The Pandemic's Golden Touch: (Neo) Extractivism, Coloniality, and Necropolitics on Brazil's Indigenous Territories

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Abstract

Mining has been at the forefront of coloniality for hundreds of years in Brazil, representing one of the main threats to the integrity and health of Indigenous lands. The 1988 Brazilian Constitution recognized Indigenous peoples' rights to the lands they occupy, and their natural resources, according to their traditions, uses, beliefs, and practices. Constitutional provisions, however, have not impeded governments and lawmakers from actively enabling extractive activities in Indigenous territories and their surroundings. Recently, the Bolsonaro government proposed a package of laws and policies to legalize mineral exploitation on Indigenous lands, using the economic uncertainties generated by the COVID-19 pandemic as a justification. However, this action must be explained through the paradigms (or philosophical frameworks) of the extractive economy and coloniality of power, operationalized by necropolitics. The article's main argument is that the Constitution requires the government to engage in practices of decoloniality that express Indigenous legal traditions. Even though a newly elected government has been revoking many of Bolsonaro's proposals, the paradigms of the extractive economy and the coloniality of power have a profound, structural influence on the Brazilian legal and political systems and must be challenged by a revival of decolonial ways of thinking and acting.

Keywords: decoloniality, Indigenous rights and territories, constitutional interpretation, Indigenous traditions

Résumé

L'exploitation minière a été au premier plan de la colonisation depuis des centaines d'années au Brésil, représentant l'une des menaces les plus importantes pour l'intégrité et la santé des terres autochtones. La Constitution brésilienne de 1988 reconnaît aux peuples autochtones le droit d'occuper leurs terres ainsi qu'un droit

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envers leurs ressources naturelles, conformément à leurs traditions, usages, croyances et pratiques. Les dispositions constitutionnelles n'ont toutefois pas empêché les gouvernements et les législateurs d'autoriser de manière proactive des activités extractives dans les territoires autochtones. Récemment, le gouvernement Bolsonaro a proposé un ensemble de lois et de politiques pour légaliser l'exploitation minière sur les terres autochtones, en invoquant les incertitudes économiques générées par la pandémie de COVID-19. Toutefois, cette action doit être expliquée par les paradigmes (ou cadres théoriques) de l'économie extractive et de la colonialité du pouvoir, opérationnalisés par la nécropolitique. Le principal argument de cet article est que la Constitution exige du gouvernement qu'il s'engage dans des pratiques de décolonialité qui expriment les traditions juridiques autochtones. Même si un gouvernement nouvellement élu a révoqué de nombreuses propositions de Bolsonaro, les paradigmes de l'économie extractive et la colonialité du pouvoir exercent une influence profonde et structurelle sur les systèmes juridiques et politiques brésiliens et doivent être remis en question par la résurgence des modes de pensée et d'action décoloniaux.

Mots-clés: extractivisme, Brésil, nécropolitique, décolonialité, droits et territoires autochtones

I. Introduction

A far-right authoritarian government and the COVID-19 pandemic created the perfect storm to revamp the extractive economy in Brazil. In a Federal Ministers' meeting in April 2020, the Minister of Environment at the time, Ricardo Salles, argued emphatically that the government should take the opportunity provided by COVID-19 to *passar a boiada* ("to pass a herd of cattle through");[1] that is, to enact regulatory changes that would facilitate extractive activities in protected areas such as Indigenous territories (Ennes 2021).

The Bolsonaro government followed Salles' advice and proposed a package of laws and policies (also reviving a set of older bills) that would facilitate mineral extraction in and around Indigenous territories. Constitutional provisions regarding Indigenous and environmental rights were bluntly ignored, exposing the weakness of State laws (in and of themselves) in ensuring the protection of Indigenous peoples' ways of life and their connection with their territories (Presidência da República do Brasil, 1988). The package of laws and policies put forward by the Bolsonaro government aimed not only to legalize illegal mining activities but also to decrease oversight of those activities.

Facilitating extractive activities on Indigenous territories, however, is only one manifestation of the idea of coloniality of power in the history of Brazil. As Aníbal Quijano and Walter Mignolo have articulated, coloniality of power vests itself with the mantle of modernity, purporting to furnish universal principles of thinking and

[1] The image is of cattle passing through a gate. This is a popular saying used in reference to the act of taking advantage of a confusing or turbulent moment to lower the standards in deciding what specific actions should be allowed.

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knowing (Quijano 2000, Mignolo 2018). It is a modernity, however, which Ailton Krenak notes has dragged people from the forest to live in shantytowns, uprooting them from their collectives and their ancestral memories, while confining them to Western ways of life (Krenak 2020, 8–9).[2]

Mignolo draws upon Quijano's idea of decoloniality as an epistemic reconstitution to "change the terms (assumptions and rules) of the conversation, rather than the content," and expose coloniality's attempt to homogenize humanity (Mignolo 2018, 380). Decoloniality has been exercised, among other forms, through Indigenous peoples enacting their diverse ways of thinking, being in the world, and building alternatives for survival and well-being beyond the exercise of State power, as discussed further in the paper.

In 2023, the new government of Lula da Silva came to power, promising to dissolve Bolsonaro's attempts to weaken Indigenous rights and environmental protection (Correia 2022). Although Lula has revoked some of the neo-extractivist policies and withdrawn part of Bolsonaro's legislative proposals in Congress, the change in government is not a promise to overthrow the extractive economy paradigm, let alone the coloniality of power ideology. For this reason, it is as important as ever to identify how coloniality of power is expressed through necropolitics to justify and operationalize State laws that threaten Indigenous peoples' lives and territories. Only by acknowledging and supporting diverse expressions of Indigenous legal traditions can the coloniality of power and extractive economics that beset Brazilian policy and law-making be meaningfully resisted.

This article offers an analysis of some of the historical and conceptual foundations of the Bolsonaro government's discourse and actions against Indigenous peoples, which have been more or less constant in Brazilian political and legal history. The methodology consists of examining primary sources of law (legislation and court decisions) and government policies, secondary literature on the effects of mining on Indigenous lands and communities, news articles on recent events in Brazilian politics, as well as literature on the theory of coloniality of power and necropolitics, aiming to analyze its application to the recent facts in Brazilian political and legal history.

The paper is organized into six sections. Following this introduction, the second section describes the concepts of coloniality of power and necropolitics, which have shaped the relationship between the State and Indigenous peoples since colonization. The third section briefly describes the mining sector's devastating effects on Indigenous peoples and their lands. The fourth section contains a characterization of the Brazilian constitutional system of protection of Indigenous peoples' rights. The fifth section gives an overview of the package of laws and policies proposed by the Bolsonaro government to weaken those constitutional rights and facilitate mineral extraction in Indigenous lands. These proposals are one reflection of the coloniality of power and necropolitics and are more or less consistently present in

[2] Krenak is an Indigenous author and activist, member of the Krenak people, whose lands are located in Minas Gerais state, Brazil. Krenak was recently added to the Brazilian Academy of Letters as its first Indigenous member.

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the history of Brazilian political and legal systems. Bolsonaro's policies are, in fact, the most overt episode of resurgence of the pre-constitutional colonial orientation of the political and legal systems since the Constitution. Finally, the last section outlines the idea of decoloniality as practices adopted by Indigenous groups based on their laws and traditions, challenging the foundations of coloniality and its implications for State laws.

II. Necropolitics and the Coloniality of Power

Based on Foucault's concept of biopolitics (Foucault 2003, 61),[3] the Cameroonian scholar Achille Mbembe developed the notion of necropolitics, which he explains as follows: "the ultimate expression of sovereignty resides, to a large degree, in the power and the capacity to dictate who may live and who must die. Hence, to kill or to allow to live constitutes the limits of sovereignty, its fundamental attributes. To exercise sovereignty is to exercise control over mortality and to define life as the development and manifestation of power" (Mbembe 2003, 11–12). The principles of necropolitics are based on the notion of the sovereign State having control over the lives of its population, especially the most marginalized. Sovereignty would be the will and capacity to kill some (usually those who embody less or no economic interest) to allow others to live.

Necropolitics' first principle is "[t]he perception of the existence of the Other as an attempt on my life, as a mortal threat or absolute danger whose biophysical elimination would strengthen my potential to life and security—this, I suggest, is one of the many imaginaries of sovereignty characteristic of both early and late modernity" (Mbembe 2003, 18). It is an imaginary of sovereignty that the protection of my life requires the death of the other. This conception seeks to eliminate the plurality of the human condition. A unified common will, the supposedly unavoidable public interest, presupposes that human plurality is the chief obstacle to the goals of the Nation (Mbembe 2003, 20).

Necropolitics may require the physical death of the other, as expressed by Bolsonaro's statement in 1998 when he was a member of the Brazilian Congress: "It's a shame that the Brazilian cavalry hasn't been as efficient as the Americans, who exterminated the Indians" (Survival International). Statements such as this resonated in parts of Brazilian society during his government. Uncoincidentally, recent data on violent acts against Indigenous peoples in Brazil is staggering. In 2021, there were 305 cases of invasion of Indigenous lands for illegal exploitation, which affected at least 226 Indigenous lands in twenty-two of Brazil's states (CIMI 2022, 4). In the previous year, 263 cases of invasion had affected 201 indigenous lands in nineteen states, and the number of such cases is almost three times higher

[3] In "Society Must be Defended" Foucault defines biopolitics as "a battle that has to be waged not between races, but by a race that is portrayed as the one true race, the race that holds power and is entitled to define the norm, and against those who deviate from that norm, against those who pose a threat to the biological heritage."

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than those reported in 2018. In 2020, there were 183 recorded murders of Indigenous persons, the highest number ever recorded (CIMI 2022, 4).[4]

The second principle of necropolitics refers to the territorialization of the sovereign State by establishing its borders in the context of the Westphalian global order (Coggins 2009).[5] The concentration of extractive activities that produce valuable resources within those borders turns those territories into unique spaces of war and death, where the war is fed by the growth in the sales of the extracted products (Mbembe 2003, 33). The maintenance of consumerism, which relies on extractivism, has helped shape legal and political systems. For Krenak, modernity fosters the belief that the Earth is separated from humanity, and that it can be endlessly exploited to support consumption without major implications for human life (Krenak 2020, 8, 9, 12). Every form of life not tethered in this paradigm is a threat and could be justifiably eliminated.

Therefore, the sovereign has the right to kill (animals, plants, and humans) so that extractive activities in its territories may thrive. The colonial wars are not subject to legal and institutional rules (Mbembe 2003, 25). In the Brazilian colonial period, Portuguese authorities could declare "just wars" against Indigenous peoples to ensure the metropole's interests over land and resources.

Even though literal wars against Indigenous peoples still happen in the Brazilian territory, with an astonishing number of Indigenous leaders being killed (Spezia 2022), a more subtle form of necropolitics is founded on the ideas of social determinism and assimilation. According to this form of necropolitics, the "integration of Indigenous peoples into the national society is inevitable as they supposedly reach 'higher evolutionary and developmental levels'" (Rocha and Porto 2020, 9). Bolsonaro also advanced this type of violence through his speech: "The Indians are evolving, more and more they are human beings like us" and "[t]he Indians do not speak our language, they do not have money, they do not have culture. They are native peoples. How did they manage to get 13% of the national territory?" (Survival International 2022).

The application of these principles of necropolitics is often justified by a sense of exception, emergency, and a common enemy of the public interest that needs to be eliminated (Bonin and Liebgott 2022). Indigenous peoples and their constitutionally protected lands are often viewed as obstacles to development, economic growth, and progress, even more so now with the economic and social crises potentialized by the pandemic. This is the perceived "threat to life" described in necropolitics and seen in Brazil (see Duprat and Terena 2021).

Historically, the Brazilian State has followed a logic of divergent occupation of lands, through which Indigenous occupation hampered maximum exploitation of resources. The State also followed a logic of scarcity, through which all resources

[4] The Conselho Indigenista Missionário (CIMI) has been investigating and recording violence against Indigenous peoples since 2014. CIMI's data links the murders and violence in general, often, with territorial conflicts, especially those involving illegal occupation of Indigenous territories.

[5] The Westphalian global order is understood as the association of sovereign states with the monopoly of force within their mutually recognized territories.

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must always be extracted and never "go to waste." After all, the Nation had to grow, distribute those riches amongst its citizens, and provide public services and essential goods. This has been the discourse of exception and emergency, as if the current (and historic) hunger for gold would end one day. This old way of thinking (Alimonda 2015) resurfaced recently with COVID-19 and Bolsonaro's government policies.[6]

The application of necropolitics against Indigenous peoples can be explained through Aníbal Quijano's theory of "coloniality of power." Quijano examined the colonization of Latin America through the imposition of Eurocentric forms of labour, production, and exploitation centred around the axis of capital and the world market. In this colonization process, a new mental category of "race" was created between the conquering and the conquered populations, naturalizing the division between superior and inferior groups (Quijano 2000, 216). The colonial European approach to Latin America was to "create states specifically designed around extracting resources to generate wealth for European elites, thus founding states within a world capitalist model of exploitation" (Darke and Khan 2021, 730).

Darke and Khan, based on Quijano's conception of the coloniality of power, contend that the "discourses and techniques of war that accompanied the Iberian monarchical traditions of hierarchy, militarism and moral crusade were some of the foundational elements on which Brazilian colonial society was built. From this base, a framework categorising peoples and legitimating lethal state violence has been justified and naturalised" (Darke and Khan 2021, 730–731). Based on this premise, contemporary "just wars" against Indigenous peoples and other minority groups in Brazil are founded on and legitimized by the understanding that there is a hierarchy of humanity and that violence is justified by an extractive capitalist agenda (Darke and Khan 2021, 730–731). Both an implied hierarchy of humanity and a supposed threat to life are part of the concept of necropolitics.

Necropolitics serves as a tool to realize the coloniality of power by normalizing the perception that the existence of "others" is an attempt against my life (Mbembe 203, 18). The "imaginary of sovereignty," as part of the concept of necropolitics, is the basis on which the government legitimizes the death of Indigenous peoples, part of a secondary category of people, not as engaged with an economy of consumption as other groups in Brazilian society. Living in and from the forest allows them a certain degree of autonomy from the economy of consumption and, therefore, some independence from the power of the State to regulate and reproduce capital. In contrast, political systems seem too often to advertise that the only alternative for human existence is the destruction of all other forms of life (Krenak 2020, 25).

The frameworks of the coloniality of power and necropolitics contribute to identifying and understanding how Brazilian law and policy proposals sought to legalize the exploitation of Indigenous territories and do away with the protection

[6] Alimonda offers a discussion of the historical political ecology of mining in Latin America, arguing that "the coloniality project in Latin America was the necessary counterpart to the modernity project in Europe (later the USA)" (149). He indicates that from 1700 to1800 only, a thousand tons of registered gold were removed from Brazil and sent to Europe. An equivalent amount was sent unregistered, through clandestine means (151).

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of constitutional rights. The next section offers a portrait of how exploitation directly affects Indigenous peoples' relationships with their lands and their ways of life, a practical illustration of necropolitics and the coloniality of power at work.

III. Mining in Indigenous Territories

Since 2019, when Bolsonaro was sworn in as President, the federal government has revamped neo-extractivist policies targeting all protected areas in the country, including Indigenous territories. When the pandemic hit, the government gained the perfect excuse for boosting the country's mining economy. With the financial uncertainties caused by COVID-19, the international demand for gold increased, as the market regarded it as the most reliable form of investment (Neate 2020). Brazil is one of the top ten producers of gold in the world. The country's mining sector has been at the forefront of colonization for over 400 years and has been one of the main threats to Indigenous and traditional communities (Rocha and Porto 2020, 7). In the last decades, even years before Bolsonaro was elected, a neo-extractivist development model based on mining, agribusinesses, and infrastructure building, such as hydropower dams, roads, and ports, led to the growth of social exclusion and violence in the country, especially in the Amazon region, among traditional communities that rely on the land and forests for their survival (Rocha and Porto 2020, 7).

Mining activities can be conducted industrially, with heavy machinery, or using artisanal practices, usually on a small scale. Both require companies to request authorization from the National Mining Agency (NMA) and hold adequate environmental licences. Any mining activity on Indigenous lands (lands either formally recognized by the government or not) and any mining activity without authorization from the NMA is considered illegal (Verdum and IWGIA 2022, 9). The mechanization of artisanal mining has grown in the past decades, making it sometimes impossible to differentiate between the two types of activity, with both causing significant environmental degradation. Artisanal mining often uses mercury to separate the metal from other substances, contaminating entire river systems (Veiga and Hinton 2002).

The NMA estimates that, in 2020, Brazil's gross production of gold was 121.5 tons. Approximately 28% of that gold was extracted illegally from Indigenous territories and environmental conservation areas (Verdum and IWGIA 2022,14). The gold is incorporated into an informal economy and leaves the region in which it was extracted through different clandestine agents to be then integrated into the formal economy (Verdum and IWGIA 2022, 14). Approximately 17% of the gold exported from Brazil had an illegal origin, lacking the necessary licences and NMA authorization (Verdum and IWGIA 2022, 18). The weakening of state oversight over mineral exploitation and commercialization, which was part of Bolsonaro's policies, contributes to clandestine operations. The package of laws and policies put forward by his government aimed not only to legalize those illegal activities but also to decrease oversight.

Illegal mining is financed by a few high-level businesses concentrating most of the riches from the Indigenous territories. Their entrepreneurs are members of the

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country's economic and political elite (Hutukara Associação Yanomami and Associação Wanasseduume Ye'kwana 2022, 10; Prazeres 2022; Gusen 2021). The activities happen in parallel with government policies to reduce protected areas and promote economic activities in Indigenous territories. Illegal mining is not a new or accidental activity that has escaped the eyes of law enforcement (Albert 1992), nor is it inevitable as if the government did not have the necessary apparatus to stop it. Studies have shown that the government limiting funding to environmental agencies, defunding environmental protection policies, reducing fines for environmental crimes, and implementing policies to authorize illegal mining coincide with the increase of violence and death in Indigenous communities, especially in the Amazon (Forensic Architecture 2022).

The demand for gold creates a chain of extraction and exploitation of land, resources, and people in relatively unexploited areas (Villen-Pérez et al. 2022, 3). Small- and large-scale mining directly affects Indigenous territories by deforesting them, polluting rivers (especially with methylmercury), taking away areas used by communities to grow food, and killing or scaring away animals essential to Indigenous people's hunting practices. The sector requires infrastructure development to provide energy and transportation to and from mining plants. The components that need to be built for this industry to thrive include highways, hydropower plants, transmission lines, and ports. It is a productive chain from extraction to exportation that generates a series of local conflicts with Indigenous people and makes communities and their ways of life more and more vulnerable (Rocha and Porto 2020, 11). Siqueira-Gay et al. argue that such infrastructure "facilitates access to otherwise barely accessible land and can result in cumulative impacts from multiple mining operations and other surrounding land users" (Siqueira-Gay et al 2020, 357).

The Yanomami people are one of the most impacted by illegal mining. In 2021, the environmental devastation in their territory increased by 46% compared with 2020 (Hutukara Associação Yanomami and Associação Wanasseduume Ye'kwana 2022, 16–18). Fishing has become too risky due to the alarming mercury levels in the waters from mining plants. Food insecurity has forced the Yanomami to trade with miners, leaving their communities vulnerable to the presence and demands of the miners. The scenario of abuse is not new, but the Brazilian government has never acted significantly to stop it, tacitly allowing it. The environmental devastation has been so great that the Yanomami have trouble keeping their traditional practices alive (Hutukara Associação Yanomami and Associação Wanasseduume Ye'kwana 2022, 16–18).

The environmental destruction of the Yanomami territory is combined with various health and social problems in the communities. The presence of illegal miners and squatters generates sexual and economic exploitation of the most vulnerable members of the communities, especially women and children (Hutukara Associação Yanomami and Associação Wanasseduume Ye'kwana 2022, 24, 84, 96). Children have been killed by the mining drainage equipment in the rivers (Hutukara Associação Yanomami and Associação Wanasseduume Ye'kwana 2022, 56). Illegal miners and squatters have attacked communities with gunfire seeking revenge for the communities' occasional resistance to their

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presence (Milhorance 2021). The Yanomami face the presence of organized crime in their territory, based on drug cartels, which have recently associated themselves with illegal miners (Forensic Architecture 2022). Several other Indigenous peoples in Brazil are living the same situation as the Yanomami.

Even though the 1988 Constitution clearly formalized Indigenous rights, including the protection of Indigenous territories, the Bolsonaro government persistently and strategically ignored illegal activities and disabled the country's law enforcement apparatus. One hundred forty-eight Indigenous territories (45% of the total area of Indigenous lands in Brazil) already contain some kind of illegal mining activity (Siqueira-Gay et al 2020, 357). Even though mining is not allowed in Indigenous territories, mining companies are active in the search for exploitable areas. About half of the Indigenous territories that contain isolated groups in the Brazilian Legal Amazon (twenty-five lands or 45%) are targeted by companies with a registered interest in mining (Villen-Pérez et al. 2022, 5). The package of laws and policies put forward by the Bolsonaro government aimed to legalize those illegal activities and enable further exploitation of Indigenous territories, with dire consequences for the safety and well-being of communities, as is discussed further.

IV. The Brazilian Constitution and Indigenous Rights

With the 1988 Federal Constitution, Indigenous peoples gained recognition of their rights to being and living distinctively from a "national identity." The Constitution incorporated the principle of a pluri-ethnic state (Squeff 2016, 53), based on the acknowledgement that different groups with their own social, cultural, and legal traditions live within the same national territory (Allen 1989). With the end of the military regime in 1985, Indigenous movements, mostly represented by the Union of Indigenous Nations (founded in 1980) started to mobilize and pressure the new Constituent Assembly, which would draft the 1988 Federal Constitution. Indigenous movements had an important role in including the principle of the pluri-ethnic state in the Constitution. The novelty came at a time when many Latin American countries were enacting new constitutions that enshrined the human rights of Indigenous peoples. The notion of pluri-ethnicity, however, does not ensure the necessary legal and political pluralism to transform positivist laws into social practices and government policies.

Based on the understanding that Indigenous peoples have a distinct and ancient relationship to their traditional territories, the Constitution recognized Indigenous territorial rights to the lands they occupy (Presidência da República do Brasil 1988, art. 231). Even though the relationship of each Indigenous group to the land is different, the law acknowledges that they relate to the land in fundamentally distinctive ways compared with the conventional capitalist mode of extraction and production. Their territories are the basis of their livelihood, family relations, cultures, and spirituality (Kambemba 2020; Baniwa 2017; Villares 2013, 113). Indigenous peoples therefore have a collective constitutional right to use the land and natural resources for their well-being, according to their traditions, uses, beliefs, and practices (Presidência da República do Brasil1988, art. 231). This right

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is based on historical land occupation, regardless of whether state law has yet formalized that occupation (Villares 2013, 105; Duprat 2018).

Article 231 of the Constitution establishes that any energy development or mineral prospection and extraction on Indigenous territories requires the authorization of the National Congress, after hearing the communities involved. While this constitutional provision (regarding mineral exploitation) has not yet been further developed with a statutory framework, one existing regulation decrees that all environmental decision-making affecting Indigenous peoples and lands directly requires consultation with affected communities (Presidência da República do Brasil 2012).

Indigenous territories are areas of property of the Union (the Brazilian State) traditionally occupied by Indigenous peoples (Presidência da República do Brasil 1988, art. 20, XI). They are subject to a special tenure regime—while the property of the federal government, their occupation and use are legally ensured to Indigenous communities. It is not a private right to ownership but a unique and collective tenure right in recognition of Indigenous peoples' occupation, by present generations and by their ancestors, since time immemorial (Villares 2013, 110). Commercial transactions of those lands, extraction of natural resources, and the development of agriculture or livestock rearing by non-Indigenous peoples are prohibited on those territories (Presidência da República do Brasil 1973, art. 18). Land rights thus create the State's responsibility to demarcate and protect those areas against invasions and illegal natural resource extraction and development. This responsibility stems from the State's fiduciary duty towards Indigenous peoples (Presidência da República do Brasil 1973, art. 19).

Demarcation is the State act to define the limits of an Indigenous territory based on specialized studies to identify the area and its natural boundaries through cartographic and historical documents.[7] After the Ministry of Justice consents to the identification of the area, the Brazilian President sanctions the demarcation procedure through a presidential decree (Presidência da República do Brasil 1996). These recognized territories are similar to the concept of Indigenous reserves in that demarcated areas do not necessarily represent the integrity of traditional territories that Indigenous communities have historically occupied. To comply with constitutional requirements, the Union should have concluded the demarcation of Indigenous lands within five years of the promulgation of the 1988 Federal Constitution, by 1993 (Presidência da República do Brasil 1988, Temporary Constitutional Provisions Act, art. 67; Hutchison et al. 2006).

[7] This process is conducted by FUNAI (Fundação Nacional dos Povos Indígenas – Indigenous Peoples National Foundation), a government agency created by law in 1967 to carry out policies related to Indigenous Peoples. FUNAI forwards its conclusions and recommendations regarding the demarcation of lands to the Ministry of Justice for its decision. Part of the Brazilian Congress has been striving to weaken FUNAI's role in demarcation by proposing an amendment to the Constitution (Constitutional Amendment proposal 215), so that the Congress would be responsible for demarcations. Jair Bolsonaro, in his first day in the presidency, fast-tracked the weakening of FUNAI by enacting a temporary executive order transferring the powers to demarcate Indigenous traditional lands from FUNAI to the Ministry of Agriculture. The former president also announced that he would not be authorizing any demarcation during his mandate.

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Non-compliance by the Union does not affect or diminish Indigenous peoples' rights to the demarcation of their lands today. While demarcation is the recognition of an inherent right, as defined by the 1988 Federal Constitution and the Brazilian *Indian Act*, the right to traditional land is not at all dependent upon demarcation (Presidência da República do Brasil 1973, art. 25). Nevertheless, a 2009 decision by the Federal Supreme Court (Supremo Tribunal Federal, STF) weakened the enforcement of this right by indicating that the date of the 1988 Federal Constitution is a criterion by which to identify whether Indigenous communities have the right to a territory (STF 2010). This thesis, named *marco temporal* or "milestone," restricts the demarcation of Indigenous lands to areas under the proven possession of the original peoples on October 5, 1988, the date the Federal Constitution was promulgated (Duprat 2018, Silva 2018). The Federal Supreme Court has recently changed its understanding, determining that "the constitutional protection of Indigenous peoples' original rights over the lands that they traditionally occupy is independent of a milestone on October 5, 1988" (STF 2016).[8] Despite the Supreme Court's recent judgment, only two days after the landmark decision, the Brazilian Senate passed a bill to legislate the *marco temporal.* As this article is being edited for publication, the bill is before the Brazilian President (Lula da Silva) waiting for his assent for it to become law (Senado Federal do Brasil 2023, Carvalho 2023). It is clear that a regression in the recognition of Indigenous rights still forms part of the National Congress' agenda.

In any event, the Brazilian government is also bound by international law, notably International Labour Organization Convention 169, ratified and adopted by Brazil through Presidential Decree no. 10088 in 2019, which provides that governments shall consult with Indigenous peoples whenever the government is considering legislative or administrative measures that may affect them (ILO 1989, art. 6). The foundations of Convention 169 are the right to participation and consultation, including the right to be consulted through their own "representative institutions" using "appropriate procedures," in connection with the right to land and resources and to determine Indigenous-led priorities for development (Rombouts 2017, 184; Yaffe 2018, 721–722).

V. Package of Neo-extractivist Laws and Policies

As indicated previously, according to the Brazilian Constitution, the lands traditionally occupied by Indigenous people "are intended for their permanent possession, and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein" (Presidência da República do Brasil 1988, art. 231, paras 3, 4). Any hydroelectric and mineral resources in Indigenous lands "may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law" (Presidência da República do Brasil 1988, art. 231, paras 3–4).

[8] Author's translation from Portuguese.

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A 2020 administrative instruction by FUNAI (IN 09/2020) allowed landowners to declare that their property includes some Indigenous lands that have not been demarcated and formally recognized by the government. However, a federal court decision temporarily suspended this policy in August 2022 (Procuradoria-Geral da República 2021). Bill 2633, also proposed by the executive branch of the federal government in 2020 (Câmara dos Deputados do Brasil 2020b), aims to consolidate and formalize irregular occupation of areas of the Union (federal public areas) in the Amazon region. The Bill, which is still being discussed in Congress, does not deal directly with Indigenous lands not recognized by the government. But, if approved, the law could formalize the exploitation of public lands historically occupied by Indigenous peoples and in the process of demarcation. According to the Constitution, the federal government cannot dispose of those lands. But in combination with FUNAI IN 09/2020, this law could allow for the issuance of private land titles in parts of non-formalized Indigenous territories (Rocha and Porto 2020, 15–16).

Additionally, a series of presidential decrees and orders since 2020 have aimed at supporting artisanal mining, consolidating its presence in Indigenous territories and fostering its expansion, especially in the Amazon region. In February 2022, for instance, President Bolsonaro signed a decree to establish simplified procedures for analyzing and issuing authorizations by the NMA for small-scale mining activities (Verdum and IWGIA 2022, 22–24).

Bill 191 was put forward in 2020 by the Federal Executive power to regulate a provision of the Constitution that establishes that mineral resources and hydraulic energy potential belong to the Union and are distinct from the soil (Câmara dos Deputados do Brasil 1988, art. 176). The regulation of this provision concerning the possibility of extraction in Indigenous territories has been expected since the enactment of the Constitution in 1988. However, this proposal caused a strong adverse reaction from Indigenous movements and their supporters, who argue that the Bill is unconstitutional (ISA 2020). Particular aspects of the Bill are questionable, such as the concept of Indigenous territories, which would only be considered as such when fully demarcated and recognized according to the *Indian Act* (Câmara dos Deputados do Brasil 2020a, art. 2). In other words, the areas traditionally occupied by Indigenous communities but not completely formalized by the federal government are treated like any other area that belongs to the Union, without the Constitutional protection ensured to Indigenous territories.

Another aspect of the Bill that compromises its constitutionality refers to the conditions for mineral or hydraulic exploitation, which included consultation with affected Indigenous communities and approval from the National Congress. Article 10 of the Bill indicates that consultation with affected Indigenous communities is required for Congress to approve an extractive project (Câmara dos Deputados do Brasil 2020a, art. 10). However, the language of the Bill distorts the Constitution's intent by arbitrarily conferring the final decision on the National Congress, which is not bound by the results of consultation with affected communities. Article 231, paragraph 3, of the Constitution does not refer only to the approval of particular extractive projects in Indigenous territories but mainly to the requirement that any law that regulates the issue be subject to consultation. This

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has not happened. The National Congress discussed the Bill without any dialogue with Indigenous groups and organizations in the country.

In March 2023, the Lula government requested that Bill 191 be withdrawn from the Congress's schedule, which was accepted by their members (FUNAI 2023). But had it been approved, the law would have granted immediate acceptance of all administrative requirements for mineral exploitation in Indigenous territories made to the NMA before the demarcation and formal recognition of those territories, validating illegal mineral activities in place. The proposed legislation could have impacted a large extent of forests, up to 20% more than the potentially affected area under current trends of mining expansion (Siqueira-Gay et al. 2020). This would directly affect 237 Indigenous territories (sixty-two formally recognized and 175 in the process of demarcation) and their biodiversity. Currently, the NMA is examining 3,843 requests for mineral exploitation in those areas (Rocha and Porto 2020, 14). Gold mining accounts for 64% of the requested sites (Rorato et al. 2020). It is unlikely that the new law would have restricted any type of mineral development in Indigenous territories, especially considering the demand for economic growth following the effects of the pandemic (Rocha and Porto 2020, 15).

Bill 191 does not exist anymore, but its embodied interests are quite alive in the Brazilian Congress and the economic sectors that are represented there. Since the promulgation of the 1988 Federal Constitution, almost every year, some kind of Bill has sought to infringe on Indigenous land rights. A study shows that four moments in the history of the new Constitution stand out regarding the number of proposals: 1989, 2007, 2015, and 2020 (Alkmin 2022, 83).

As indicated, Brazil's Indigenous peoples face a more fundamental legal problem in the courts today, the *marco temporal* thesis (APIB 2022), which does not consider the fact that Indigenous communities were violently dispossessed of their territories in the long period of Brazilian history until 1988. Liana Amin Lima da Silva and Carlos Marés rightly point out that the right to land is an "original" right, as articulated in the text of the 1988 Constitution. It is a right inherently linked to Indigenous peoples' social organization, history, memory and spiritual connection with the land (Amin Lima da Silva and Marés de Souza Filho 2021). The *marco temporal* is a legal fiction reflecting the fear that Indigenous peoples' existence and connection with their lands would threaten society by diminishing the extent of land available to the extractive economy. It is a clear example of necropolitics and the coloniality of power in action.

This battle being fought in the field of constitutional interpretation shows the extractive economics paradigm and coloniality of power ideology at work, as well. Much of what was proposed by those laws and policies is premised on a restricted definition of Indigenous territories and the right to land. The right to land protects the life of Indigenous peoples, as individuals and as social, cultural, and political groups. Bolsonaro's package of proposed laws and policies operationalizes the concept of necropolitics by treating respect for Indigenous rights, and therefore Indigenous life, as an existential threat to the unified Brazilian "nation."

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VI. Decolonization as Decoloniality

While the "imaginary of sovereignty" shapes necropolitical policies that seek to "eliminate the plurality of the human condition," decoloniality aims to deconstruct the conceptual apparatus of knowing and understanding that has supported the uniformization and categorization of people (Mignolo 2021). Walter Mignolo argues that the way to decoloniality is through emerging global and diverse political societies that take their destinies into their own hands, focusing on epistemic and ontological reconstitutions (Mignolo 2021). Ontological reconstitution depends on the knowledges and wisdoms which have been marginalized through coloniality coming to the forefront and becoming part of the construction of new realities. The solution is not just more State laws but recognizing and enacting constitutional protection of Indigenous legal traditions, beyond the narrow conditions assigned by the State.

As State governments come and go with different sets of agendas, State laws are often detached from real life and from the diverse practices of living and thinking (on and with the land) present in Indigenous traditions. Fortunately, for the past decade, we have seen a resurgence of Indigenous laws and traditions in Brazil, challenging the uniformity and fictionality of State laws. Almires Martins Machado, a Guarani legal scholar, explains that the Guarani law is collective, and all beings are interconnected. The land is not only land but also an entity with life, spirit, and soul. The spirit of the land is free (Martins Machado 2019, 202–204). As Yanomami leader Davi Kopenawa beautifully argues, "[o]ur thoughts expand in all directions and our words are ancient and many. They come from our ancestors… they are engraved inside of us" (Kopenawa and Albert 2010, 75).[9] Bringing those legal traditions to the forefront is part of the work of reconstituting epistemic and ontological realities. Below are three examples of decolonial practices that seek to expand the interpretation of constitutional protection of Indigenous land, to encompass the necessary lived practices happening within those territories.

One practical way Indigenous communities have been doing that is by creating Protocols for Consultation and Consent based on their own laws and traditions (Montambeault et al. 2019). For instance, the Juruna people of the Xingu River created their Consultation and Consent Protocol based on their laws and traditions after their experience with the approval of the Belo Monte mega hydro dam in 2015, which did not involve proper respect for their right to self-determination, as they understand it as part of their constitutional rights. The Federal Court of Pará state ordered the suspension of a mining project license in the region, based on the duty of the state to consult with the Juruna people pursuant to the Juruna protocol (Marés de Souza Filho et al. 2019). The Wajãpi people in Brazil created their Consultation and Consent Protocol in order to formalize to the State what proper procedures would be accepted in future dialogues about environmental decision-making that affect the community (Amin Lima da Silva 2016, 106–107). According to the protocol, the collective of the representatives of all Wajãpi communities deliberate and make decisions together, with the support of the associations and

[9] Author's translation from Portuguese.

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organizations formed by members of the communities. One of the objectives of the protocol is the negotiation and ratification of an agreement with the colonial government with a plan for future dialogue between the Brazilian and the Wajãpi governments (Amin Lima da Silva 2016, 106–107). Indigenous peoples are reconstructing their role in the Brazilian legal system by demanding respect for their land and laws through Consultation and Consent Protocols.

A second example of reconstituting epistemic and ontological realities is Indigenous communities seeking to protect their traditional territories in light of the increasing illegal occupation and exploitation of their lands. They do not accept the "reality" imposed by the federal government through the proposal of unconstitutional laws and policies. Communities of the Xikrin people in the Amazon monitor the borders of their territories and send warriors to expel the squatters (Maisonnave 2019). They have been implementing measures to monitor their lands, using geo-referenced data, drones, marks, and training of their agents.

A third example is the masses of Indigenous peoples travelling from all across the country to Brasília every April for the ten-day Free Land Camp. They use their bodies in protests, dances, ceremonies, and marches to call the federal government's and society's attention to their claims (Phillips 2019). The Camp is organized by the Articulation of the Indigenous Peoples of Brazil (Articulação dos Povos Indígenas do Brasil, APIB), a national network of Indigenous organizations that has defended Indigenous rights in courts. These broader decolonial strategies have also included Indigenous peoples deploying state institutional mechanisms on their own terms to pursue such rights recognition. Indigenous individuals have been increasingly participating in State politics. At the end of 2022, Brazil elected a record number of Indigenous candidates for all levels of the legislature: two representatives in legislative assemblies, two senators, and five representatives to the House of Deputies (four of them Indigenous women) (Brito and Lopes 2022).

Finally, one event symbolically illustrates the work of decentring law from the State to centring it in communal practices. In November 2019, a month before the United Nations Climate Change Conference COP 25, the city of Altamira, in the Pará State, hosted the event *Amazônia Centro do Mundo* (Amazon, the Centre of the World). Groups of activists from across the globe, Indigenous leaders such as Davi Kopenawa and Raoni, youth climate activists, leaders of religious groups, journalists, scholars, and citizens at large concerned with the climate emergency gathered in that small city in the heart of the Amazon. That was where the Belo Monte dam had been built a few years before, causing extreme devastation over the land and rivers of importance to Indigenous communities (Erdos et al. 2019). At the event, grassroots movements offered Indigenous peoples of the Amazon their support, recognizing that the peoples of the forest (as they are often called) have offered their own bodies to protect the rainforest for centuries.

The *Amazônia Centro do Mundo* event is a call for reconstituting epistemic and ontological realities. The main actors were not State representatives such as the ones gathered in Madrid for COP 25 but, rather, leaders of Indigenous and other traditional communities such as the African-Brazilian *Quilombolas,* as well as local activists and youth from across the globe. The centre of the world for that week of events was not Madrid, London, New York, or Brasília. It was Altamira, in the

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Amazon region. The experts heard at the event were Indigenous elders who shared about the forest and what it used to look like. The *Amazônia Centro do Mundo* shifted the attention from climate specialists and government officials to the knowledge and wisdom of the peoples of the forest and sought to organize and design new realities. These practices of decoloniality counter necropolitics by reinvigorating the Indigenous right to land, which makes possible Indigenous life and traditional ways of living on and with the land.

VII. Conclusion

The laws and policies to legalize mineral exploitation on Indigenous territories, as proposed and advanced by the Bolsonaro government, would increase the threat to Indigenous peoples' lands, communities, and bodies. The economic uncertainties generated by the pandemic were used to justify this move. But, more fundamentally, the proposal reflects the paradigm of the extractive economy and coloniality of power, operationalized by necropolitics. Fear that Brazilian society at large would be starved of the resources present in Indigenous territories cements this paradigm. Necropolitics is its brutal expression. Although violence against Indigenous peoples has been supported by governmental actions, such as "just wars" and assimilationist policies, Indigenous peoples have been acting to reconstitute their epistemologies and ontologies for centuries and create alternative paradigms of governance. The actions mentioned in the last section are only some of the practices of decoloniality, within a long history of colonialism, that reflect their plural Indigenous legal traditions. Although those practices do not immediately impede the encroachment of extractive activities on Indigenous territories, they slowly find resonance in Brazilian and international communities and expose how State law has embodied the idea of coloniality in regulating Indigenous lives. While coloniality restricts and ultimately empties the definition of Indigenous right to land, practices of decoloniality help expand constitutional interpretation to properly encompass protection of the well-being of Indigenous communities and their traditions within healthy territories.

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