the bases of “Law” are, in the following order: laws, jurisprudence, doctrines, and customs. However, the absence of a theorized, standardized, written legal science does not imply the dearth of norms of coexistence worthy of consideration or legitimate means of social control. No society can be judged by virtue of what it seems to lack, as Pierre Clastres proposes in *Society Against the State*:

In reality, the same old evolutionism remains intact beneath the modern formulations. (...) It has already been remarked that archaic societies are almost always classed negatively, under the heading of lack: societies without a State, societies without writing, societies without history. (Clastres, 2017 [1987], p. 190)

The absence of written law cannot lead us to retreat to evolutionism, lest we reproduce old biases about indigenous peoples.

Agents in the legal realm do not perceive indigenous persons as subjects of many rights in view light of the autonomy of culture and social organization conferred by Brazil’s federal constitution. A so-called rupture with the current legal order imposed by the state would demand an approach based on dialogue with recognized ethnic groups — some of whose lands are demarcated, while many others continue to struggle for demarcation. In this sense, the study notes that the judiciary does not attach importance to cultural considerations in ruling on criminal cases with indigenous defendants. Legal pluralism, called for in recognition of social heterogeneity and tensions arising from inter-ethnic relations, is ignored.

As it appears, Brazilian courts follow the logic of productivism in issuing decisions — that is, judges who rule on a large number of cases are considered “good judges” without any substantive evaluation of their decisions such as verification of the constitutionality of applicable norms or respect for human rights. This is reflected in guidelines by the National Council of Justice, in which court representatives approved the “2020 National Goals for the Brazilian Judiciary.”³ Of the twelve goals that were outlined and approved, the first states the following: decide on a higher number of pending cases than the number of new cases brought before the court. This can be taken to mean that issuing a large number of decisions supplants the need to analyze cases seriously and thoroughly, curtailing the instrumentality of law as a means of social transformation and putting into evidence the empirical fragility of this notion. As a consequence, incarceration is not considered a problem per se; rather, the problem is the volume of cases before the court.

3 <https://www.cnj.jus.br/wp-content/uploads/2020/01/Metas-Nacionais-aprovadas-no-XIII-ENPJ.pdf>

The determination of sentences with due hermeneutic rigor in light of democratic values does not seem to figure among the courts' priorities. It's certainly a valid critique to call the justice system sluggish — and the accumulation of backlogs of cases should be addressed — but this must be done in a way that does not breed injustice or the dismissal of the social consequences of rulings. Punitive interventions cannot constitute the grounds for perpetrating additional violations.

Recently, motivated by the coronavirus pandemic, indigenous peoples across Brazil have mobilized in their territories, forming a sort of community policing system to control the entrance of outsiders as a preventative measure to curb potential infection. This form of policing should not be confused with activity by armed militias or paramilitary forces, but rather should be considered an exercise of autonomy over decisions that directly affect their communities. This gives rise to a question about the actual scope of autonomy conferred to indigenous peoples. Now, if indigenous peoples are not permitted to practice forms of social organization according to their own principles as they see fit — and if there is a lack of recognition of diverse epistemologies involving practices of education, healthcare, social assistance, and justice — they are limited to the enjoyment of *partial autonomy*, which bears a resemblance to the state policy of tutelage of indigenous peoples. It seems unreasonable to shroud these vestiges, perhaps of little importance to authorities, from public debate or to naturalize them as dominant practices imposed by the state from the top-down.

In this sense, I suggest that there may exist an aporia between the structure of the contemporary democratic state of law and the exercise of full autonomy by indigenous peoples, as the ethical totality codified in criminal law through prohibitions does not appear to be amicably accepted, as legal manuals might lead one to believe.

Official Data on Incarcerated Indigenous Persons

On December 17, 2019, a technical note was published by the Ministry of Justice and Public Security.⁴ According to the document, it was a “technical note through which the Department of Women’s and Minority Welfare (DIAMGE) — part of the General Coordination of Citizenship and Penal Alternatives (CGCAP) under the Board of Penitentiary Policy (DIRPP) of the National Penitentiary Department (DEPEN) — issued to recommend to state prison administration entities the adoption of necessary and effective measures with regard to the custody of indigenous persons deprived of liberty in penal institutions in accordance with international and national regulations.” Notably, DEPEN does not mention the legitimacy (or lack thereof) of the imprisonment of indigenous persons, but only alludes to the “rights of incarcerated indigenous persons.”

National statistics on incarcerated persons are produced by the National Penitentiary Department (DEPEN), which is subordinated to the Ministry of Justice and Public Security. The most recent data on the number of incarcerated indigenous persons can be found in a technical note published on May 26, 2020,⁵ which signals continuity with the previously cited note. It's worth emphasizing that this was the first time that data was gathered on the number of incarcerated individuals who self-identified as belonging to indigenous peoples, disaggregated by ethnic group. The note stated: “1. According to data from the National Penitentiary Information Survey (Infopen) from December 2019, there are 1,390 indigenous persons in the Brazilian prison system. Of this number, a) 1,325 are men and b) 65 are women. 2. However, to quantify the number of ethnic groups with incarcerated members, the Department of Women’s and Minority Welfare (DIAMGE) produced a study demonstrating the presence of 672 indigenous persons who indicated their respective peoples.”

4 Technical Note n. 53/2019/DIAMGE/CGCAP/DIRPP/DEPEN/MJ

5 Technical Note n. 77/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ



Ministério da Justiça e Segurança Pública
Departamento Penitenciário Nacional
Divisão de Atenção às Mulheres e Grupos Específicos

NOTA TÉCNICA Nº 77/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ

Processo: 08016.018784/2018-01

Interessado: DIAMGE

Trata-se de apresentação de dados de indígenas que se encontram no sistema prisional brasileiro, com intuito de mapear as etnias que possuem membros em situação de prisão.

DO MAPEAMENTO NACIONAL DE POPULAÇÃO INDÍGENA

1. Informamos que, segundo dados do Levantamento Nacional de Informações Penitenciárias (Infopen) de dezembro de 2019, há no sistema prisional brasileiro 1.390 indígenas presos, sendo:

a) 1.325 homens; e

b) 65 mulheres.

2. Entretanto, com objetivo principal de quantificar as etnias que possuem membros em situação de prisão, a Divisão de Atenção às Mulheres e Grupos Específicos produziu pesquisa que demonstra a existência de 672 indígenas presos autodeclarados que indicaram seus respectivos povos.

3. Como resultado do levantamento, apresenta-se um mapeamento da população específica, conforme tabela a seguir:

Previously, statistics did not even take into account self-identification, as seen here: “The Infopen survey uses the five categories proposed by the Brazilian Institute of Geography and Statistics (IBGE) to classify race: White (*Branca*), Black (*Preta*), Brown (*Parda*), Yellow (*Amarela*), or Indigenous (*Indígena*). The category Black (*Negra*) is constructed by combining the categories Black (*Preta*) and Brown (*Parda*). It is important to emphasize that data collected by the IBGE on the population’s race or ethnicity are based on self-identification, whereas data collected by Infopen on these variables are recorded by survey administrators, without tracking self-declaration of these characteristics” (Infopen 2016, p. 32).

The identification of inmates’ ethnicities on the list provided by police precincts for the purpose of data collection follows suit, as inmates are not given the opportunity to self-identify either at the police station or in court, leaving this task to administrators at the station itself. This means that individuals deprived of liberty are also deprived of the right to self-identify, casting doubt on the reliability of official data. As such, official data from DEPEN should be treated with caution. Ground-truthed with empirical data, these figures seem questionable, implying that the numbers of indigenous persons incarcerated in Brazilian prisons are likely underreported. For example, in the state of Amazonas, there were eleven incarcerated indigenous persons according to official data. However, in this study, the number of incarcerated indigenous persons observed in the city of São Gabriel da Cachoeira alone exceeds the official count in the entire state. Several media outlets published articles on this issue in 2017.⁶

Carceral policies have been formulated without consideration for the diversity of peoples present in Brazil. The theoretical advances of anthropology have only been mildly influential in debates in the juridical field, in part due to the relative youth of the discipline of legal anthropology in Brazilian law schools. Brazilian penal norms do not contemplate discussions around identity, alterity, ethnicity, indigenous peoples’ autonomy, and culture.

⁶ <https://www.folha.uol.com.br/cotidiano/2017/07/1901538-homens-mulheres-e-adolescentes-dividem-delegacia-presidio-no-am.shtml>; <https://diplomatique.org.br/indigenas-tem-suas-identidades-invisibilizadas-nas-prisoas-do-brasil/>, accessed on September 20, 2020.

It should be clarified that criminal defense is generally conducted by supporting the accused person's version of events and proving the illegality of judicial acts. A majority of the indigenous population does not have private lawyers or public defenders. Brazilian legislation states that if a defendant does not have a lawyer or public defender, the judge will appoint one to carry out their defense in order to continue the proceedings and to ensure the right to defense. As it happens, in such cases, the defense is typically a mere bureaucratic formality without due attention to the person's rights.

Court-appointed defense lawyers also typically have their own private clients whose cases will be seen by the same judge, incentivizing them to refrain from being too aggressive in defending non-paying clients such to avoid engendering animosity from the judge on the given charge, thus abstaining from making a case or invoking rights that could help the defendant avoid jail time. These facts can help us delineate the social relations that mediate the justice system. This is not the place for such a discussion, however.

Would it be possible, then, to foment a movement to decolonize the judiciary? What steps are necessary to ensure respect for the autonomy of indigenous peoples, including with regard to the resolution of conflicts of a criminal nature? I suggest that debates on any aspect of policy, including crime policies, currently demands greater public participation and consequently, the involvement of all (or the largest possible number of) segments of society — including traditional peoples and communities.

Legal Tools Applicable to Indigenous Persons in View of Cases Observed

With regard to the legal tools applicable to the situations presented here, it's worth highlighting the existence of Resolution 287/2019 of the National Council of Justice,⁷ effective since mid-2019, with a manual⁸ containing guidelines for judges with respect to the treatment of indigenous persons under criminal law. In its "General Principles for the Conduct of Courts and Judges in Criminal Cases Involving Indigenous Accused Persons, Defendants, or Convicted Persons," the manual lists the following: a) Diversity of indigenous peoples; b) The right to consult with indigenous peoples; c) Respect for indigenous peoples' language, customs, beliefs, and traditions, as well as indigenous forms of social organization, political, legal, economic, social, and cultural systems; d) Importance of territorial rights; e) Indigenous people's right to access to justice; f) Extreme exceptionality of indigenous incarceration.

Law 6.0001/73, also known as the Indian Statute, was created during the dictatorship regime prior to Brazil's democratization with the promulgation of the Constitution of 1988. For this reason, it should be interpreted through the lens of new constitutional values. Premised on the notion of the tutelage of indigenous peoples, this law states that indigenous persons deprived of liberty should be held at the site of the nearest indigenous affairs bureau, which I have never seen happen in practice.

The Brazilian criminal code, on the other hand, makes no mention of the criminal responsibility of indigenous persons or any distinct treatment that should be accorded to them. In "Commentary on the Criminal Code," Nelson Hungria noted that there were no references to indigenous persons "to avoid, with an explicit allusion to them, giving the false impression abroad that we are a nation infested with barbarians" (Hungria, 1958, p. 336). Thus, the treatment of indigenous persons under the criminal code is only concerned with the notion of competency, placing them in a position analogous to persons with diminished mental capacity.

⁷ https://atos.cnj.jus.br/files/resolucao_287_25062019_08072019182402.pdf

⁸ <https://www.cnj.jus.br/wp-content/uploads/2019/09/Manual-Resolu%C3%A7%C3%A3o-287-2019-CNJ.pdf>

In an international context, Article 10 of the International Labor Organization Convention 169 (the Indigenous and Tribal Peoples' Convention), ratified by Brazil, states that: "1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics. 2. Preference shall be given to methods of punishment other than confinement in prison."

When judicial decisions address cultural elements, they do so in a way that delegitimizes indigenous identity. Forgoing anthropological expert witness reports, a set of criteria is applied in which contact with national society serves as the basis of identity. In other words, the judge infers, at their own discretion, whether the indigenous person should be considered indigenous in view of the degree to which they are integrated with non-indigenous society.

The indigenous persons whose stories are told here were not provided the opportunity to testify in their own languages⁹ at the police station or in court. Nor were anthropological expert witness reports requested¹⁰ for the consideration of the prosecutor, the defense, and the judge. The ethnic identification of accused indigenous persons is simply avoided or disregarded by authorities or, when registered, bears no impact on their treatment. It is also necessary to highlight that prison sentencing is naturalized among lawyers and public defenders involved in cases involving indigenous defendants. Arguments relativizing the criminal justice system are not taken into account, and special norms available in Brazil are not invoked.

The decision that absolved Fábio is three pages in length with no mention of cultural aspects, nor any discussion of the legitimacy of the proceedings against him in connection to pluralism, the autonomy of indigenous peoples, or ILO Convention 169.

In another case in 2014, a federal judge from the state of Amazonas rejected the application of legislation relevant to indigenous peoples, even having provided documentation of the defendant's indigenous birth certificate (RANI). In a purely rhetorical and legalistic fashion, the judge negated the defendant's identity with ethnocentric and racist arguments, as though a person who attends school or possesses government-issued ID was no longer indigenous and could not claim their rights as such.

Similarly, in 2020, the public prosecutor opposed the application of National Council of Justice Resolution 287/2019 and the so-called Indian Statute (Law 6.001/1973) in the appeal of a decision to sentence an indigenous woman to nine years and four months in solitary confinement. In his decision, he expressed: "In the case in question, it is clear that this is a situation of acculturation, one in which the benefits of the aforementioned statute do not apply with regard to the use and enforcement of criminal sanctions."

The juridical field, as such, reveals a feedback loop informed by its own concepts without consideration for different social realities and situations surrounding the concept of punishment. The scope of norms is restricted in denying the need for anthropological expert witness testimony, rather opting to invoke legal instruments such as case law and legal doctrines.

9 "Article 5. Legal authorities will seek to guarantee the presence of an interpreter, preferably a member of the defendant's own indigenous community, at every stage of the process in which the indigenous person participates: I - If the language spoken is not Portuguese; II - If there is any doubt about the person's fluency and understanding of the spoken language, including with regard to the meaning of procedural acts and the indigenous person's verbal communication; III - At the request of the defense attorney or FUNAI; IV - At the request of the person in question."

10 "Article 6. Upon receiving a complaint or accusation against an indigenous person, legal authorities may determine, whenever possible, acting in their own authority or at the request of the interested parties, to solicit an anthropological expert witness report to ascertain the competency of the accused person, which should contain, at minimum: I - The classification, ethnicity, and language spoken by the accused person; II - The personal, cultural, social, and economic circumstances of the accused person; III - The uses, customs, and traditions of the indigenous community to which they are connected; IV - The indigenous community's understanding with regard to the act for which the person is being charged, as well as internal adjudication mechanisms and forms of punishment adopted by its members; and V - Other information deemed relevant to the facts of the case. Sole paragraph. The expert witness report should be carried out by an anthropologist, social scientist, or other professional assigned by the judge with specific knowledge on the topic."

Bourdieu highlights the formalism of legal science as a “specific mode of theoretical thinking, entirely freed of any social determination” (Bourdieu 1987, p. 814). For him, Hans Kelsen’s attempt to formulate a “pure theory of law” sought “to construct a body of doctrine and rules totally independent of social constraints and pressures, one which finds its foundation entirely within itself” (Bourdieu 1987, p. 814). Yet more, “divergences between ‘authorized interpreters’ are necessarily limited, and the coexistence of a multitude of juridical norms in competition with each other is by definition excluded from the juridical order” (Bourdieu 1987, p. 818). Regarding the situation of imprisonment and the indigenous men’s responsibility for gender violence, perhaps — before legitimizing the practices of trial and imprisonment — the inefficiencies of criminal proceedings and the primacy of sentencing as a solution should be better understood, which would, in turn, require consideration of all categories and definitions of offenses that are regarded as criminal. With regard to special rights concerning culture, Benhabib reminds us that “contemporary feminist discourse on these issues is strongly polarized... The claims of moral and political autonomy contradict the pluralist preservation of multicultural traditions that seem to make no room for such autonomy” (Benhabib, 2002, p. 101).

In this sense, it is worth mentioning the author’s approach, which proposes a discourse theory as an entry point in order to consider some actions related to minority groups legitimate. Her interpretation is backed by two principles: universal moral respect and egalitarian reciprocity. “Universal respect requires that we recognize the right of all beings capable of speech and action to be participants in the moral conversation; the principle of egalitarian reciprocity, interpreted within the confines of discourse ethics, stipulates that within discourses each should have the same right to various speech acts, to initiate new topics, and to ask for justification of the presuppositions of the conversation, and the like” (Benhabib, 2002, p. 107).

Sound scientific arguments can be ineffective in the juridical field and ultimately, it is up to the presiding judge to decide whether they find the anthropological expert witness report convincing or not. In other words, the force and weight of the expert report will ultimately depend on the judge responsible for analyzing it, which is indicative of the judiciary’s impermeability with regard to other branches of scientific knowledge. Anti-crime policy measures are sustained by discourses that reinforce penal punitivism through popular commotion, pressure from the media, and populist discourses. The legitimacy of incarceration goes against scientific evidence showing that this form of criminal justice is of little or no benefit to society, in addition to its frequent aberrations from the law — from confrontations on the street to sentencing — as intellectuals like Louk Hulman, Nils Christie and Angela Davis have discussed.

Conclusion

Outdated categories that are inadequate for democratic policies of inclusion continue to be used by agents in the juridical field under a colonial logic that does not consider the epistemology, knowledge, and experience of indigenous peoples in the production of legislation and in debates on justice. As the facts indicate, penal alternatives are not sufficient to address the problem of crime policies. We need more than penal alternatives — we need *alternatives to punishment*. Such alternatives are offered by indigenous peoples who have socially reproduced and resisted throughout history without the violent practice of incarceration and the symbolic violence enacted by such forms of punishment.

To fail to problematize the criminal treatment of indigenous persons is to tacitly condone the violence and harms inflicted on them by the state — ignoring the power asymmetries that exist between government authorities and indigenous peoples, as well as the violations that are practiced. The legal gap between self-determination and the submission of various peoples with their own forms of social organization to the dominant legal system emerges as a new challenge for contemporary democracy, which demands greater participation of all subjects.

The judiciary has usurped indigenous forms of conflict resolution and imposed a juridical order based on colonial categories. Penal theory has become an object of discussion in pursuit of alternatives to existing practices that privilege imprisonment. The construction of crime necessarily involves the imposition of universal rules of conduct that, when violated, may result in the use of force and restriction of liberty of the offender on the part of the state — whether or not the person who violates the norm is aware or agrees with the principle. The pursuit of ethical universality, therefore, points to an intense and uninterrupted process of colonization via criminal law.

This is not to say that political scientists, sociologists, anthropologists and other academics should don judges' robes and preside over cases involving their areas of research. Thesis defenses, in which academics participate as examiners, are their objects of judgement. However, it would be reasonable to expect dialogue with the juridical field and with social agents involved in punishment to be fluid and considered relevant in a deliberative democracy.

The Brazilian government should be responsible not for reproducing forms of domination, but for creating the necessary conditions for the maintenance, realization, and sociocultural reproduction of indigenous peoples through respect for difference and the observance of their practices, knowledge, narratives, institutions, and rituals such to actualize their right to autonomy and eschew tokenism. Insofar as there exist (limited) public policy initiatives, directed toward health or education, for example, judicial powers remain universalizing with a monopoly on the language of the law and on access to forums in which rights are discussed, perpetuating colonial and racist forms of surveillance and control over various indigenous peoples not only in São Gabriel da Cachoeira but across Brazil. The banalization of criminal prosecution and incarceration in Brazil cannot be extended to indigenous peoples as a mode of social control, simply excluding them from debate on criminal policies. As such, a new form of jurisdiction is necessary — one that not only imposes itself but that is also open to democratic participation.

In 2019, the present study served as a theoretical reference in the elaboration of National Justice Council Resolution 287/2019 — on criminal procedures applied to indigenous defendants, accused persons, or incarcerated persons — and its respective manual.¹¹ This was part of an initiative by indigenous movements together with the United Nations Development Programme (UNDP) and the “Justiça Presente” Program, an initiative of the National Justice Council (CNJ), aiming to humanize sentencing and make other improvements to the prison system. One current outcome of the aforementioned mechanism is Recommendation 62/2020, which concerns the situation of the pandemic in the prison system. Article 12 considers the specific nature of the situation for indigenous peoples (Article 12. Recommend that judges, in exercise of their duties, provide information to the National Indian Foundation (FUNAI), the Special Secretariat for Indigenous Health (SESAI), the Federal Public Prosecutor's Office, and the community in question with respect to the adoption of measures that directly affect indigenous persons deprived of liberty, particularly with regard to COVID-19 diagnoses and the granting of provisional release or the fulfillment of sentences in an open regime, taking note of the differentiated juridical-penal treatment to do justice and procedures described in CNJ Resolution n. 287/2019). Also in 2019, the National Penitentiary Department (DEPEN) elaborated a technical note¹² “through which the Department of Women's and Minority Welfare (DIAMGE) — part of the General Coordination of Citizenship and Penal Alternatives (CGCAP) under the Board of Penitentiary Policy (DIRPP) of the National Penitentiary Department (DEPEN) — issued to recommend to state prison administration entities the adoption of necessary and effective measures with regard to the custody of indigenous persons deprived of liberty in penal institutions in accordance with international and national regulations.”

11 Available at: <https://www.cnj.jus.br/wp-content/uploads/2019/09/Manual-Resolu%C3%A7%C3%A3o-287-2019-CNJ.pdf>

12 Technical Note n. 53/2019/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, available at: http://depen.gov.br/DEPEN/copy3_of_indigenas.pdf

Earlier, in May 2020, the same entity released a technical note¹³ on the “publication of data on indigenous persons in the Brazilian prison system with the objective of mapping the ethnic groups with incarcerated members.” The document states that there are 1,390 incarcerated indigenous persons in Brazil, 672 of whom “self-identified their respective peoples.”

It’s important to recall that National Justice Council Resolution 287/2019 introduces the requirement to solicit an anthropological expert witness report with the support of the Brazilian Anthropological Association (ABA) to this end,¹⁴ underscoring the importance of anthropological social science.

These are measures taken by federal authorities that are worthy of researchers’ attention as they highlight the relevance of studies in this area — primarily due to the fact that existing data is distorted by underreporting. Considering the fact that the note mentions only eleven indigenous persons in the entire state of Amazonas, a simple observation of prisons in the city of São Gabriel da Cachoeira should be sufficient to refute official data. As such, this study shows that the judiciary has impacted and continues to impact indigenous social organization — particularly with regard to the authority of indigenous leaders who could play a role in reconciling, mediating, or de-escalating conflicts as they emerge. Instead, these conflicts are managed by non-indigenous persons who use complicated terms and wear formal clothing, in official buildings where indigenous languages are not spoken, through the use of physical violence and imprisonment — following countless formalities and procedures as part of “criminal prosecution” or “criminal cases,” or, in many cases, simply going over their heads as though they were cooperating.

As such, it is possible to ascertain that the “effect of closure,” the hermetic effect, — which, following Bourdieu (1987, p. 834), is intrinsic to the juridical field — leads to the negation of the ethnic plurality that exists in a given territory. Disputes and different interests are excluded from debates advanced by legal operatives who focus “their own problems and their own solutions according to a hermetic logic unavailable to laypeople” (Bourdieu 1987, p. 834).

It becomes clear that the right to punish in Western legal systems — constructed through an epistemology that excludes indigenous knowledge — has gradually and violently usurped modes of conflict resolution based on “counseling” and constructive dialogue in favor of formal institutions of the state that privilege guns, handcuffs, trials, and prisons. Features of the justice system such as police stations, courthouses, prosecutors, lawyers, and judges may be alien to the ways of doing justice familiar to indigenous accused persons in their own communities and cities, as they embody forms of power that are difficult to grasp. This is not to say that accused persons do not have the intellectual capacity to understand, but rather than they have different forms of social organization, policies, and ways of resolving conflicts between individuals. As a strategy of domination, the state seeks to make everyone “equals,” controverting diversity, a current struggle of minority groups who seek political inclusion through the demand for recognition. On this point, it’s worth citing the words of Taylor:

“Non-recognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being... misrecognition shows not just a lack of due respect. It can inflict a grievous wound saddening its victims with a critical self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need” (Taylor, 1994, p. 25).

¹³ Technical Note n. 77/2020/DIAMGE/CGCAP/DIRPP/DEPEN/MJ, available at: http://depen.gov.br/DEPEN/copy_of_SEI_MJ11751702NotaTcnicaLevantamentoIndigena.pdf

¹⁴ “For the preparation of the anthropological expertise, contact with the Brazilian Association of Anthropology (ABA) may be relevant for the identification of a professional with knowledge about the culture of the accused indigenous person” (p. 25).

Following the authors cited here, I argue that acts of the state that affect traditional populations should be analyzed through a plural vision, taking into account the different identities that exist in the Amazon region, such 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. It is my 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.

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