UNIVERSITY OF WESTMINSTER

Coloniality and the Courtroom:

Understanding Pre-trial Judicial Decision Making in Brazil

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Abstract

This thesis focuses on judicial decision making during custody hearings in Rio de Janeiro, Brazil. The impetus for the study is that while national and international protocols mandate the use of pre-trial detention only as a last resort, judges continue to detain people pre-trial in large numbers. Custody hearings were introduced in 2015, but the initiative has not produced the reduction in pre-trial detention that was hoped. This study aims to understand what informs judicial decision making at this stage. The research is approached through a decolonial lens to foreground legacies of colonialism, overlooked in mainstream criminological scholarship. This is an interview-based study, where key court actors (judges, prosecutors, and public defenders) and subject matter specialists were asked about influences on judicial decision making. Interview data is complemented by non-participatory observation of custody hearings. The research responds directly to Aliverti et al.'s (2021) call to 'decolonize the criminal question' by exposing and explaining how colonialism informs criminal justice practices. Answering the call in relation to judicial decision making, findings provide evidence that colonial-era assumptions, dynamics, and hierarchies were evident in the practice of custody hearings and continue to inform judges' decisions, thus demonstrating the coloniality of justice. This study is significant for the new empirical data presented and theoretical innovation is also offered via the introduction of the 'anticitizen'. The concept builds on Souza's (2007) 'subcitizen' to account for the active pursuit of dangerous Others by judges casting themselves as crime fighters in a modern moral crusade. The findings point to the limited utility of human rights discourse – the normative approach to influencing judicial decision making around pre-trial detention – as a plurality of conceptualisations compete for dominance. This study has important implications for all actors aiming to reduce pre-trial detention in Brazil because unless underpinning colonial logics are addressed, every innovation risks becoming the next *lei para inglês ver* (law [just] for the English to see).

Contents

List of Tables

List of Figures

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Author Declaration

I declare that all the material contained in this thesis is my own work.

Chapter 1 | Introduction

1.1 Context of the Research

My personal pathway to this research was paved in the experiences as a programme manager of criminal justice reform projects for national and international criminal justice non-government organisations (NGOs). The projects were designed and implemented in partnership with judiciaries, and prison and probation departments across several countries in the global South and funded by European donors. Programmes usually focused on a specific area of the justice system, for example, the high rates of pre-trial detention, and aimed to facilitate progressive reform via a range of activities with relevant justice personnel.

On several occasions, a core programme activity was to facilitate training with criminal justice practitioners on the importance of international human rights soft law, such as the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). The broad rationale for such training is that when justice practitioners are provided with sufficient information about universally agreed human rights and the benefits of minimum standards of treatment, then they will adjust their behaviour to reduce suffering and pain.

On one occasion, the funding for training with the Kenyan Prison Service would only be sanctioned by the Northern European donor organisation, if the group of trainers were exclusively drawn from a pool of international experts. National staff with decades worth of experience were not considered appropriate, despite their expertise and understanding of the local context. We circumvented this issue by being creative with the job titles of the local experts so that they could lead discussions, but as far as the donor was concerned, external, Northern/Western *international criminal justice reform experts* were applying the appropriate knowledge in this Southern context.

I start with these brief recollections because such experiences led me to investigate some of the doubts that I had been harbouring about the approach taken by the international justice reform communities, such as donor agencies, UN departments and NGOs. The concerns stemmed from the apparent ontological assumptions of these international communities about *whose knowledge counts* and *who gets to decide*? Throughout my experience of conferences and workshops on international justice reform, there appeared to be an automatic reifying of knowledge and experts from the global North which felt reminiscent of assumptions of superiority that accompanied previous global power dynamics. The same reform approaches underpinned by normative human rights discourse appeared to be applied across all programmes without consideration of the local political, historical, or socio-economic contexts. Given the vastly different realities, is there not scope for international justice communities to be more cognisant of such contextual factors?

Even though there is a wealth of literature related to the historical periods of colonialism and its legacies for post-colonial contexts, there remains little recognition of such legacies in the policy and programmatic world of justice reform. Rather than continuing with what amounts to the occidentalist effect of denying the difference between contexts, I believe that the international communities can do better. This study is therefore about exploring the significance of some of these particular factors within a specific criminological context.

1.2 Problem Statement

This thesis focuses on the specific context of the large-scale use of pre-trial detention in Rio de Janeiro, Brazil. While national and international protocols mandate that pre-trial detention should be used solely as a last resort and UN bodies and NGOs have highlighted the human rights violations that result from pre-trial detention, judges continue to regularly decide to detain large numbers of people until trial, which can be months, and in some cases years. It is therefore important to explore what factors influence judges' decisions to detain pre-trial, considering that neither the overt guidelines nor human rights-based advocacy appear to facilitate a reduction in the use of detention.

Why Pre-trial Detention?

While I will provide detail specific to the Brazilian context shortly, it is worth highlighting that pre-trial detention is one of the drivers of mass incarceration globally (Schönteich and Varenik 2014), and as such, is important as the front door to the prison system. Criminal justice reform will often target this part of the justice system both to protect the right to presumption of innocence, but also prevent the many other rights violations that can accompany pre-trial detention. In addition to the denial of liberty, the decision to detain an individual rather releasing them until trial can lead to many negative realities including the limiting of access to legal advice, family and in many cases, clean water, food and medicine (Heard and Fair, 2019). As I will detail, studies have also shown that people in pre-trial detention face a heightened risk of torture and inhumane treatment.

Pre-trial detention is therefore a relevant focus of study as it represents a crossroads whereby one path allows a person to return to their family, maintain their responsibilities and prepare for their trial; and the other places restrictions on fundamental rights such as those to liberty, presumption of innocence and protection from torture. Current methods to prevent the over-use of pre-trial detention tend to centre around human rights sensitisation training with judges (such as those as I have been involved with), as explained above. Understanding how and why judges come to their decisions about pre-trial detention can thus inform and improve the international communities' efforts to facilitate reform.

Why Brazil?

Brazil is of particular interest due to the scale of mass incarceration and use of pre-trial detention. Brazil is the fifth most populous country in the world, with approximately 2.75% of the global population (Worldometers, 2019), but the third greatest incarcerator in the world with 6.43% of the world prison population, (Walmsley, 2018)[1]. As of February 2019, there were 243,308 pre-trial detainees in Brazil (ICPR, 2019a), representing 33.8% of the overall

[1] Calculation made using Walmsley's (2018) data. Brazilian prison population of 690,722 as a percentage of the world prison population of 10,743,619 = 6.43%. Statistics are approximates as they are the number or 'snapshot' of prison populations on a single day.

Brazilian prison population. This is a huge increase from the year 2000, when there were only 80,775 pre-trial detainees recorded (Ibid.). This increase cannot be accounted for by a rise in the country's general population during this time, as the number of pre-trial detainees per 100,000 of the national population also dramatically increased from 46 to 114 during this same period (ICPR, 2019a). There is also a clear overrepresentation of black Brazilians and those with plural heritage in prison at 64%, compared to 53% the general population (Conectas, 2017), meaning that the context may be better described as 'hyperincarceration' (Wacquant, 2010) due to targeted policing and sentencing of racialised groups.

Brazil is also notable as the country which received the largest number of enslaved people from African countries. Between 1501 and 1856, 5,848,265 African people forcibly embarked on the trans-Atlantic enslavers' ships, with 5,099,815 disembarking in Brazil[2] (SlaveVoyages, nd). Brazil, therefore, represents a leading example of a growing prison population with an overrepresenttaion of racialised groups and a history of a racist hierarchy of humanity. It is thus an appropriate and 'representative case' (Pakes, 2019: 18) for centring the legacies of colonialism in an examination of contemporary justice.

With specific consideration to pre-trial detention in Brazil, until 2015, judges made decisions on whether to detain pre-trial, purely based on information provided in police reports, and a detainee could spend months in prison before seeing a judge. After much campaigning from national and international rights groups, custody hearings were introduced in 2015 in an attempt to reduce the over-use of pretrial detention whereby those who were allegedly arrested *flagrante delicto* (caught in the act), would be brought promptly before a judge, so that informed decisions could be made about detention or release. However, the policy did not translate into the level of reduction in pre-trial detention anticipated (Medina, 2016).

For those concerned with the problems caused by hyperincarceration, it is obvious that in statistical terms, in Brazil there is a great need for reform. Numerous local and national NGOs

[2] The difference between those who embarked and disembarked equates to a loss of 748,450 lives. SlaveVoyages.org draws on multiple sources to best estimate numbers of people forcibly transported.

have called for decarceration in Brazil and a reduction in the use of pre-trial detention. It is important therefore to empirically understand what influences judicial decision making in Brazil, rather than applying a normative framework and hoping that it will be effective.

Brazil is a diverse country consisting of 26 states, with considerable variations in geography, economic resources, and demographic make-up. The Federal Constitution grants each state the power to write its own constitution and organise its own judicial systems (although judges can move between state systems). The wide variation between states and their interpretations of legislation means that it is almost impossible to account for a truly 'Brazilian' perspective, which is certainly not my aim for this thesis. While much of that discussed in this thesis applies to large parts of Brazil, it would be accurate to suggest that there are many contexts within Brazil that can be investigated. In order to be as specific as possible, I focus my investigation on one state context only.

Why Rio de Janeiro?

While there are issues with violence and human rights violations throughout the country, Rio de Janeiro is a state that has seen unprecedented security intervention in recent years, culminating in the deployment of the military to the city streets and civilian authorities replaced by army generals. These are actions that have been unheard-of in the country since the return to democracy in 1985 (Child and Simoes, 2019). In this sense, Rio de Janeiro acts as an extreme example of the Brazilian contexts.

Extra-judicial killings are a huge issue in Rio de Janeiro state and 2018 saw the highest number of police killings since records began in 1998 (Human Rights Watch, 2018a). This record was then broken in 2019 (BBC, 2020). The Brazilian context is further complicated by popular support for the punitive policies of President Bolsonaro, democratically elected in 2018. Such policies include mass incarceration and extra-judicial killing of citizens thought to be criminals. The scale of reform required to reduce harm and suffering at the hands of the state makes Rio de Janeiro a particularly pressing context for investigation.

The extreme violent realities of Rio de Janeiro also serve to highlight the inappropriateness of criminological theory that does not take the everyday nature of violence into account. Much criminological scholarship contains assumptions about the nature of the nation state including a monopoly on use of violence (Carrington, Hogg and Sozzo, 2016a), and therefore it is important to consider how to understand judicial decision making in a context where the traditional social contract between the state and the population is not in place and violent power is shared between the state and organised-crime groups. Taking this context as a point of departure contributes to addressing such an imbalance in knowledge production according to normative assumptions.

Practicalities and logistics are also important considerations when undertaking a study of this size. It is therefore also relevant to highlight that I had spent extended periods of time in Rio de Janeiro before undertaking this study and have Brazilian Portuguese language abilities. Previous contacts in the criminal justice world also provided reliable assurances that I would be able to carry out the investigation that I had designed.

1.3 Aim and Scope

Aim

The long-term impetus for this research is to contribute towards the understanding of how the international criminal justice communities can better support reform efforts to reduce the overuse of pre-trial detention in the global South. Such a goal is beyond the scope of one piece of work. Therefore, I aim to contribute towards it by investigating an isolated criminal justice context in Brazil whilst taking the importance of the legacies of colonialism as a point of departure. The aim of this research is thus to understand what influences judicial decision making at the pre-trial stage in Rio de Janeiro, Brazil. Specifically, the research questions asks:

> To what extent are judicial decisions during custody hearings in Rio de Janeiro, Brazil, informed by coloniality?

In this section I will define the explicit parameters for the research and introduce 'coloniality' as a central concept.

Theoretical Scope

I approach this research through a "decolonial lens". The following chapter will provide an overview of the latest thinking related to "decolonising the criminological question" and provide a full consideration of what it means to take up the "decolonial option". However, to set expectations clearly, I highlight here some key concepts for this approach before further elaboration in Chapter 2.

Western domination over the legitimating of knowledge has led to much criminological theorisation absent of the destructive legacies of empire (Carrington et al. 2016), with much silence suggestive of 'criminology's complicity in the imperial project' (Agozino 2003: 13). Taking up a decolonial lens is thus an effort to foreground these specific legacies of colonialism, which have proved to be a blind spot for much of mainstream criminological scholarship, focused on Western/Northern ontologies and epistemologies.

Rather than focus on theory and assumptions born of the West/North, my point of departure is decolonial theory created in the locations and epistemologies of the Americas of the South. The 'coloniality of power' relates to how the societies implanted by the invading European powers across the Souths of America were designed from their inception around a dual axis of an exploitative global capitalism and a racialised social hierarchy, dividing all peoples between the conquerors and the conquered (Quijano 2000: 218). In considering the legacies of Quijano's coloniality of power for contemporary Americas of the South, Mignolo and Walsh (2018: 4) refer to the ongoing system of domination as the 'colonial matrix of power', using 'coloniality' as its shorthand. Coloniality is thus a useful concept for considering the historical impacts of colonialism and how the legacies inform the way modernity has been constructed. It is a core concept of the 'decolonial option', which considers colonial logics and actions, but also centres localised and non-hegemonic forms of knowing and being, (Mignolo, 2002, 2011; Grosfoguel, 2007, 2011; Santos, 2016; Suárez-Krabbe, 2016; Mignolo and Walsh, 2018; Escobar, 2020). Decoloniality is thus, not a paradigm but 'a way, an option, a standpoint, and a practice (and praxis) of analyzing, but also of being, becoming, sensing, feeling, thinking, and doing' (Walsh, 2018: 102).

Aliverti et al., (2021) propose a framework for 'decolonizing the criminal question', which involves two key aspects. The first relates to exposing and explaining how colonialism informs criminal justice policies, practices, and institutions as well as normative criminological methodologies and theorising (ibid: 299). The second considers how to move forward by dismantling these discriminatory dynamics and 'contribute to building alternative paths, both at the level of thinking and intervention (ibid). One thesis cannot do justice to so large a task, so this research is focused specifically on the first part of the framework, i.e., to investigate and explain how the legacies of colonialism inform judicial decision making. It is my hope that by centring such realities, the research can provide the foundations for further work to contribute to the second aspect of building alternative decolonial paths within international justice reform, which include these important contextual details.

A positivist approach to research in methodological terms relates to identifying commonalities, convergences and criminal justice concepts which can be applied universally (Nelken, 2010; Pakes, 2019). This characterises much comparative criminological work whereby a set of concepts born of one place (usually the Metropolitan centres of the North/West) are applied to other contexts. For this thesis, an interpretivist approach[3] is more suitable whereby focus is given to contextual divergencies, in this case from normative conceptions and expectations. As Darke (2021: 382) explains:

> Interpretivist comparative criminology, on the other hand, warns researchers and policy makers to be sure they fully understand a country or region's social and political cultures before they promote criminal justice reforms, otherwise they may end up exporting or importing policies that will not work in practice, or may do more harm than good.

Although the over-use of pre-trial detention is an observable phenomenon globally, I adopt an interpretivist approach to concentrate on the particular social, cultural, and historical factors of Brazil. Such an approach is complementary to the use of a decolonial lens, which is particularly alert to exposing the imposition of assumptions of one positionality onto others.

[3] Sometimes referred to as 'relativist', see (Pakes, 2019: 17)

Investigating the Brazilian case is a worthy pursuit in itself, but the demonstration of the contextual nuances specific to Brazil can also be a prompt for international reform communities to question their own positivist methods of applying similar approaches across circumstances.

Logistical Scope

There are many ways to examine judicial decision making, such as by isolating individual environmental factors such as room temperature or time of day decisions are made; or measuring judges' mood; explicitly dividing by political opinion or religious belief. This research does not focus on any of these avenues for investigation, but rather is an interview-based study, where judges were asked openly about what they believe influences judicial decision making[4]. This self-reporting was supplemented by contextual triangulation via interviews with other key court actors (prosecutors, and public defenders) and subject matter specialists (e.g., NGO experts working on projects related to pre-trial detention).

The interviews were combined and complemented with non-participatory observation of custody hearings and all observations were conducted at the custody hearing courts in Benfica, Rio de Janeiro during three months in 2019. The research did not set-out to investigate decision making related to the hearings of male detainees in particular, however, the vast overrepresentation of men involved in the criminal justice system[5] inevitably led to observation of a greater number of hearings of men. The testaments from interviewees largely also follow this demographic profile, but I have highlighted gendered concerns where they have been mentioned as relevant. Separate study of judicial decision making specifically related to women during custody hearings is likely to uncover further nuance.

[4] More detail is provided on all of these matters in Chapter 5: Methodology

[5] While the number of women in prison has increased, women prisoners as a percentage of the overall prison population has remained consistently low, between 4 and 7% over the past two decades (ICPR, 2021).

1.4 Significance of the Research

Custody hearings were introduced in Brazil in 2015 and while there has been investigative work produced by Non-Government Organisations (NGOs) see for example (CESeC, 2016; ISER, 2016; IDDD, 2017; IDDD, Justiça Global and OBSAC-UFRJ, 2020), little scholarly work has been produced in this area. Of the academic studies available, the focus has been on observing the extent to which implementation of custody hearings meet guidelines, (Nascimento dos Reis, 2017b; Crespo and Machado, 2021), or how the practice relates to restorative justice (de Souza, 2017). There are no studies to date in Portuguese or English, exploring how coloniality informs judicial decision making during custody hearings in Brazil.

This study is significant for the new empirical data presented, including accounts from currently serving judges, prosecutors, and public defenders. The research responds directly to Aliverti et al.'s (2021) call to 'decolonize the criminal question' by exposing and explaining how colonialism informs criminal justice practices, in this case, judicial decision making. By doing so, the study builds on Segato's (2007) conception of the 'coloniality of justice', little explored in outside of Hispanophone Souths of America.

The study also provides the foundations for considering alternative ways for thinking about practicing criminal justice reform (linked to the second part of Aliverti et al.'s (2021) framework), which are beyond the scope of this research. If international criminal justice communities are to be able to effectively provide support to localised efforts to reduce the pain and suffering related to pre-trial detention, a thorough understanding of the local context is required. For the Brazilian context, this includes understanding how coloniality[6] informs criminological thinking and practice.

[6] Earlier in this chapter I introduced 'coloniality' according to Quijano (2000) and Mignolo and Walsh (2018) and in the following chapter, I provide further consideration for the concept alongside others helpful for considering the legacies of colonialism.

1.5 Overview

This first chapter has introduced the thesis, outlining the impetus and context for research. It has highlighted the use of a decolonial lens (expanded in Chapter 2), presented the problems related to pre-trial detention (see Chapter 4 for detail), and defined the scope of the study.

Chapter 2, 'Colonialism, Justice and Human Rights', considers the current academic debates related to the many issues that arise from the centrality of Western epistemology to the criminological canon. The chapter explores the geopolitics of knowledge production and examines the underlying assumptions that inform policy transfer and a linear form of development. 'Human rights' is examined as a concept which has been presented and actioned as universal, and examples are provided that problematise such assertions. The final section of the chapter contemplates recent philosophical grappling with how to decolonise criminology in theory and praxis. By doing so, I arrive at a theoretical framework with which to approach my own research and to contribute to decolonising the criminal question.

Chapter 3, 'Colonialism and Citizenship in Brazil', provides an in-depth understanding of socio-political dynamics during Portuguese and Brazilian Empire and how these evolved over time. While the entirety of the historical period cannot be covered, the chapter targets the scholarship that gives light to the nature of citizenship, which is important for understanding the relationship between individuals and the state. The chapter charts how despite changing justifications over time, those in power were able to impose and maintain a racialised hierarchy and prioritise economic interests over the lives of those they oppressed.

Chapter 4, 'Pre-trial Detention: Establishing the Justice Landscape' provides a detailed overview of the context related to high rates of pre-trial detention in Brazil and the introduction of custody hearings as a means to address the issue. This chapter also holds a lens to the judicial body to examine the demographic make-up and how the status of judges relates to understandings of citizenship. The final section considers the violence inherent in the management and practice of justice and the targeted nature of powers against specific racialsed groups and geographies.

Chapter 5 is the 'Methods' chapter. It restates the research question in light of the information and theories considered in chapters 2-4, before providing detail of the approach to empirical data collection and analysis. Methods for semi-structured interviews with court actors are presented alongside observation of custody hearings, and sampling techniques are explained. Description and explanation of the seven phases of thematic framework analysis used illustrates the analytical approach and how this is favourable for the interpretivist and decolonial theoretical framework. The chapter also reflects on access to interviewees and court, on positionality as a researcher and the realities of conducting research in a *live* and changing environment. The chapter concludes with some final ethical considerations.

Chapter 6, 'Citizenship' is the first empirical chapter. The chapter begins by noting assertions from interviewees relating to dichotomous societal divisions. Some interviewees discussed their belief that difference in treatment in court is accepted as normal or even felt to be correct in some influential quarters. Further interrogation of how a hierarchy in treatment is formed leads to discussion of who is presumed to belong in what place and how association with certain spaces leads to differing outcomes during custody hearings. Several interviewees make distinct links to colonial practices or highlight similarities in power a-symmetries and physical treatment. Some clear assumptions around criminality are examined and connected to the centring of whiteness and the normalisation of black pain.

Chapter 7, 'Gatekeepers & Philosophies of Justice' responds to interviewees' reflections on the position of the judge in custody hearings and each of the three sections examines an aspect of the judge as an actor and how this informs decision making. The first section focuses on what interviewees believe about the purpose of the judge and the philosophies employed by them. Themes examined include the active nature of fighting crime (rather than acting as a neutral arbiter), and the genuine belief in punitive responses to crime. The second section considers how the process of selecting judges limits the range of positionalities that decision makers adopt, and the influences of key gatekeepers for custody hearing decisions. It also considers the social and empathetical distance between the judge and the judged. Thirdly, the chapter examines external influences on judges and how this impacts their in-court decisions. Recalling the aim of this thesis to understand what factors inform judicial decision

making, this chapter is important for examining how institutional cultures shape the behaviours of court actors. Discussion highlights how the discretion and elevated position of judges allows for the maintenance of colonial asymmetries of power. Building on Souza's (2007) concept of the 'subcitizen', this chapter also introduces the notion of the 'anti-citizen' to be hunted as matter of imperative by judges characterised as heroically defending society.

Chapter 8, 'Utility of Human Rights' explores how interviewees grappled with various interpretations of human rights in relation to custody hearing decisions. In contrast to normative discussions relating to universal applicability, notions of rights as an obstacle are highlighted, as well as the conditional application of many rights, deemed finite and in need of rationing. The second section reflects on how judges deal with specific human rights violations relating to presumption of innocence and prevention of torture as key areas of consideration during custody hearings. Interviewees' reflections on the utility of national and international protocols are also examined. The chapter concludes by connecting colonial era social hierarchies and assumptions to contemporary attitudes towards human rights discourse, and thus its limited impact on judicial decisions during custody hearings.

Chapter 9, 'Courtroom Dynamics' is the final empirical chapter. It keeps all the previous philosophical considerations in mind whilst holding a lens to the behaviours in and around the court to examine how interactions and physical surroundings effect decisions. The chapter is divided into two broad sections. The first reflects on the environment and procedures that are standard to the custody hearing process. This includes consideration of how the physical architecture of the courtroom and the administrative processes within them echo colonial frameworks and contribute towards judicial decision making. The second half of the chapter considers the interpersonal dynamics and to what extent the presentations given by prosecution and defence influence the decision to release or detain pre-trial. This chapter combines interviewee statements with my own observations in and around custody hearings, both of which highlight the normalised lower standard of treatment for targeted groups.

Chapter 10 provides conclusions drawn from discussion sections of empirical chapters. It identifies implications of these conclusions and contributions to knowledge.

Chapter 2 | Colonialism, Justice & Human Rights

2.1 Introduction

This chapter identifies the current academic debates relevant to the thesis. The first section acknowledges the centrality of Western epistemology to the criminological canon and considers the many issues which arise from this, such as the geopolitics related to knowledge production and how situated products are presented and actioned as if they were universal. The normative conception of *human rights* is given particular attention due to its central place within justice reform work to reduce pre-trial detention, and the universal aspects of this conception are problematised. Acknowledging the centrality of specific positionalities for most criminological work helps state the need for theorising from other points of departure. It also asks us to consider the value of conceptions presented as universal for contexts beyond the metropolitan centres of knowledge production, as with the case of Brazil.

The following section considers discussions related to criminological practice which are operationalised according to assumptions of a linear form of development and Western/Northern supremacy of thought and morality. Interrogation of these assumptions is helpful for revealing underpinning ways of knowing and being, which are largely asserted uncritically. Specifically, the nature of policy transfer from contexts of the global North to the global South is examined and the 'modernization thesis' which informs it is exposed. Given that much justice reform work takes places within such theoretical confines, it is relevant to identify problematic aspects of common frameworks, before embarking on research that includes considerations that are traditionally overlooked.

The final section of the chapter contemplates recent philosophical grappling with how to decolonise criminology in theory and praxis. By doing so, I arrive at a theoretical framework with which to approach my own research.

2.2 Critiquing the Criminological Canon

Knowledge Production

This research is set against a backdrop whereby criminal justice reform thinking and practices are dominated by Anglophone Western/Northern studies, practitioners, and researchers. This first sub-section therefore examines the current debates around the situated nature of knowledge production and legitimation, before considering how dominant concepts and theories are represented and actioned as universal truths. 'Human rights' as a concept is given particular attention, both because it is an example of a contested concept asserted as universal, and for its relevance to criminal justice reform practice.

Western domination over the legitimating of knowledge has led to much criminological theorisation absent of the destructive legacies of empire (Carrington et al. 2016), with much silence suggestive of 'criminology's complicity in the imperial project' (Agozino 2003: 13). Healthy competition has developed between paradigms aiming to highlight and critique the domination of Western epistemological positions. Most notable recent fruitions of the debate have come from Asian Criminology (Liu, 2009), Counter-Colonial Criminology (Agozino, 2003), Indigenous Criminology (Cunneen and Tauri, 2016), Post-colonial Criminology (Cunneen, 2011), and Southern Criminology (Carrington et al, 2016b). However, it should also be noted that the critical criminological tradition has long criticised the dominance of Western positionalities, and championed the need to combat Eurocentrism, with many notable interventions coming from the Souths of America, including Aniyar de Castro's (1987) 'Criminology of Liberation', del Olmo's (1990) 'Second Criminological Break', and Zaffaroni's (1988) 'Criminology from the Margins'.

Despite this excellent range of scholarship, challenges to the fundamental points of departure for research, such as the nature of knowledge production and legitimisation have not been totally embraced by mainstream criminology and remain on the periphery. Aliverti et al., (2021: 308) refer to the range of perspectives as a 'patchwork of different approaches' but contend that 'future pursuits in this direction ought to strive to facilitate a dialogue between different streams of thought within the field', drawing on insights from a plurality of

perspectives, both within criminology and more broadly throughout the humanities and social sciences. In this light, rather than providing an encyclopaedic overview of each of the paradigms and conceptualising them as vying for position[7], I draw inspiration from a variety of perspectives and present here the scholarship most formative and relevant for this particular research project.

Several scholars have pointed to domination of criminological knowledge production by Anglophone journals and how this centres of previous global imperial powers (Agozino, 2004; Aas, 2012; Liu, 2017; Moosavi, 2018). While 85% of the world population live in the global South, the vast majority of academic knowledge is created in the UK and USA (Carrington et al., 2018: 2), resigning the periphery to consumer and follower status (Hogg et al., 2017: 1). The creation of knowledge from these traditional metropolitan locations has centred the epistemological positions grounded in ways of knowing and being related to those contexts, at the expense of alternative ways of understanding the world. A recent study has shown that across a sample of 24 criminology journals, only 155 articles have ever been published centring Indigenous issues, constituting 0.2 articles per year (Goyes and South, 2021).

The production of criminological knowledge has been shown to be far from a purely objective or neutral pursuit, but rather that the impetus of colonialism was central to the development of criminology (Agozino, 2003). In fact, criminology 'coincided with the zenith of European imperialism' (Carrington et al., 2018:17) and in connecting the demonisation of working classes at home and that of colonised peoples abroad 'criminology can be said to be a handmaid of colonialism from its inception' (Kitossa, 2012: 204). Enlightenment philosophers such as Kant have been exposed as propagating explicitly white supremacist arguments related to the level degeneration of different races and subsequent rationale for treatment (Saini, 2019; Rutherford, 2020; Shilliam, 2021). Colonial states weaponised such philosophies and with the trans-Atlantic trade in enslaved people, the superior-inferior dichotomy was

[7] Some have attempted to mitigate the perception that each expression of the debate is an attempt to create a new branch or paradigm. See for example proponents of Southern Criminology change to referring to a 'Southernizing' of criminology (Carrington et al., 2018; Sozzo, 2020).

naturalised and provided legitimisation for oppression (Suárez-Krabbe, 2016: 57). It is clear then that foundational concepts about understanding societies, such as the Hobbesian social contract, were never deemed applicable to enslaved peoples (Agozino, 2003: 16), and thus the knowledge that has been built upon for centuries has been exclusionary rather than holistic from inception.

Such legitimisation was also followed by the now debunked pseudoscience of eugenics to justify subjugation of colonised and racialised peoples (Zaffaroni, 1988; Cunneen, 2018). While criminology has gone through much change, it is clear that it is 'still in vital respects haunted by the ghosts of Lombroso and the nineteenth-century positivists' (Carrington et al., 2018:17). Dimou highlights that remnants of these prejudicial views persist today via 'pathological interpretations of: immaturity, impulsiveness, low IQs, a propensity for criminality and a lack of self-control, and in need of adjustment, "correction," and management' (Dimou, 2021: 15). Many hoped that aspects of globalisation such as greater interconnectivity would lead to an improved democratisation of knowledge production (Aas, 2013), but the promise has not been fulfilled as the commodification and commercialisation of information has only helped to consolidate the dominance of the metropole (Carrington et al., 2018: 13). Where globalisation has been accepted as a part of the criminological mainstream, it has been related to in highly orientalising terms (Aliverti et al., 2021), reducing global South contexts to simplified and shallow examinations which misapply concepts such as 'organised crime' (Atkinson-Sheppard, 2016) or 'prison disorder' (Darke, 2018). For Carrington et al it is clear:

> The criminological concepts and arguments constructed in the Global North reflect the problems and contexts around which they were formed and how this feature makes them, in some cases, inadequate to describe and understand problems and contexts of the Global South. (Carrington et al., 2018: 188)

However, Western/Northern theorisation continues to dominate and be presented as universally applicable theories, or abstract concepts unconnected to particular contexts. Part of the consequence of this is that it dictates what is legitimated and taught as appropriate criminology throughout the world, meaning that even those in Southern locations may centre

Western/Northern ways of thinking criminologically (Carrington et al., 2018; Sozzo, 2020). Puerto Rican scholar Ramón Grosfoguel explains this predicament by separating epistemic and social locations (2011: 5). He contends that if a person is socially located on the oppressed side of unequal power division, it does not necessarily mean that their epistemological position will be a way of thinking from that location. In fact, Grosfoguel (ibid) argues:

> 'Precisely, the success of the modern/colonial world-system consists in making subjects that are socially located in the oppressed side of the colonial difference, to think epistemically like the ones on the dominant positions.

This myth of an un-located, natural or objective truth feeds a foundational ontology that renders invisible or 'de-links' the epistemic location of the speaker, creating the illusion of a positivist, universal truth or 'god-eyed view' (ibid: 5). Grosfoguel contends that Western philosophers have used the guise of an 'abstract universalism' to present their knowledge as 'the only one capable of achieving universal consciousness, and to dismiss non-Western knowledge as particularistic and, thus, unable to achieve universality (2011: 5-6). This echoes Edward Said's (2003) illustrations of how the West orientalises the Eastern (or we could say Subaltern/global South/Peripheralised) forms of knowledge and compartmentalises it as *other* and different to Western philosophy. This imposes a label of limited applicability and inferiority to Western ideas, to the extent that 'the sense of Western power over the Orient is taken for granted as having the status of scientific truth' (Said, 2003: 46). To this point, Mignolo states that 'universality is always imperial and war driven' (2018: xii). I take this to speak to the hegemonic nature of the epistemological position, i.e., that it is not just the dominant position among many, but that this actively subordinates other forms of being and knowing. This is particularly clear during the periods of colonialism where local understandings of being and knowing, language, and values were replaced by the colonisers assertions, in what constitutes 'epistemic violence' (Spivak, 1994: 82). The continued disregarding of the knowledges and histories of colonised and peripheralized peoples results in widescale 'sanctioned ignorance' (Spivak, 1999: 164). This systemic maligning and delegitimization of non-hegemonic understandings and histories cannot allow for social

justice, but rather results in 'cognitive injustice' (Santos, 2016: 189) leading to 'epistemicide' (ibid: 92).

Escobar grapples with the way that the Western world produces its epistemological position as universal by describing the notion of a "One-World World", 'predicated on the West's ability to arrogate to itself the right to be "the world" and relegate all other worlds to its rules, to a state of subordination, or to nonexistence' (Escobar, 2020: 14). He explains that the best way to counter such thinking is by considering the Zapatisitas notion of '*a world in which many worlds might fit*' (emphasis original) and that this is 'the most succinct and eloquent definition of the pluriverse' (ibid:26). Grosfoguel suggests that we live in a 'pluriversal' world, where multiple perspectives exist, with each speaker or writer looking out from a specific 'location of enunciation' (2011: 3-4). The acknowledgement of the multiple positions within, what has been referred to as the 'body-politics of knowledge' (Anzaldúa, 1987; Fanon, 1970; Grosfoguel, 2011), or as 'geopolitics of knowledge' (Dussel, 2011; Mignolo, 2002; Prando, 2019) allows us space to highlight the power dynamics between different interpretations. This also helps to expose the myth that normative conceptualisations have come from a neutral 'non-situated ego' in Western philosophy, described by Grosfoguel as the 'ego-politics of knowledge' (2011: 4).

Perhaps the most salient concept to be asserted as universal is that of human rights. This next section will now consider how this idea in detail.

Human Rights and Universality

This subsection briefly outlines mainstream or normative understandings of human rights before introducing some examples of contexts from the global South where alternative interpretations of the concept have developed. Normative human rights-based arguments have been fundamental to advocacy related to reducing the use of pre-trial detention; however, acknowledgement of multiple interpretations of human rights in Southern contexts means that the universal aspect of the concept must be called into question. Such examples illustrate the need for theory, policy and practice born of nuanced contextual understanding rather than assumed universal application.

At the core of the contemporary normative human rights argument is the notion that there are a group of universal principles and fundamental freedoms inherently preserved as the birth right of every human, without exception. The modern cornerstone of this discourse remains the post-World War II enshrining of the United Nations Declaration of Human Rights, which begins its preamble with the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world' and that the United Nations proclaim that 'this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations' (UN General Assembly, 1948).

While such strong declarations make it abundantly clear that these rights are for everyone, it is also widely acknowledged that no single nation state can claim to fully ensure every right for every individual within its jurisdiction. Human rights are therefore both basic standards and aspirational goals at one and the same time. This has given impetus to a wide and varying industry to introduce and ensure human rights across all corners of the globe. Human Rights have thus been used as a discourse for lobbying for change, to improve conditions, especially for minority, underrepresented or underserved groups. It has been a rallying cry for advocacy groups to drive progressive agendas and has been a lens through which international development donors (both governmental and non-governmental) have decided on the distribution of funds and measuring the success of the impacts.

Discussion of the origin of notion of *human rights* tends to centre around either the French Declaration of the Rights of Man and of Citizens, or the US Declaration of Independence. However, Julia Suárez-Krabbe noted that recent research has also highlighted the inspirational effects of Latin American constitutions on the UN Declaration, suggesting that its formation was not exclusively the intellectual property of the global North victors of the Second World War, and thus, 'the need to recognize the "creolized" nature of human rights' (2015: 41). It is therefore not so simple as to say that human rights are purely a Western/Northern invention. When we consider who created such constitutions and represented those in Latin America, however, we are led back to the white elites who 'precisely in this period of history, begin to emphasise the (northern) European origins of

civilization and modernity' (ibid). Rosa del Olmo uses the term 'Enlightened minorities' to reflect the ruling elites' position as both the powerful few who rule, as well as their adherence to the Western epistemic assertions of Enlightenment rationality and universal truths (1999: 24).

It is necessary to highlight the situated nature of the formulation and normalisation of dominant intellectual positions on the notion of human rights within certain paradigmatic confines. A claim of universal applicability of human rights necessitates a universal comprehension, yet an increasing body of work exists that problematises the notion of a universal conception across justice settings, especially in relation to contexts of the global South (Cohen, 1993; Jefferson, 2007; T Martin Max, 2014; Bosworth, 2017; Stanley and Mihaere, 2019). I now provide three brief examples of studies which explore problems that arose where a normative human rights discourse did not produce the desired outcomes.

In South Africa, Hayem demonstrated that the notion of human rights had changed from a model of inclusivity to one defined by the confines of citizenship, and human rights were then perceived as a 'national privilege regarding access to basic needs' (2013: 77). She explains that there had been an increasing emphasis on the suggestion that foreign nationals 'compete with citizens or, in their view, that they illegitimately access economic goods, facilities or rights to which only those who are stereotypically seen as south African should be entitled' (2013: 84). Hayem links this protectionist sentiment surrounding human rights in South Africa to the large-scale, violent xenophobic attacks that took place in 2011.

As well as a focus on the boundaried nature of human rights, scholars have highlighted how they can be weaponised to suit the interests of powerful elites, rather than providing protections for the most vulnerable. Shannon Speed and Jane Collier note that some, including previous UN High Commissioners for Human Rights, have argued that human rights cannot 'be considered an imposition of western values' because many national governments have set up their own human rights commissions and have taken ownership of the concept and put it into operation (2000: 877-8). However, in their study of Chiapas, Mexico, the authors illustrate how state officials enforced very literal interpretations of human rights

documents in order to prevent Indigenous groups from asserting their own political economic values, and also as justification for intervention in local power dynamics where the group leaders had displeased state officials. Despite a context where rhetoric of self-determination is officially embraced, the scholars liken the behaviour of the Mexican state in maintaining the power to designate what is deemed acceptable behaviours and briefs to the colonial era 'repugnance clauses'' (ibid :878), which outlined what conquering powers would tolerate from subjugated populations. Speed and Collier conclude that the imposition of human rights policy in this context could be considered 'another form of colonialism' (ibid: 878).

I include here one last brief example of an alternative conceptualisation of 'human rights', which explicitly examines rights-based sensitisation training with criminal justice actors. Tomas Max Martin conducted an ethnographic study (2014) of human rights training with prison officers in Uganda, focused on reducing corporal punishment and found that while the introduction of universalised discourse led to the denouncing of torture in all forms, the distinction of what officers considered to be torture had not been drawn where policy makers may have intended. Martin (2014: 78) quotes an officer as explaining:

> But human rights does not understand the disciplinary procedure of the land. One, two strokes are not torture. If you are subject to one, two strokes it is reasonable. If it is 20, it is torture. I have never seen that.

It appears that the officer is suggesting that the overarching message of *torture is bad and prohibited*, has been received and even welcomed as an obvious truism, but that the local interpretation has hybridised the sentiment of the discourse with existing beliefs about discipline and severity. In this context Martin explains that 'reasonable caning', was conceptualised as being consistent with human rights and anti-torture initiatives (ibid.).

This last example in particular highlights that where normative discourse is exported to locations with differing socio-political, economic, and historical contexts, and ontological understandings about the fundamental nature of being, then at best resources are not being used effectively, but at worst, they may be used as justification for violence, oppression and upholding existing power imbalances. This thesis will consider what factors influence judicial

decision making during custody hearings, against a backdrop where the normative approach to advocate for progressive reform in this area is to conduct human rights sensitisation training with judges. Given the normative approach of exporting concepts, it is also pertinent to consider the literature about policy transfer and the assumptions which underpin the operationalisation of ideas in practice.

2.3 Implications for Practice

Policy Transfer

Given the international reform communities' proclivity to search for and highlight international "best-practice" and positivist academics' desire to unearth grand theories and universal truths, it is important to examine the validity of policies and practices that assume that what appears to "work" in one context, can also be applied elsewhere. There exists an implicit notion that if something is a *good policy* – which often means that has been tested in the West or has been evaluated by a metropolitan expert – then it can work anywhere. This concept rings true in the global criminal justice reform community, which is constantly on the look-out for "good practice models", that can be applied to new contexts, which can result in 'made-for-export-criminology' (Cohen, 1988: 183).

Coronil, in his assessment of Latin America and postcolonial studies, notes a shift therefore, from 'Eurocentrism' to 'globalcentrism', where the West, rather than overtly dominating the rest, dissolves into the international economic market, hidden in 'less visible transnational nodules of concentrated financial and political power' (Coronil, 2015: 190), but nevertheless remain holding the reins of power. He explains that this process, which he names as 'occidentalist', leads to a reduced level of cultural conflict through the inclusion of oriental or peripheral cultures into a 'common global space' (Coronil, 2015: 190). The term 'occidentalism' has been ascribed various meanings, so for clarity, I will outline my interpretation for use within this thesis. I follow Maureen Cain's definition of *occidentalism* as a process carried out by the West which 'presumes the "sameness" of key cultural categories, practices and institutions' (Cain, 2000: 239), which can be contrasted with *orientalism*, which asserts a novel difference of the *Other*. The positivist action of applying the same notion

across time and/or space, or denial of difference across contexts makes occidentalism an important concept for consideration throughout this thesis.

The question of whether a concept is contested, adapted, or maintains its meaning when it arrives in a context other than where it was formed has been addressed in depth by several scholars. Undoubtedly, an important place to start is with Edward Said's 'Traveling Theory', in which he states that, '[l]ike people and schools of criticism, ideas and theories travel – from person to person, from situation to situation, from one period to another' (Said, 1984: 226). Said notes that it is important to examine whether a concept gains or loses strength via the travelling process and whether it holds an altogether different meaning when appreciated at different historical moments (ibid). He argues that any travel of an idea from one place to another never transpires unimpeded and is confronted on arrival in the new time and location, by conditions of acceptance and/or resistance to assess the possibility of introduction (ibid.).

Sally Engle Merry discusses the arrival stage of the travel of ideas from transnational sources to smaller communities and describes the localised adaptation as a '*vernacularization*' (Merry, 2006: 39). She specifically recognises that human rights discourse is 'extracted from the universal and adapted to national and local communities' and uses the term '*indigenization*' to describe the change in meaning or framing to align with local norms and customs, adding that 'Indigenization is the symbolic dimension of vernacularization' (ibid.). Merry problematizes the simple distinction between local and global, where:

> '[L]*ocal* tends to stand for a lack of mobility, wealth, education, and cosmopolitanism, as well as recalcitrant particularity, whereas *global* encompasses the ability to move across borders, to adopt universal moral frameworks, and to share in the affluence, education, and cosmopolitan awareness of elites from other parts of the world. (Merry, 2006: 39 emphases original).

The transnational consciousness is thus imbued with elites' conceptions of the world from a limited number of metropolitan localities and therefore, as Merry contends, 'the things that we call "global" are often circulating locals" (2006: 40). In specific reference to criminological study, David Nelken notes that what is presented by those searching for universals 'turn out

to be cultural rather than scientific truisms' and contends that comparative criminology plays an important role in attempting to 'undermine the pretentions of positivistic criminology' buried within the search for universals (Nelken, 2010: 20).

The criminal justice arena has been no stranger to the implantation of concepts born of the Centre into the Periphery, with little change or accounting for social, economic, political, or cultural contextual differences. Andrew Jefferson highlights factors that are overlooked when justice actors in the global South are asked to operationalise normative human rights discourse for the local context, providing the example of Nigeria and how projects that exported penal norms did not consider that strong hierarchical paramilitary heritage of the justice system means that innovation is difficult to achieve (Jefferson, 2007: 34). Just as in Nigeria, empowering individual prison officers with knowledge on normative human rights discourse may not be sufficient to achieve a reduction in inhumane treatment, or the elimination of torture as Martin (2014) highlighted in Uganda; training related to normative human rights with justice actors in Brazil is also unlikely to lead to an 'ideal appropriation' of the concepts as Olivier de Sardan termed, 'the kind dreamed up in project documents' (2011: 25).

Stanley Cohen (1988) wrote explicitly about the question of intention and the dynamics of power during the transfer of Western crime control models and whether the process is one of 'benign transfer' or 'malignant colonialism', setting them diametrically opposite approaches. Cohen describes that for those adhering to a 'benign transfer' model, there is an inherent assumption about the nature of progress which inevitably leads to 'a triumph of enlightened humanism over barbarity, and of rationality and scientific progress over irrationality and prejudice' (1988: 177). Within this conception, the "third world" is situated at a similar stage to the West at the beginning of their own industrial age. The model implies that the Western position is one of superiority in that 'we have seen it all before, and with our sophisticated knowledge we can help you try to avoid most of the mistakes we made' (Cohen, 1988: 178). Cohen suggests that even where proponents may have positive intentions, such approaches are still 'tinged with neo-colonial paternalism and Cold War mentality' (ibid).

Alternatively, rather than a well-meaning focus on growth and development of the other, Cohen describes the opposing conception of 'malignant colonialism' as 'the story of sham, hypocrisy, and ideological mystification', and overtly used for manipulative gain (1988: 184). Whether overtly used as part of oppressive state apparatus to maintain order and inequality, or more to supplement existing systems, the system of crime control functions as part of the 'systematic exploitation by a worldwide capitalist system'. Cohen contends that rather than a focus on a paternalistic notion of development, the approach is more centred around 'colonialism, neo-colonialism, dependency, imperialism, exploitation, and marginalization'. There is no intention of growth or development here, but rather we see a process of 'Neocolonialism' which leads to the impoverishment and "underdevelopment" for the recipients of such criminological transfer (ibid).

Whether the impetus for transferring theory and practice to a new context is humanitarian or more closely linked to reasserting exploitative power dynamics, it is apparent that certain kinds of legitimated knowledge based in the generalising of Enlightenment assumptions reproduced as globally hegemonic and thus more likely to travel. Knowledge production, therefore, mirrors historical asymmetries of power and, as Nitasha Kaul puts it, pushes 'differences of gender, race, class, culture, ecology, sexuality under the epistemological carpet' (2009: 89). While innovations from the South can and have travelled North – a recent example would be Carrington et al.'s (2020) investigation of women's police stations – the vast majority of criminological theory passes from North to South. Accompanying these biases is the assumption that the West represents progress, and all that is desirable and truthful, with those in the "developing world" inevitably following the same linear trajectory, just several steps behind. The following section considers the assumptions underpinning notions of development and modernisation to better understand the intellectual drivers that facilitate such presumptions of superiority.

Modernisation Thesis

The subterranean feature of many theories around policy transfer is that Western norms are still idealised, leading to Western ideals remaining the norm. The received understanding prevalent around much of the world is that there exists a natural and temporally linear form

of development and that states of the global South are somehow incomplete versions of the most economically or militarily advanced. Awareness of unspoken assumptions linked to modernisation and progress is important for noting the adherence to such logics within contemporary justice practice (and reform efforts). It is also an important area of consideration when contemplating how to produce new knowledge while consciously avoiding such hegemonic assertions.

Turning to terminology briefly; Brown points out that the term 'third world', which has been common parlance up until more contemporary use of global North and South by scholars and practitioners, 'references an Enlightenment teleology of progress, at once hiding colonialism, while situating these societies in a game of catch-up with their former colonial rulers' (Brown, 2018: 92). Whether labelled as *third* and in the process of *catching-up*, or deemed to be a *developing* country, the peoples of the periphery are placed on a continuum of development or modernisation in comparison to the global powers setting the terms, implying a 'temporal succession' (Carrington et al., 2018: 6-7), or a 'pseudo-chronological or historical relationship among the categories' (Pletsch, 1981: 576). The inherent assumption is that progress and modernisation has always and can only happen via a pioneering West, condemning those *developing* nations to 'an imaginary waiting room of history' (Chakrabarty, 2008: 6).

Shilliam demonstrates the 'colonial paradox of comparison' to highlight internal logics which, on the one hand, may accept that there are different ways of knowing and being across different times and spaces, but crucially, that at the same time, 'difference is disavowed normatively', meaning that there is a hierarchy to these perspectives based on the key understanding that there is a way that we *should* understand the human experience (2021: 89). He calls on Wynter's example of a friar, las Casas, who contrary to many of his contemporaries in Spanish colonial Hispaniola during the 15th and 16th centuries, contended that Indigenous peoples did have the capacity for reasoning and morality required to accept the word of God. If, however, after hearing the gospels, Indigenous peoples did not accept Christianity, this was used as evidence that they were not rationale or virtuous, and this was presented as legitimisation enough to disposes and enslave (ibid). The paradox is alive and

well today, but Shilliam notes that there has been a shift from the achievement of virtue via a spiritually driven religious register to the achievement via material improvement, and thus the current focus on "development" and modernisation (ibid: 90).

In dissecting the assumptions of what has been described for more than half a century as a 'Modernization Thesis' (Coronil, 2015; McMichael, 2008; Rostow, 1960), Blaustein et al. (2018: 770) highlight the colonial origins of many development related policies and practices. They call on McMichael's description of the colonial era perception that 'non-European native people or colonial subjects were "backward", trapped in stifling cultural traditions' (McMichael, 2008: 26-27). Taking this as a conscious or unconscious starting point, the logic of the modernization thesis thus advocates for and necessitates the adoption of modern methods (Western practices) to develop socio-economic infrastructure and specialised industry, to create institutions centred around capitalist endeavour in the mould of the West (Blaustein et al., 2018: 770–771).

What the modernisation thesis does not acknowledge is that *developed* states have arrived at their current level of modernisation through systematic exploitation of the people and resources of their colonies. The modernization thesis has therefore come under fire from a counter argument linked to dependency theory, with Coronil stating that 'development and underdevelopment are mutually dependent outcomes of Capitalist accumulation of a world scale' (2015: 77). Asking the periphery to now follow the route of the metropole is impossible because it negates the historical asymmetric power relations that existed and continue to exist. Carrington et al. (2018: 5) discuss a process of normalisation of differential power relations between the Northern and Southern Hemispheres and contend that '[b]eing "under-developed" or economically "backward" was not the "normal" or "natural" condition of particular countries so labelled, but commonly a consequence of their subordinate place in the global economic and political order', itself a consequence of centuries of European colonial domination.

Connell notes that time tends to be divided into linear periods of 'intelligible historic succession (pre-modern to modern, pre-capitalist to capitalist, etc.)' (2007: 45). Such

transitions are clearly conceptions as they relate to the metropole, and macro-level *progress* over time as experienced by the centre. These conceptions persist even though a linear conception of progress does not fit huge swathes of the periphery and as Connell powerfully states:

> 'For colonised cultures, conquest is not evolution, rationalisation or transformation, but catastrophe. Colonisation introduces fundamental disjunctions into social experience that simply cannot be represented in metropolitan theory's models of change through time.' (2007: 45-6).

Dependency theorists argue that the modernisation framework pointedly promotes the interests of the metropole over the periphery and at their expense, both economically via a greater marketplace for their industries, and politically to allow a manner of higher status and control. Blaustein et al argue that 'the strategic concerns of donors, rather than recipients, were prioritised in development aid schemes, and that modernization-inspired development programmes served to increase debt and inequality both within and between nation states (2018: 771).

Agozino points out the irony that those exporting such "modernising" criminal justice products usually are from countries with high crime rates or imprisonment rates, yet assume that they can teach countries with lower rates how to *develop* (2004: 351). This section has worked to highlight how the centring of Western/Northern epistemology presented as a universalised way of understanding the world has an occidentalising effect across criminological thinking and praxis. The exportation of positionality from these centres has led to an absence of consideration of the legacies of colonialism and other contextual differences across situations within mainstream criminology, and so I now turn to recent discussions about decolonising criminology.

2.4 Decolonising the Criminal Question

The main thrust of this chapter has been to highlight the need to challenge mainstream criminological knowledge production and legitimisation, and to give due consideration to how power dynamics and ontological assumptions constructed during previous colonial

periods impact contemporary criminal justice. The question remains: how to go about it? This final section will outline how "coloniality" and the "decolonial option" provide an effective theoretical point of departure for this thesis to understand colonial legacies for contemporary judicial decision making.

With the invasion and invention of the Americas, a new kind of expression of power was created. Quijano names this 'the coloniality of power' and asserts that it revolves around two fundamental pivots (Quijano, 2000: 218). Firstly, that the new society was specifically arranged – from its inception – for the expressed purpose of global capitalism and thus, all forms of labour and exploitation were united in forwarding this agenda (ibid). While through a European lens, labour has a historical and value-laden progression from enslaved to serf, petty commodity production, and salaried labour; with the creation of societies designed from the outset to benefit an international market, something entirely new was produced in the Souths of America.

Secondly, the construction of boundaries between the 'conquerors' and the 'conquered', according to invented and hierarchicalised racial categories, used as if they were biological truths (2000: 216). The exact definitions accorded to racial groups have adapted over time, but the core issue was that the groups were imbued – by design – with a naturalised sense of superiority and inferiority. The echoing of colonial-era asymmetries of power and privilege through the execution of criminal justice in the Souths of America has led Segato (2007) to highlight the 'coloniality of justice'. Here the process and products of justice echo and reproduce colonial hierarchies and centre the interests of the powerful over the lives of the powerless. The racial demographics of prison populations clearly reveal the targeted nature of state justice apparatus, but Segato maintains that race is not the cause of inequality, but 'a product of centuries of modernity and the joint work of academics, intellectuals, artists, philosophers, lawyers, legislators and law enforcement officials, who have classified the difference as the raciality of the conquered peoples' (ibid.:150).

In considering the legacies of Quijano's coloniality of power for contemporary Americas of the South, Mignolo and Walsh (2018: 4) refer to the ongoing system of domination as the

'colonial matrix of power', using 'coloniality' as its shorthand. For Mignolo and Walsh, 'there is no modernity without coloniality' (ibid) due to the integral role that the hierarchical colonial philosophies and practices played in shaping the realities of today. This means that we can say that coloniality is 'the dark side of modernity' (Mignolo, 2018b: 111), or that the concepts are 'two sides of a single coin' (Grosfoguel 2007: 218). Mignolo and Walsh describe 'coloniality' as being 'unveiled' when it became clear that despite official decolonisation and independence, states remained dominated by elites with ties to Europe, thus maintaining power dynamics globally and domestically via an 'internal colonialism' (ibid: 5-6). Santos expands on this last phrase to illustrate the importance for all levels of societal interaction across the souths of America:

> [I]nternal colonialism is not only, or mainly, a state policy; it is rather a very wide social grammar that permeates social relations, public and private spaces, culture, mentalities, and subjectivities. In sum, it is a way of life, a form of unequal conviviality that is often shared by both those who benefit from it and those who suffer its consequences. (Santos 2016: 26)

Coloniality is thus a valuable concept for contemplating contemporary manifestations of colonial-era dynamics because it demands a close examination of how expressions of modernity have been constructed according to colonial logics, hierarchies and capitalist priorities. Coloniality emphasises that contemporary power differentials are connected to the previously asserted notion of the 'colonial difference' – that colonized peoples were different and naturally inferior – and thus the durability of colonial logics goes beyond the facilitation of exploitative economic relations to influence epistemology and ontology (Meghji, 2021: 21). The insinuation of an on-going process imbued within the concept of 'coloniality' helps to underscore overlooked continuities within underpinning assumptions that justify and normalise power imbalances.

Coloniality is a core concept of the 'decolonial option', which considers colonial logics and actions, but also centres localised and non-hegemonic forms of knowing and being, which include considering points of departure beyond the Anthropocene (Mignolo, 2002, 2011; Grosfoguel, 2007, 2011; Santos, 2016; Suárez-Krabbe, 2016; Mignolo and Walsh, 2018; Escobar, 2020). Decoloniality is thus, not a new paradigm but 'a way, an option, a standpoint,

and a practice (and praxis) of analyzing, but also of being, becoming, sensing, feeling, thinking, and doing' (Walsh, 2018: 102). As Dimou (2021: 5) summarises:

> The "decolonial option," then, is essentially a gesture to move from a trauma-informed framework of dehumanization, exploitation, silencing, and separation and destruction of the Earth, to a life-informed framework of multiple knowledges and ways of being and of relationality to the Earth, humans, and nonhuman animals.

Criminologists have lamented the lack of scholarly work connecting the coloniality of power with the discipline (Kitossa, 2012; Atiles, 2018; Cunneen, 2018; Dimou, 2021), however, in recognition that the assumptions and processes that inform criminological knowledge production and criminal justice practice continue to be informed by colonial assumptions and processes, Aliverti et al., (2021) propose a framework for 'decolonizing the criminal question'. For these scholars, there are two key aspects to decolonising the criminal question. The first can be characterised as exposing and explaining how colonialism informs criminal justice policies, practices, and institutions as well as normative criminological methodologies and theorising (ibid: 299). The second aspect relates to efforts to move forward by dismantling these discriminatory dynamics and contributing 'to building alternative paths, both at the level of thinking and intervention' (ibid).

To draw a clear connection to my own research; this thesis speaks directly to the first facet of this endeavour: to investigate how colonialism informs judicial decision making during custody hearings. By providing an example, the hope for the research is that it can then inform further work to engage in the second facet: to dismantle colonial dynamics endemic in judicial decision making in Brazil specifically, and to provide foundations for building alternative ways of conceptualising and practicing criminal justice reform broadly.

Aliverti et al., (2021) offer a further three dimensions for considering coloniality, which provide a strong theoretical framework and relate closely to the issues highlighted throughout this chapter. Firstly, 'temporal dimensions' of the criminal question relate to the need to re-examine the importance of colonial assumptions and practices for our 'colonial presents' (Stoler, 2016: ix), and problematise assumptions of a linear form of development towards a

Western ideal (Aliverti et al., 2021: 302). Next, the 'spatial dimension' to the decolonisation of the criminal question relates to the over-representation of Euro-American locations for research and epistemological positions for thinking about criminological theory, at the expense of alternative ways of thinking and being, especially from post-colonial locations of the global South (ibid: 304). This relates closely to the problems of occidentalism and positivist tendencies to apply normative (or even hegemonic) concepts and theories universally, rather than appreciating their situated origin and nature. The 'subjective dimension' is the final aspect to consider (ibid: 305). The scholars highlight the fact that the racialised nature of the criminal question has been largely overlooked despite the wide acknowledgement throughout the discipline that 'crime and criminalization have historically served as tools of oppression' (ibid). Underscoring the point, Aliverti et al. (2021: 306-7) assert:

> The material and symbolic effects of racial violence and racism during colonialism are critical for understanding current patterns of social marginalization and criminalization of racialized and marginalized groups around the world.

Indeed, Lugones argues that in terms of expressions of coloniality, racialised classification of people according to white supremacist assertions has been the 'deepest and most enduring (2007: 191). How coloniality is expressed with regards to racialised hierarchy will therefore be a key consideration for my analysis, along with temporal and special dimensions of the criminal question.

2.5 Conclusion

This chapter has considered many problems resulting from the Western epistemological dominance across criminological theory and practice. Most iterations of reform work to reduce pre-trial detention rely on emphasising and transposing the normative conceptualisation of human rights into spaces where there appear to be violations in the hope that the framework will provide protections and thus prevent future suffering. This chapter has highlighted problems with the assumed feasibility of such policy transfer by illustrating alternative interpretations of human rights in Southern contexts. Many situated

knowledges are circulated as if they are universal, and in examining how judges make their decisions, this research will also consider to what extent decision-makers have internalised various hegemonic notions.

While the work to decolonise criminology is vast, and thus there is an impetus to make generalised statements to problematise the canon, the way forward is to focus in on specific contexts to centre ways of being and knowing from those locations. While this research cannot cover all aspects of decolonising the criminal question, the chapter has outlined how my research aims to investigate and expose how coloniality informs contemporary judicial decision making at the pre-trial stage in Brazil. In doing so, I aim to directly to answer the call from (Aliverti et al., 2021) to apply a decolonial lens by considering temporal, spatial and subjective dimensions to decolonisation. To identify contemporary coloniality, we must first have a clear understanding of power and justice dynamics during Brazil's colonial periods. The next chapter will provide this examination.

Chapter 3 | Colonialism & Citizenship in Brazil

3.1 Introduction

The nature of citizenship and its multiple forms is central to understanding the relationship between individuals and the state. This chapter considers the changing nature of citizenship throughout Brazilian history, from the moment of invasion to today, to chart how despite changing justifications over time, those in power were able to impose and maintain a racialised hierarchy and prioritise economic interests over the lives of those they oppressed. While one chapter could not possibly do justice to over 400 years of history, this part of the thesis focuses on how coloniality has been evident throughout this period. During this time, the very nature of being was called into question for targeted groups, to the extent that the most fundamental right – that to life – was presented as legitimately removable. This chapter, therefore, is about the Brazilian killable Other, then and now.

The chapter opens with a consideration of the underpinning logics that legitimated invasion, enslavement and murder. Concepts including 'just war' and 'moral crusade' provide religious sanctioned justifications for extreme actions. The construction of 'race' as a valid way to divide and create hierarchy amongst populations is also explored as one of the founding features of the new society imposed in the Souths of America. This alongside the exploitative and extractive nature of the trans-Atlantic slave trade, forms the dual axis of the coloniality of power (Quijano, 2000). This section further considers the maintenance of colonial power despite formal decolonisation from the Portuguese empire and how strong socio-economic conditions and whiteness acted as protectors of preferential conditions of citizenship. The chapter highlights that legal steps to outlaw the trade in enslaved people were consistently met with resistance in practice by elites, and despite official emancipation in the late 19th century, this did not represent a change in elites' core beliefs and ways of being or knowing. Adherence to such ontology meant that discriminatory racial hierarchy remained.

Where religious doctrine and royal decree had previously legitimated subordination and murder, the following section acknowledges how eugenics and social Darwinism provided new justification for elites intent on whitening the population and maintaining racialised boundaries to citizenship. A further significant change in tactics in the 1930s saw the discussions move from overt white supremacist philosophies to the denial of racism with the proclamation of racial eutopia in Brazil. The chapter highlights the importance of this change for its continuing ability to silence legitimate claims of structural racism. Souza's (2007) conceptualisation of the 'subcitizen' is underscored as a significant means for understanding Brazilian citizenship throughout the 20th century. The latter part of the chapter considers this concept for understanding the contemporary killable Other. The chapter closes by asserting the significance of 'orientalism' and 'occidentalism' as concepts for understanding contemporary forms of coloniality expressed in Brazil.

3.2 Invasion and Invention

Legitimisation via Just War and Morale Crusade

As outlined in the previous chapter, with the construction of a *New World* in the Americas the 'coloniality of power' was formative in creating society and revolved around the dual axis of an exploitative global capitalism and a racialised social hierarchy (Quijano 2000: 218). At the time, the categories did not include 'white' – a term he dates to the 18th century – but were divided along identities of 'Spanish' or 'Portuguese' and 'Indians', 'Negroes' and 'Mestizos'[8], which identified a person's place in the power hierarchy (Quijano, 2000: 216-17). As well as reducing the Indigenous and African populations to inferior status, their wide diversity was also overridden, with peoples of different culture, languages, religions, and histories reduced to broad simplifications[9].

[8] Meaning mixed-race or dual heritage

[9] Quijano (2000: 219) provides examples such as diverse American cultures of 'Aztecs, Mayas, Quechuas, Aymaras, Incas, Chibchas, and others' all reduced to the category of 'Indian'. Likewise, peoples transported to the Americas and enslaved including 'Ashantis, Yorubas, Zulus, Congos, Bacongos, and others' were all homogenised as 'Negroes'.

In Brazil, the categorisation was clear, Africans were enslaved peoples and Indigenous groups were for the most part 'peoples of the Amazonian forest and so foreign to the new state' (Quijano, 2000: 226). Not only were these groups not considered citizens, but there was genuine questioning of whether black and Indigenous people had souls or were even human at all. Brunstetter writes how, content in the security of the belief that the Pope had jurisdiction over the whole world, the Portuguese colonisers had no ethical concerns when massacring or enslaving Indigenous people, in what they saw as the waging of a *just war*, due to the Alexandrine Bull of 1493[10] granting them the land (Brunstetter, 2005: 16). The assertion was that Indigenous people had no right to refuse Christianity, with the dominant views being 'that the superiority of Christianity gave rights such as liberty and self-sovereignty to Christians while denying them to others' (Brunstetter, 2005: 117-118). In 1570, the practice was made official in Brazil for the first time with legislation from King Dom Sebastião asserting that Indigenous people hostile to the Portuguese settlers could be legally enslaved as part of a just war (Cagle, 2005: 55). However, subsequent rulings illustrate the conflicting views at the time and genuine concern for Indigenous people. Laws in 1605 forbade the enslavement of Indigenous people and in 1609 stated that all people were born free and could not be compelled to work (this did not extend to enslaved Africans) (ibid.). Yet in 1611, due to dissatisfaction and unrest from colonial elites, the enslaving of people according to a *just war* was again legalised (ibid: 56).

The justification of 'a just war' in the name of Christianity, had precedence with European colonisers. For example, in 1344, Pope Clement VI's sanctioned colonisation of the Canary Islands by the Portuguese and Spanish as a crusade against the Indigenous people and documentation shows that in 1415, Dom João I went to great lengths to ensure that an attack on the Moroccan city of Ceuta was legitimised by service to God (Cagle, 2005: 10-11). Julia Suárez-Krabbe (2016: 55) highlights that those carrying out the intra-Iberian processes of extermination across the Americas were also accustomed to using such religiously informed

[10] The Alexandrine Bull of 1493, was a Papal decision that divided the newly discovered lands between Portugal and Spain.

justification in their homelands after genocide perpetrated against the Semites (Jews and Muslims) and the Roma in the late 15th century.

Another significant aspect of the Christian moral crusade were the Iberian methods of Inquisition. While more commonly associated with Spanish rule, two inquisitional commissions were sent to Brazil in the 16th century (Aufderheide, 1973). This process sanctioned extreme violence and torture and legitimised it as means to 'determine the truth' (Batista, 2016: 3). Violence was justified to gain confession as those not faithful to religious doctrine were considered enemies.

Although records vary, estimates suggest that when colonisers arrived in 1500, approximately 11 million Indigenous people across about 2,000 tribes were living in what is now considered Brazil, but that by the end of the century, only 10% remained due to a combination of contagious disease and violence (Survival International, n.d.). In fact, a recent study has suggested that European colonisation of the Americas resulted in so many Indigenous America deaths – around 56 million within the century 1500 to 1600, that this may have had an indirect effect on the cooling of the world's climate by 0.15°C (Koch et al., 2019: 13). Suárez-Krabbe (2016: 57) explains how colonisers also acted with 'an imperial certainty' that Africans were not enslaved humans, but rather that they were not considered human at all, where their status of subjugation was so essentialised that they were deemed slaves by nature. The Portuguese began importing Africans to Brazil in 1561, and in the century that followed, almost 500,000[11] people were enslaved and embarked on the forced journey to Brazil (Slave Voyages, nd.).

[11] Estimates suggest that 498,145 Africans embarked on enslavers' ships in the first 100 years, with 423,174 disembarking in Brazil, representing 74,971 lives lost en route. People were enslaved by countries other than Portugal and therefore these figures include those enslaved and shipped from Africa to Brazil under the authorities of Portugal, the Netherlands, and Denmark.

Invention of the New World

Categorising race was never a politically neutral act. There was always a hierarchicalisation to the categorisation with characteristics imbued on others by white, Western scientists and privileged classes, many of whom did not ever encounter the people that they were classifying, in an orientalising process that was deemed natural and scientific. Over the four hundred years following the 1500 European *discovery* of the Americas, Europeans continued to conflate phenotypical expression with human – or even inhuman – qualities, culminating in the pseudoscientific eugenicist policies of the 20th century (explored in more detail later in this chapter). Carl Linnaeus, a Swedish botanist, was one of the first to formally catalogue 'races' in 1758, dividing simply according to continents Africa, America, Asia and Europe, ascribing the colours of black, red, yellow and white[12] respectively (Saini, 2019: 47). But as well as providing visual descriptions, Linnaeus also noted character traits, with description of Indigenous Americans as 'subjugated', asserting that the position of being dominated by others was innate to the people (ibid: 48).

From the outset of the European domination of the Americas, 'race' was used as the delineator to decide the social classification of all peoples, via the distribution of work and geocultural identities, for the ring-fencing of access to and control of capital, resources and power over social relations and its enduring effect leads to what Quijano termed, the 'coloniality of power' (2000: 218). Although slavery had existed previously in many forms and those enslaved were always conceptualised as culturally, morally or ethnically inferior, whether they were captured during war with rivals, or were criminals, foreigners, pagans or infidels; the status difference did not necessarily imply a racial difference (Lemgruber et al., 2017: 36). For the first time, with colonisation of the Americas, race becomes fundamental to the conception of slavery, as the term 'black' became synonymous with 'slave'. Lemgruber et al emphasise that when referring to a black man who was free, it was necessary to state, 'free black man', because by solely stating 'black man', the assumption would be the reference to

[12] Linnaeus also included separate sub-categories of 'monster-like and feral humans'. See Saini (2019: 47)

an enslaved person (2017: 36). The authors further cite a dictionary definition of "a black man" from 1789, which provides as the example phrase "I bought a black man", illustrating the inference (ibid).

Black and Indigenous people were considered non-citizen Others from the moment of conception of the new state. The new society was built on the assumption that rights were only for a specific religious community, with war and enslavement being justified against non-believers. While the interpretations, descriptions or boundaries of racial groups may have changed over time, what remains, and what this chapter contends, is that the coloniality of power continues to be relevant to contemporary society via the consistent alienation, subordination, and othering of Indigenous and Afro-descendant peoples in Brazil, which has gone hand-in-glove with Eurocentric idealisation and privileging of whiteness.

Protections & Precarity of Citizenship during Empire

Having focused on invasion and the instituting of a society structured around exploitative capitalism and racism, I move now to discuss the period related to the abolition of enslavement and the trade in enslaved peoples, which examines the shift towards legal citizenship. Although elites' privileged status was clear, for others, there was a sliding scale of lesser treatment, and it is appropriate to consider the factors that were the indicators of protection from sliding down such a scale.

When considering the legacies of empire, it is perhaps particularly pertinent to note that while neighbouring countries were introducing independent republics, Pedro I maintained the monarchy through Brazilian independence in 1822. He later declared himself Emperor, with some arguing that the absence of large-scale revolution or rupture has helped to preserve 'a certain mind-set within its governance institutions that has endured to this day' (IBAHRI, 2010: 28). The Brazilian elites had no need to change their philosophies and practices and thus maintained their dominance via the continuation of Portuguese colonial practice of purposefully limiting upward social mobility and especially access to governance. It is hard to imagine a moment of state decolonisation whereby the coloniality of power remained so clearly intact.

While neighbouring Spanish colonies saw more rupture via revolutions and efforts to build republics, they also created national universities and invested in numerous high courts, unlike the Brazilian elites who actively prevented the creation of institutions of higher learning, who instead followed previous colonial policies to ensure dependency of the colonies on Portugal (Carvalho, 1982: 383). In fact, most elites from the era of independence (in 1822) through to the mid 19th century were educated at one single university, Portugal's Coimbra[13] (ibid).

This exclusivity had three important consequences for the newly independent Brazil. Firstly, as Carvalho notes, due to the colonial-era maintenance of power with so few, and the lack of substantial diversity or alternative educated power base, the ruling classes had 'a solid ideological homogeneity' within this 'small club of friends and former classmates' (Carvalho, 1982: 385-6), which allowed them to close ranks and maintain colonial-era structures of power. Secondly, this structure of power was laden with the underlying assumption of European superiority. The physical maintenance of knowledge in European institutions further substantiated the latent presumption of white Europeans as the heirs to Enlightenment thinking, and the elitist pilgrimage to this imagined home of the production and legitimisation of knowledge only further cemented the belief in higher intellectual abilities of the ruling white European-descendant minority. Rosa del Olmo uses the term 'Enlightened minorities' to reflect the ruling elites' position as both the powerful few who rule, as well as their adherence to the Western epistemic assertions of Enlightenment rationality and universal truths (1999: 24). Finally, with the ruling classes sticking closely together on one side of a divide, there was also a maintenance of a largely uneducated underclass on the other, which continued into the newly independent Brazil. People enslaved were clearly at the bottom of the social hierarchy, but unlike at the top of the socio-economic pyramid, changes in citizenship status throughout the 19th century among the poor did allow for some movement, although it was limited and the position always precarious.

[13] During the century of 1772 to 1872, a total of 1,242 Brazilian elites from all 18 captaincies, were enrolled at Coimbra and 80% attended before 1828 when Brazil's first two law schools opened. See Carvalho (1982: 384).

Peter M. Beattie (2015) explains that the social and political sentiments related to citizenship status of the time can be derived from the record keeping from the penal colony of the island Fernando de Norohna during years 1822-1889. He explains that the convict matriculation books reveal seven categories under "civil condition": 'free, slave, freedman, army enlisted man, navy enlisted man, arsenal worker, Indian, and national guardsman' (Beattie, 2015: 5). Beattie notes the importance of the apparent logic that only those in the first category are deemed to be free. He reflects that it reveals the 'degrees of unfreeness' in Brazil where those enlisted to the military, Indigenous people and even a 'freedman' could not be considered truly *free* to the same extent (2015: 5). Interestingly, even within these unfree groups or 'intractable poor' (Beattie, 2015: 5) stratification existed and that due to the association with slavery, the whip was not used to punish enlisted men, sailors or prisoners, meaning that 'even though privileged Brazilians viewed these categories with disdain, institutions made symbolic efforts to maintain distinctions between them through their instruments of torture' (Beattie, 2015: 206).

Beattie coins the phrase 'category drift' and uses this to explain how enslaved peoples, freed Africans and other subsections of the intractable poor could move – or perhaps more accurately *be moved* – across low-status categories, largely at the behest of the governing class (2015: 6). He explains that freed women and men of Indigenous or African descent often lived and worked in such bad conditions that their life was akin to that under slavery and that it was not uncommon for landowners to illegally reduce them to enslaved conditions with impunity (Beattie, 2015: 6). Beattie assesses the situation as precarious for all members of the intractable poor, but that category drift 'disproportionally targeted nonwhites' (2015: 234). The constitution of 1824 considered all freedmen born in Brazil to be citizens, however, they were consistently externalised as a non-citizen foreigner and criminalised, for example if found travelling within Brazil without the explicit written permission from a Brazilian citizen a freed African was subject to a fine of the equivalent of at least three days' work or be condemned to eight days in prison (Chalhoub, 2011: 414). This clearly indicates that people of African descent were not considered Brazilian and thus provided with inferior treatment before the law.

The War of the Triple Alliance[14] (1864-1870) was a great driver of category drift, both due the fact that those normally protected from military impressment were pressed to fight alongside the intractable poor, but also due to the large number of enslaved people 'purchased by the state or "patriotically" donated' to the war effort (Beattie, 2015: 234). Some prisoners and enslaved people were promised freedom after nine years of military service. Therefore it was entirely possible for some people to have gained freedom after being born into enslavement but then find themselves convicted of a poverty-related crime and be forced to labour before being pressed into the military with the promise of regaining freedom.

The above has described the precarity of citizenship status at the lower strata of Brazilian 19th century society, but it is also worth considering the protectionism of the higher strata. Men of certain financial means were protected from forced service, but an additional legal exemption for married men shows the level of importance given to the institution of marriage at the time as it was felt that '[p]ressing a responsible married man would be immoral' (Beattie, 2015: 36). I highlight this point as it helps to illustrate who was deemed to be a good citizen. Heterosexual, wealthy, married men were those deemed responsible, and worthy of protection, while those whose morality was deemed questionable were criminalised and forced into service. Immorality was implicitly conflated with criminality even if not explicitly stated in law. This constructed interpretation of morality demonstrates the value attached to certain groups, or perhaps more pertinently, the *lack* of value attributed to many groups, where batch-living, linked to the military, criminals and brothels 'stood at the opposite end of an imagined spectrum of values represented by the honourable family home' (ibid).

This notion of socio-economic condition deciding a person's level of access to full citizenship status was engrained in Brazilian cultures in other ways too. The constitution established a

[14] The 'War of the Triple Alliance' began after a political faction sympathetic to Brazil unseated the ruling group in Uruguay who had ties to the dictatorship in Paraguay. Concerned about access to river routes that allowed landlocked Paraguay access to trade, the dictator, Francisco Solano Lopez invaded Brazil, but in doing so violated Argentinian territory. Brazil, Uruguay and Argentina formed an alliance against Paraguay, yet it was mostly fought on the Brazilian front and Brazilian forces made up the vast majority of alliance combatants (Beattie, 2015: 37-38).

two-tier system, where all freemen (emphasis on men) could vote at an initial municipal council stage, but not for the provincial deputies, general deputies, and senators, reserved for those of substantial wealth and lands (Chalhoub, 2011: 413). These criteria also meant that restricted access to high profile professions including justice of the peace, ranked police officer, attorney, judge, diplomat, or bishop (ibid).

Resistance to Change

During the 19th century, Brazil saw a slow crawl towards the legal prohibition of slavery, with abolition finally won in 1888[15], making it the last country in the Americas to do so. However, the legal reforms that were passed did not reflect the attitude of the Brazilian elite classes, who resisted the loosening of their grasp over people as possessions at every stage. While across the colonially dominated world, slavery was receiving a rebrand of sorts, whereby it was no longer deemed justifiable and increasingly seen as an abomination, the number of enslaved people imported to Brazil continued to rise. The road to abolition of slavery and the gaining of citizenship status for Afro-descendant Brazilians was far less to do with a progressive change in societal attitudes and far more to do with geopolitics and royal concern with international relations. While it is not possible or desirable to recount all steps towards the abolition of slavery in Brazil, the most important legal change in citizenship the country has ever witnessed, it is important to focus in on key moments to illustrate how the drivers were mainly external to Brazil, and often opposed by the elite classes. This helps us to frame continued divisive attitude and Brazilian coloniality, despite official progressive reforms.

In the early nineteenth century, colonial powers contested trade routes and territory, but they also competed over the ethical high-ground in a 'game of moral one-upmanship' or a 'human rights race', one which Brazil was late to (2015: 33). By the time Prince Pedro declared himself Pedro I, Emperor of an independent Brazil, the rulers of the world political-economic powers – the countries he considered his equals – had already banned the slave trade. The same

[15] Neighbouring South American countries dates of abolition of slavery:
Bolivia: 1831; Uruguay: 1842; Colombia: 1851; Ecuador: 1851; Argentina: 1853; Venezuela: 1854; Peru: 1855. See Beattie (2015: 258).

practices that these colonial powers had employed themselves, such as slavery and torture became increasingly seen as solely the practice of *barbaric* places, which meant that Brazil had a very bad reputation due to its lagging behind in the comportment of what was considered a modern country.

In 1824, two years after independence was declared, Pedro I established the first Brazilian parliament, yet the accompanying new constitution ensured that power remained centred around the emperor (Beattie, 2015: 29). In the following year, war broke out with Argentina, which would last until 1828[16], and during this war, Pedro signed a trade deal with the UK, without the approval of parliament. The trade deal included a commitment to end slavery and this led to a law being passed in 1831 which explicitly stated that anyone entering Brazilian territory enslaved would be deemed free (Grinberg, 2009: 401).

Initially, the law did seem to make an impact, with imports of Africans dropping from 'almost 73,000 in 1829, when the trade was still legal, to little more than 6,000 in 1831' (Chalhoub, 2011: 423). Yet this change was short-lived and Chalhoub suggests that with 'the expansion of coffee, class solidarity, and the strengthening of the hold of conservative politicians in central government', the forced importations returned to previous rates by 1837 (ibid.). To illustrate the class solidarity among the enslavers around this time, faithfulness to which appeared to be stronger than that to the law, Chalhoub provides an extract from a planter's will from 1837:

> Due to ignorance and because other people told me that I could do it, I bought two Africans after the law that forbade these transactions, and because my only wish is to save my soul and in matters of conscience one has to proceed very cautiously, I ask the person in charge of my last will and testament to take the aforementioned Africans to the judge of the orphans, requiring that they be deposited with my heirs until they are educated, and they will be baptized, but not as slaves. Therefore I finish this will, and I want fulfilled what I establish here, except that if there is a law determining that the Africans now existent should be slaves, then the two about whom I made the declaration above must belong to my heirs as their slaves. (Meyer Ferraz, (2010) ''Entradas para a liberdade", cited in Chalhoub, 2011: 424).

[16] The 'Cisplatine War' (*Guerra da Cisplatina*)

While the planter expresses regret in buying and enslaving people, this is only a technical apology for self-preservation and the caveat that he wishes his heirs to inherit the enslaved people where this is permitted, is indicative of the lack of moral opposition to slavery despite the changes in law. In fact, it is estimated that in the two decades following the law, 737,740 Africans arrived in Brazil (with 902,869 originally embarking), as displayed in Table 1 (Slave Voyages, nd.). By law, they arrived as free people, but in reality, they were enslaved. Chalhoub (2011: 423) notes that such a degree of disregard existed relating to the 1831 law, that a proposal to revoke it reached the senate, which would have also legalised all enslaver purchases in the meantime.

Table 1: Number of Africans forcibly transported to Brazil 1831-1851

Brazilian Region	Embarked	Disembarked
Amazonia	4,977	4,454
Bahia	112,136	99,155
Pernambuco	67,015	54,175
South-east Brazil	712,224	574,023
Brazil unspecified	6,517	5,933
Totals	902,869	737,740

This was not the first treaty between Brazil and Britain referencing slavery, nor was it the first time that legislation was passed in Brazil on paper, only to be summarily ignored in practice. In 1815 a treaty to prevent Portuguese trading in enslaved people north of the equator and off the coast of Africa was agreed, yet it required an additional convention in 1817 to enforce the ban, to punish traffickers and liberate enslaved people found aboard (Conrad, 1973: 52). Those Africans either intercepted by the British navy at sea and brought to Rio de Janeiro to be liberated at the British-Brazilian mixed commission, or who were seized by Brazilian officials and subsequently freed by judicial authorities, were known as the 'emancipados' and although legally free, they were 'kept in a state of de facto servitude, some for perhaps as long as half a century' (ibid: 51). The *freed* emancipados were mandated to serve an apprenticeship of a maximum of 14 years and were effectively rented to the close friends and family of the judges in charge, while the Europeans found guilty of trading in enslaved people were to be exiled to Mozambique for five years, with no requirement to work, although many were able to evade such a sentence (Conrad, 1973: 52). Robert Conrad notes that 'the

Brazilian government violated the laws and directives which it had itself drawn up to protect the emancipados' (ibid: 56) and that they were routinely 'subject both to cruel treatment and to re-enslavement' (ibid: 59). He notes that observers at the time reported that the emancipados were kept in horrendous conditions, 'a thousand times worse' than those in slavery (ibid: 60), and 'all this under the cloak of humanity' due to government claims to be acting in the interests of the freed Africans (ibid: 57).

These promises to and treaties with the British did eventually lead to legislation in Brazil, such as the 1831 law, yet they became known as '*Leis para inglês ver*', meaning 'laws for the English to see', as the impetus for their certifying was to secure a trade agreement with the British, rather than any real commitment to abolition (Cota, 2011; IBA, 2010; Santos, 2010). This phrase remains in the Lusophone lexicon for application to situations where a rule is put in place *just for show* or where there is no intention of a policy to be policed (Freitas and Mozine, 2015: 604). The trend continued into the reign of Pedro II, who supported reforms to the penal system in order to improve Brazil's social standing amongst perceived peers, but after more pressure from the British on the issue of enslavement and passing a parliament decree for the liberation of free Africans, it needed to be reissued in 1864 due to inaction (Beattie, 2015: 33).

Although the Brazilian government did little to implement the 1831 law at the national level, groups of abolitionists and lawyers who had previously relied on ethical arguments, were able to make use of the law as a technicality. In fact, Cota (2011) wrote a whole paper on how the 1831 law was not merely *for the English to see*, because activists were able to show that many of those in enslavement had been brought into the country as enslaved people illegally and so by law they were free. Although this rule only applied to some of the enslaved people, Beattie emphasises that the interconnectedness of the various legal categories of enslaved peoples made it difficult to grant rights to one group without it strengthening the argument for rights for other groups and that the legal victories for some, inspired further emancipation efforts (Beattie, 2015: 33). Keila Grinberg wrote on how the 'principle of liberty' was used in conjunction with the 1831 law, by arguing that any enslaved person who crossed the Brazilian border, for example into Uruguay, would instantly be deemed free when crossing back into

Brazilian territory, as the law stated all those arriving in Brazil were to be designated free (2009: 402). Like Beattie, Grinberg too argues for the cumulative and wide-ranging impacts of individual legal cases fought and won, on the formation of the eventual road to abolition.

Further evidence of elites' lack of appetite for progressive change can be found in the piecemeal nature of the passing of other key pieces of antislavery legislation. After five months of specific debate, the 'Law of the Free Womb' was passed in September 1871, which stated that all those born of an enslaved mother were born free and directed enslavers to care for them until the age of eight (Abreu, 1996: 568). However, the pretence to progressive policy is exposed when we note the additional detail that masters were still able to *employ* these free-born children, until the age of 21 years (ibid), in theory ensuring they maintained a subjugated workforce until 1893. Another virtue signalling but ultimately inefficient piece of legislation was the Sexagenarian law[17], passed in 1885 on the 14th anniversary of Law of the Free Womb. This law freed all enslaved people of 60 years or older, yet, again, a caveat was included, this time stating that those eligible were to serve a further three years of enslavement or until they turned 65, whichever came first (Eisenberg, 1972: 585). Both laws allowed ruling elites to gesture towards emancipation, yet all the while maintaining the subjugation of Africans and their descendants for their profit.

More recent studies have underlined the fact that the active role taken by black communities within quilombos[18] and other organised groups in the dismantling of the system of slavery[19]. Richard Graham (1966) questioned the received historical narrative of a humanitarian imperative or public opinion driving the abolition of slavery in Brazil, asserting rather that it

[17] Also known as the Saraiva-Cotegipe Law

[18] Quilombos were maroon settlements in rural areas founded and run mainly by escaped enslaved peoples of Afro-Brazilian heritage. The communities usually formed in rural areas and in many cases also included poor immigrants from many places and there is some evidence of the presence of Indigenous Brazilians.

[19] Certainly, this is a topic worth significant investment due to the sustained and consistent silencing of the agency of black peoples of Brazil. This chapter focuses on the through-line of elite's views across eras in Brazil, but for greater analysis of the agency of enslaved peoples and abolition, see Barcia, 2008; Geggus, 2011; Needell, 2001; Read and Zimmerman, 2014.

was sustained international pressure (primarily from the British) that laid the foundations for abolitionist movements in Brazil as well as enslaved peoples themselves organising and escaping and seizing their freedom. Changes in the political economy of business made the continuation of slavery for business untenable. Graham describes Brazil in the latter part of the 19th century as being 'swept into the European economic vortex', where the ramping up of industrialisation increased the demand for luxury good such as Brazilian coffee (1966: 125). He explains that as the coffee planters were dominated not by the traditional elites but by the newer upwardly socially mobile group of small landowners and merchants, these groups were able to disrupt the Brazilian economy and also complained that 'slavery slowed down capital formation and tied it up in immovable labor' (1966: 128). This is all to say that while the growing urban population in Brazil centred around a European influenced capitalist economy, it was also influenced by European notions of modern and progressive ideals and the benefits of a free labour market. Importantly, it was only when the enslaved people were escaping in large numbers to quilombos or to the cities, that the ruling elites recognised that they were no longer able to enforce the system and thus presented the change as if it were their choice (ibid: 132). Hence, it was not the ontology underpinning the colonial matrix of power that changed.

What cannot be denied is that despite the role that black groups played in emancipation, their influence over the Brazilian authorities was and continues to be limited. What is significant for this chapter is the emphasis of the point that while law changed, the prevailing attitudes of the power holders and rule setters, did not. Afro-descendant Brazilians and black culture continued to be linked to immorality and criminality by ruling powers, as exemplified in the declaration of capoeira as a crime in 1890 (Chvaicer, 2002: 535); while the same law-making elite chased the image of the European ideal and claimed citizenship of the *superior* and *enlightened* via their ancestral lineage. Despite the clear official change in status for many, the structural nature of discrimination did not get wiped from Brazilian society or the collective conscience when slavery was abolished, and as I will describe in the following section, claims of equality in treatment or civic status did not make them true in practice.

3.3 Old Systems - New Tactics

Eugenics

While elites had previously justified significantly worse treatment for others via religious crusade and just war, this section examines how, by the turn of the 20th Century, legitimations for inequity were found in other quarters. The active pursuit of whitening practices illustrates how despite advancements on paper, decision makers and power wielders centred their own capitalist interests and were very happy to maintain a racialised hierarchy to do so, with some contending that it was, in fact, necessary.

The classification of *white*, while strongly boundaried in the USA historically, via the 'rule of hypo-descent' whereby anyone with any black ancestry was classed as black; was not policed so stringently in Brazil and a multiracial background did not necessitate a classification as black (Joseph, 2013: 1525-6). However, the racial make-up of the Brazilian population was clearly a preoccupation of late 19th century Brazilian ruling classes and with the birth of Brazil as a new republic, national unity and nation-building were high on the agenda. Concern appeared to have peaked when, cognisant of the fact that an injection of labour was needed post the abolition of slavery, the government considered who should be brought in to constitute the free labour economy, replacing that of enslaved peoples. The Ministry of Agriculture oversaw a direct consultation with south-eastern planters in July 1878 in Rio de Janeiro to assess the ruling class views and expectations for the rural workforce after abolition of slavery (Santos and Hallewell, 2002: 62). Race became the main point of discussion, with some groups suggesting that the formerly enslaved should be obligated to take up the labour to 'overcome their supposedly inherent laziness', while others used the same stigma to advocate for foreigners to constitute the new workforce (ibid: 63). It was clear that Europeans were the desired group, but there was a concern that the projected higher levels of intelligence and expertise would not only be more expensive, but also mean that they would aspire to independence quicker (ibid: 64).

Santos and Hallewell report the Agriculture Congress decision to temporarily meet workforce needs via the immigration of South East Asians, but solely as a stopgap because they saw it as 'a step backward for our civilization' (2002: 65). The authors further include:

> Slave labor will be abolished by emancipation or death. The native Brazilian, although some may consider him as a permanent auxiliary, does not satisfy all labor needs. It is therefore essential to import free labor, and, as an experiment and as a means of transition toward settlement by better-quality races, the Chinese hired worker is a convenient makeshift. (Congresso Agrícola, 1988: 78).

The exclusive immigration of Europeans continued to be campaigned for, with white supremacist arguments being made. Even the acclaimed advocate of anti-slavery Joaquim Nabuco was clear in his desire for whitening of the population and the superiority of 'the white races', noting his fear that the majority of the Brazilian population may remain black, that Asians could 'Mongolize' the country with their 'subservient and immoral character', and he even stated that the reason he championed abolition of slavery was that it acted as an inconvenience that deterred Europeans from immigration (Santos and Hallewell, 2002: 65-67). This is a significant point of note, as here we see that even those characterised at the vanguard of championing emancipation – and ostensibly progressive aim – yet doing so according to white supremacist logics, rather than any commitment to equality.

The Brazilian government enacted whitening policies based on what continued to be colonial white supremacist logic, but there was an additional specific philosophy to the idea of whitening. Nabuco provides the explanation of the time:

> As the black man and the white live together in the same society for hundreds of years, the former's blood will tend to be absorbed into that of the latter, or it will disappear altogether as the one race gives up the field to the other, better prepared for the struggle of life" (Nabuco, 1983: 182).

By this point in time, people from African, Indigenous American and European backgrounds had been mixing for hundreds of years but had not produced the homogenous population that some had hoped for, nor had they seen the removal of the *blood* that they disparaged. Valter Sinder turns to Sílvio Romero, one of the primary proponents of the notion of whitening in Brazil and part of the Recife School (Escola de Recife) of scientific thinking, to explain the

philosophical reasoning (Sinder, 2016: 68). He explains how Romero's argued that while there had been a lack of homogeneity to that point:

> [O]nly at the end of a process – which was likely to be long – of fusion and racial selection where, owing to their superiority, White men were to eventually triumph, would at long last rise the "Brazilian national character" in its form, if not finished, more homogenous at least. (Sinder, 2016: 69)

As well as the broad intellectual position of the time clearly maligning the existing and prospective non-white Brazilian populations, the discussions held about who should be encouraged and legally permitted to become Brazilian citizen is relevant for considering the ongoing thinking about who is/was deserving of citizenship. I include below, a quotation from Nabuco's speech because it encompasses many of these issues discussed. The notion was that all positive qualities of culture and imagination are associated with European heritage and that the Brazilian elites still *belong* more to Europe than America: That to be European is to be human, and in contrast, the non-European is something less-than or other-than human.

> We Brazilians (and the same could be said of the other nations of the Americas belong to the New World as a new, buoyant settlement, and we belong to Europe, at least in our upper strata. For any of us who has the least culture, the European influence predominates over the American. Our imagination cannot but be European, that is, human. It did not cease when Brazil held its first mass but went on, reforming the traditions of the savages who filled our shores at the time of the Discovery. It continued influenced by all the civilizations of humanity, like that of the Europeans, with whom we share the same basis of language, religion, art, law, and poetry, the same centuries of accumulated civilization, and, thus, as long as there is a ray of culture, the same historical imagination. (Nabuco, 1963: 39 in Santos and Hallewell, 2002: 67).

The desire for population whitening was a based on an ontological assumption that presented the hierarchicalisation of racial groups as obvious and natural, with scientists and philosophers at the time comfortable in the thought that they were continuing the intellectual path set by Enlightenment thinkers. Angela Saini (2019: 25) highlights the overt racism of such thinkers, quoting Kant from 1764 stating that '[t]he Negroes of Africa have by nature no feeling that rises above the trifling', and that neither David Hume nor Voltaire saw any 'contradiction between the values of liberty and fraternity and their belief that non-whites

were innately inferior to whites'. These philosophical assumptions were supplemented and enhanced in the late 19th century with the development of what was framed at the time as scientific evidence that proved these long-held assumptions. Eugenics became a notable intellectual preoccupation in Brazil and although contested by many at the time, there were considerable sections of the ruling classes that wanted to implement significant eugenic policies, which carried the same narrative justifications as the desire by many for whitening the population. The theories came to prominence after the abolition of slavery in Brazil and gained greatest traction in the 1920s and 1930s, highlighting that the colonial logic remained strong into the 20th century.

The elites in both Europe and Brazil took to the racialized pseudoscience with interest, yet the impetus behind the enthusiasm may have been different. Rosenblatt and de Mello suggest that while in Europe, the rhetoric aided the powerful to control the masses, especially those posing a threat to further industrial expansion, in Brazil, the discriminatory biological reasoning helped elites to legitimise inferior treatment of the black population who were increasingly gaining some forms of citizenship after a slow phasing-out of enslavement (2017: 347). Explicit reference to eugenics in the Brazilian press were rare until 1917, when Renato Kehl, who would become one of the leaders of the movement in Brazil, gave his first lecture, calling for scientists to become involved as 'the only way to save the population from degeneration' (Hochman et al., 2012: 499). Influenced by the work of Charles Davenport in the USA, Kehl proposed that Brazil should introduce policies of enforced sterilization, racial segregation and denial of entrance to any individual deemed to be from an inferior race (Hochman et al., 2012: 500).

> Another measure proposed by negative eugenics is the sterilization of degenerates and criminals. The simple prohibition of the marriage of these individuals will only constitute an "attenuating measure," capable of being bypassed, while sterilization will represent a "radical measure," that is often necessary. (Kehl, 1929, Lições de Eugenia, cited in Hochman et al., 2012: 501)

It is important to note that such views were contested at the time and were not employed in practice, but the fact that they were seriously considered speaks to the strength of the sentiment. At the First Brazilian Congress of Eugenics in 1929, a paper titled 'The Eugenic

Problem of Immigration' proposed the 'restriction of immigrants with antisocial tendencies' (Hochman et al., 2012: 502). The Congress voted this down by as few as three votes (ibid). If anyone was in doubt about who such *antisocial* immigrants might have been, the paper's author, journalist Azevedo Amaral, also advocated for the restriction of 'especially black immigrants, from non-white countries', and this proposal was put down by 25 votes to 17 (ibid.). Such views still held sway into the 1930s and were discussed on many fronts. In 1931, Kehl opened the Brazilian Central Commission of Eugenics (Comissão Central Brasileira de Eugenia) specifically to advocate for a 'hard-line' eugenics agenda and was successful in a resulting 1934 policy passed by the National Assembly, which was to introduce physical and mental prenuptial medical examinations (Hochman et al., 2012: 504). In response to the enacting of sterilisation laws in Adolf Hitler's Nazi Germany that same year, newspapers such as *O Globo* discussed its merits and the journal *Archivos Brasileiros de Hygiene Mental* published the text in full, asserting to its readers that it was 'extremely opportune' to translate the 'great new German law on the sterilization of degenerates' (Souza and Souza, 2016: 11 and16).

Raimundo Nina Rodrigues, a Brazilian mestiço, named 'the apostle of criminal anthropology in South America' by the father of the Italian school of criminological positivism Lombroso (Olmo, 1999: 40), specifically advocated for 'ethnic criminality' to be acknowledged in legislation (Rosenblatt and de Mello, 2017: 347). The inference was that black African and mestiço people were incapable of following or understanding legal norms due to their cultural inferiority to white people (ibid.). Rodrigues felt that miscegenation would not lead to a homogenous Brazilian mestiço, as was the belief of many others, but rather 'would create varied individuals, many of whom would be contemptible in comparison with the original races' (Hochman et al., 2012: 497). He explicitly referred to non-white people as 'inferior races' and that mixing with them was 'a tragedy that not even large-scale miscegenation with whites could alleviate' (Hochman et al., 2012: 497).

Mignolo (2000) reminds us that for all the discussions of blood and miscegenation, these are merely symbolic vehicles for ascribing different cultural signs and values, and it is this shared and understanding of such values in the collective consciousness that designates power. This

unspoken societal understanding helps to explain that even though Brazilian interest in eugenics declined after the Second World War, the underlying preoccupation with race and its relation to citizenship remained, with discussion 'moving from the question of *race and national identity* to an understanding of social inequalities centred on *race relations*' (Hochman et al., 2012: 505).

Myth of Racial Eutopia

The overt nation-building period of the following decades marked a change in tactics by the state. Rather than asserting biological differences, orientalising, and diminishing people according to a white supremacist ideology, the move was to deny difference in treatment of people. Where miscegenation had previously been connected to the misguided eugenicist logic of European blood carrying superior qualities and the *breeding out* of inferior races via whitening, the mid 20th century saw the notion redeployed as a way of presenting Brazil as a society unaffected by racism. The racial mixture of the population was (re)conceptualised as a positive aspect of the Brazilian identity and the phrase 'somos todos mestiços' (*we are all mixed*) became common, suggesting an air of equality and togetherness (Da Costa, 2014: 6).

The idea was purposely pursued by the dictatorship and celebrated as a model 'through which to achieve an egalitarian, post-racial belonging' (ibid.). The term 'racial democracy' was popularised by Brazilian anthropologist Gilberto Freyre, after returning to Brazil from the USA, where he observed clear and obvious socio-economic and political exclusion of black people, and wrote that race relations were more peaceful in Brazil and with the greater level of mixture (Joseph, 2013: 1526). Brazil was thus portrayed as a land of racial equality, where racial groups were integrated, not isolated like Apartheid South Africa, Nazi Germany or Jim Crow embracing USA. This led to accounts where narrative was reverse-engineered. Brazilians in the present were said to have warmer inter-racial relations, because, it was reasoned, slavery had been somehow *softer* in Brazil. Yet in reality, as Nascimento highlights, racial mixture was not instigated in Brazil as an anti-racist triumph, but via abuse of African and Indigenous women, and contends:

> '[S]elf-congratulatory allegations that miscegenation was based on marriage and cordial relations between the races are historically unfounded but continue to exercise an enormous effect on the popular conscience.' (Nascimento, 2004: 872)

Souza (2007:31) speaks of the constructed "social imaginaries" that circulate in modern societies built around assumptions such as the inevitable achievement of social equality via the strong performance of the economy. He explains that it is such imaginaries that produce particular collective identities within specific cultural and national contexts. For Souza Gilberto Freyre's presentation of a 'Brazilian singularity" as a "synthesis of differences" (ibid) is a form of occidentalism, whereby status differences especially those related to racism are veiled under the cover of a buoyant conviviality. This relational philosophy is taken up by Serigo Buarque de Holanda's 'cordial man', which explains the asserted singularity and hybridity of Brazilian social formation through the concepts of 'personalism and patrimonialism' (ibid).

However, Souza takes issue with these "premodern" notions of social formation, reliant on personal relationships, suggesting that this does not satisfactorily explain stratified social relations in contemporary Brazil. In fact, Souza (2007: 9) contends that it is the "impersonality' of the large-scale modernisation processes implanted in 'peripheral' countries such as Brazil which naturalises 'social inequality and the consequent production of "under-citizens" as a mass phenomenon'. It is this unbridled acceptance of *modernisation* and assumption of the ability of economic growth to solve all social ills, which serve as 'ideological cosmetics' (Souza, 2007: 10) covering over civic hierarchies. It is worth recalling Mignolo and Walsh's (2018) particular attention to "modernity" and how it is constitutive of coloniality. In differentiating the conceptualisation of the citizen and 'under-citizen', Souza underlines the value and worth of a person attached to being a 'useful producer' (Souza, 2007: 26), and thus we have both constructed social strata and a centrality of capitalism as a central axis for interpreting inherent value – or the coloniality of being.

The ways of being, the ways of understanding the nature of a state were again imported from Europe to the Americas, as they had been four centuries earlier. Souza takes pains to clarify that by European he does not mean a physical location or a people, but 'the place and

historical source of the culturally determined concept of the human being', which is cemented in the 'empiric action' of making hegemonic institutions such as nation states and global economic market (Souza, 2007: 24). Souza continues (ibid):

> The "European" and "Europeanness"… perceived as the empirical reference of a particular hierarchy of values that can – as in Rio de Janeiro, for example in the nineteenth century, be personified by a "mulatto" – be transformed into a dividing line that separates citizen (primary habitus) from "under-citizen" (precarious habitus).

So, while in the 19th century, people of dual heritage marked the boundary between the (European) 'citizen' and (pre-modern) 'under-citizen', by the 1930s "Europeanness" meant to recognise and assert equality. Therefore, Brazilian leaders keen to establish themselves on the world stage and worthy as European in every sense, then claimed that there was no boundary and that "somos todos mestiços" (we are all mixed). For a while this presentation appeared to work and in 1951 UNESCO carried out a study of race relations hoping to document and replicate the supposed racial paradise, yet inevitably the study encountered the very real racialised hierarchies (Maio, 2007).

At this point, the violent abuses of slavery in Brazil were downplayed, with those highlighting racist practices labelled as *un-Brazilian* or as the racists themselves. Thula Pires argues that the idea of a Brazilian racial democracy and equality of treatment for all was a constructed myth, purposefully propagated by the 'military-business regime' during the years of dictatorship[20] as an ideological mechanism of social control (2018b: 66). Pires argues that in addition to the structural forms of racial bias against the black and Indigenous populations, the dictatorship also made specific effort to neutralise the voices of black Brazilians involved in recognised movements of opposition to the regime (2018: 1062). Such voices represented a threat to the status quo, both via the potential mobilising of groups to directly challenge socio-political policies inherently aimed at the maintenance and perpetuation of oppression and subalternisation of the black population, but also and more prominently because the

[20] The Military Dictatorship lasted from 1st April 1964 to 15th March 1985

oppositional black voice represented an overt contradiction to the image that the dictatorship was attempting to cultivate, that of a racial paradise.

3.4 The Contemporary Killable Other

The Subcitizen

For Souza, a key difference between modern Western societies and the peripheralized context of Brazil, was that while the "primary habitus" was an accepted and generalised concept in the former with the category of 'useful producer and citizen' (2007: 26) naturally attached to almost everyone, thus allowing for the functioning of the rule of law and normative expressions if citizenship; in the latter, the notions of natural equality among people (and thus the potentiality for universal human rights), were not internalised to the extent that they were naturally applied to all (2007: 26). Invisible networks and implicit understandings therefore prevent individuals and entire social groups from full citizen status, relegating them to an under-citizen status and the 'mass phenomenon' of a 'structural underclass' (Souza, 2007: 29).

Souza provides an apt example of the repercussions of the levels of "social recognition" (2007: 27). He suggests that if a middle-class drunk driver killed a lower-class compatriot, they would effectively be held to account, yet that for an identical case in Brazil, the likelihood of effective application of the law would be 'very low' and that while a criminal case may be opened, the eventuality would be 'in the large majority of cases, would be as simple acquittal or a punishment suitable for a minor infraction, as if a chicken or a dog had been hit' (ibid). Souza suggests that huge swathes of the population, of the "*non-Europeanised* poor" are not appreciated as rational agents or naturally equal, rights bearing beings, and thus, can be related to as subcitizens[21] – subhuman – deserving of equitable treatment with domestic animals (ibid). To be clear, Souza does not assert that the powerholders operationalise this as a conscious philosophy, but rather it acts as an implicit agreement between criminal justice

[21] My preferred translation of 'subcidadãos'. Cited papers translate this as 'under-citizen'.

actors that 'some people and classes are above the law and others below it' (ibid: 28). The shared understanding is invisible, and all the more profound for being implicit and unspoken, 'invisible threads–solidarities and deep invisible prejudices' (ibid).

The under-integrated 'do not have access to the benefits of the legal system' yet 'remain dependent on its coercive rules' (Neves, 2007: 69). Therefore they are not excluded from the system, as they are still expected to fulfil 'the duties and responsibilities imposed by the coercive state apparatus, which radically submits them to its punitive structures' (Neves, 2007: 68). To this extent 'basic rights do not play a relevant role on the horizon of their action and experience' and thus constitutional laws 'are relevant almost exclusively in their effective restrictions on liberties' (ibid). Marginalised groups and brought into the justice system are 'integrated into the system' as those who do not have rights (ibid: 68-9). State repression normalises an absence of rights, or overt removal in practical terms as normative practice.

Cultural Censorship & A Veil of Conviviality

In a similar vein to Souza's critique of an overemphasis of personalism and patrimonialism, Da Costa notes the regular referral to the notion of a Brazilian conviviality in social relations, in the way that many people work and live together and act as a collective to survive and thrive. He critiques this idea of societal togetherness for its minimizing effect of the 'very real forms of antiblackness and white supremacy that dictate a social order where race determines one's position and wellbeing' (Da Costa, 2014: 7). This is not to say that interrelation and conviviality are not part of the reality for many Brazilians, and da Costa highlights the 'horizontal' relations among the poorest groups (2014: 6) as Darke does in Brazilian prisons (2018). Yet the existence of some shared spaces, such as some favelas, where all residents – regardless of race – are deemed *less than* a good citizen, does not placate, excuse, or eradicate demonstrable inequality elsewhere. Here da Costa cites 'vertical' inequality as an evident factor of social inclusion or exclusion when considering socio-economic stratification (2014: 6). Reports have shown that white Brazilians earn 74% more than black Brazilians (IBGE, 2019: 3), and it is estimated that if the rate of progress remains the same as it has for the last two decades, black Brazilians will only reach income equality with white Brazilians in 2089 (Oxfam Brasil, 2017: 28). Da Costa does not suggest that the sociability of Brazilian culture

and its racialized social stratification need to be conceptualised as a paradox; but that 'the former works to make the significance and insidiousness of the latter appear less so, an aspect central to the maintenance of anti-blackness and white supremacy' (2014: 7).

Where such structural inequality is ignored or overlooked via the creation of a myth of a colour-blind society or a racial democracy, the real differences in experience are denied. The notion that all Brazilians are mixed and are therefore all the same, silences the genuine grievances caused by deeply ingrained racialized hierarchy. Da Costa does not use the term occidentalism but emphasizes how this paradigm of over-inclusiveness denies the difference, 'encompassing the other' (ibid: 6) so that the dominant narrative of equality becomes axiomatic.

Notions of racial democracy and mixture certainly help to mute the complaints about structurally racialized inequalities evident in Brazilian society and it is within this silence that discrimination can continue to go unchecked. Brazilians have a variety of reasons for avoiding the discussion of racism in contemporary society and this means that colonial-era assumptions persist and go unchallenged. Rather than looking at the specific discourses of governments, dictatorships or otherwise, Robin E. Sheriff uses ethnographic research and interviews with different groups in Rio de Janeiro, to interrogate what specifically goes unsaid and why, noting the discussion has overlooked 'the significance of communal forms of silence in shaping the social and political landscape' (2000: 114). This additional layer of analysis goes beyond a focus on the hegemonic rhetoric, which can be restrictive and essentialise the experience or what, in reality, is much more complex an issue; as while the discussion of racism in contemporary Brazil has been silenced, the reason for the silence across demographics, as Sheriff contends, is different.

The 'cultural censorship' is not one of a coercive or politically enforced silence, or an individualised self-censorship, but one that is 'social and customary in nature', which relies on a shared unspoken understanding (Sheriff, 2000: 114). The study found that middle-class, white Brazilians tended to report that racism is insignificant in Brazil, and could not identify routine aspects such as systemic discrimination in employment or policing practices, but

rather had a more defined preoccupation with class. (ibid). Sheriff builds on Frankenberg's (1993) discussion of 'race evasive discourse' in the USA, whereby active avoidance of the topic is presented as the politically correct or polite thing to do; by explaining that, in Brazil, such a sentiment develops into 'cultural censorship' when combined with historically embedded customary silences' (Sheriff, 2000: 121). Further to this, she suggests that even well intentioned attempted to be "colour blind" and official assertions that racism should not exist, the ideology of racial democracy is perpetuated and the effect created is of cultural censorship and the shutting-down of frank and honest conversation on the politics of race (ibid).

When the silence around race was highlighted in interviews, middle-class white participants felt that this confirmed a logical conclusion that race is insignificant to society; however, the black favela residents' related the silence to the sense of inevitability of racially hierarchicalised mistreatment, and that to discuss it merely prolonged the agony. Residents were fully aware of societal racialized power imbalances and ridiculed suggestions of the insignificance of race in Brazilian society, stating that racism was in fact hidden, masked, or brushed under the carpet (ibid: 121). So while the residents were individually very aware of persistent forms of racism, both from personal experience and observance of more structural obstacles, the avoidance of open discussion even among close friends and relatives is 'a form of forgetting', and thus 'cultural censorship involves a degree of agency' (Sheriff, 2000: 122).

Talk of Crime & the Undeserving Bandido

Contemporary discourses around the threat of crime and fear about the proximity of violence and a dangerous Other often include latent or overt prejudicial anxieties linked to race and class and refer to poor and marginalised populations (Caldeira, 2000). Caldeira describes how such 'talk of crime' has a reordering function in society by 'elaborating prejudices and creating categories that naturalize some groups as dangerous. It simplistically divides the world into good and evil and criminalizes certain social categories (2000: 2). This phenomenon allows violence to be tolerated against certain groups and erodes claims and association with and access to human rights and citizenship.

Reflecting the high degree of insecurity felt by the general population, Lemgruber et al's study of more than 2,300 interviewees showed that the majority of both white (51.5%) and black/mixed-race (62.6%) respondents answered that they felt that it was probable or very probable that they would suffer police violence (2017: 11). While there was a clear difference between these groups, the division became more distinct when answering whether they thought that police could mistake them for a *bandido*[22], with the 29.8% of the white respondents and 48.4% of the black/mixed race respondents answering that they considered it probable or very probable (ibid.). The study helps us to begin to build a clear picture of who exactly is considered to be a *bandido* when we consider some of the other demographics, where those who considered themselves most frequently to be mistaken for a *bandido*, were male respondents, under 50 years and those living in favelas (ibid).

The study also showed a difference in public opinion as to whether the police should arrest or kill a suspect, depending on whether the description was of the offense or the offender, with the latter eliciting higher rates of 'must kill' responses (Lemgruber et al., 2017: 15). The greatest difference was between the description of 'someone who sells drugs' (10.3%) and a 'drug trafficker' (*traficante*) (18.6%), with the authors noting that this underscores the stigma attached to the 'traficante', a term they describe as a synonym for *bandido* or violent criminal (ibid.). I highlight this point to illustrate that the figure constructed in the public conscience, goes beyond connection to specific crimes, to conjure an image that represents danger. People are willing to accept police extra-judicial killing of this dangerous other and 37% agreed[23] that 'the only good criminal is a dead criminal'[24] (Lemgruber et al., 2017: 10).

[22] A direct translation form Portuguese would be 'bandit', but the concept of a 'bandido' has also been translated as 'criminal' or 'thug' etc. The word denotes an overt tendency towards criminal behaviour as a way of life and can be linked to violence and corruption. I will use the Portuguese word 'bandido' because it is more loaded with meaning than any translation to English.
[23] A separate study from 2015, found that 57% of respondents agreed with the statement that the only good criminal (bandido) is a dead criminal (Fórum Brasileiro de Segurança Pública de 2015). A study from 2010 found 43% agreed (Secretaria Especial de Direitos Humanos, de 2010).
[24] My translation of: "bandido bom é bandido morto".

Almost half of those surveyed agreed that *bandidos* do not deserve human rights (48%), clearly placing them outside the realm of citizenship and the authors describe the view that those who advocate human rights are perceived as traitors, opting to defend 'the enemy', instead of the deserving in society (Lemgruber et al., 2017: 17). Teresa P.R. Caldeira describes how defenders of human rights did not receive large-scale scorn when the arguments were applied to the defence of middle-class political prisoners in the late 1970s and was indeed an important part of the movement to bring the dictatorship to an end (2000: 341). After the Amnesty Bill was secured and political prisoners were freed in 1979, human rights defenders broadened their efforts to apply protections to all those in prison, many of whom were held without trial, tortured, and held in inhumane conditions (ibid.). Genuine efforts were made in this vein and some elected officials attempted to humanize prisons and improve human rights of prisoners; however, political rivals specifically targeted such policies and branded them 'privileges for bandits'[25] (Caldeira, 2000: 342). Caldeira highlights how opponents leaned into existing prejudices, skilfully using the media to articulate their rhetoric. She includes several examples of the argument, including one from a manifesto of the São Paulo Association of Police Chiefs (Associação dos Delegados de Polícia), addressed to the city's population on 4th October 1985:

> 'The situation today is one of total anxiety for you and total tranquillity for those who kill, rob, rape. Your family is destroyed and your patrimony, acquired with a lot of sacrifice, is calmly being reduced. Why does this happen? You know the answer. Believing in promises, we chose the wrong governor, the wrong political party, the PMDB. How many crimes have occurred in your neighbourhood, and how many criminals were found responsible for them? You also know this answer. They, the bandits, are protected by the so-called human rights, something that the government considers that you, an honest and hardworking citizen, do not deserve'. (In Caldeira, 2000: 343)

Such rhetoric did recede for a while with the election of Henrique Cardoso and several post-dictatorship, left-of-centre governments, which introduced important measures such as the

[25] Here I quote Caldeira's translation of the word *bandido* in Portuguese to *bandit* in English.

2012 'Quota Law'[26] to address historical imbalances; however recent years have seen a resurgence of racist discourse and a culture of conditionality in application of rights. In an interview in December 2018, shortly before taking office as President, Bolsonaro exemplified the distinction in treatment for different groups:

> "When we talk about 60,000 deaths [homicides] we have to know, of this group, how many honest people and how many bandidos died, and we have to worry about the deaths of honest people, not bandidos"[27] (Radio Bandeirantes, 2018).

This divisive rhetoric clearly positions some groups of people as worthy of human rights and deserving of both government and public concern, while justifying the lack of human rights, ill-treatment, torture and even death for others.

In-line with Bolsonaro's admiration for previous dictatorships, we are witnessing a modern interpretation of the tactic to deny the existence of racism. An overt example is the appointment in February 2020, of Sérgio Nascimento de Camargo Nascimento as the new president of the Palmares Foundation (Fundação Palmares), a publicly funded institute whose main duty is to protect and promote the cultures and peoples of Afro-descendant Brazilians. The selection caused outrage among many Afro-Brazilian groups and others because Camargo has denied that 'true racism' exists in Brazil (Watson, 2020 np). In direct contradiction to his father and much celebrated black author, Oswaldo de Camargo, Sérgio Camargo has defended slavery, advocated for the removal of events celebrating black culture, stated that black Brazilians have been influenced by the left to play a victim card and that some black Brazilians should even be forcibly deported to the Congo (Phillips and Phillips, 2020).

With the ascendance of a self-defined 'black right-winger' and racism denier to the leadership of a government institute, Camargo provides a convenient front to those interested in

[26] The Quota law – 'Law No. 12,711', introduced on 29th August 2012 required that 50% of university places in federally funded public university must be reserved for students from public secondary schools.
[27] My translation.

maintaining power with the European descendant elite and silencing those highlighting the very real aspects of modern-day discrimination. The latent white supremacist ideals of Eurocentric colonial philosophy are clear to hear in Camargo's rhetoric. Such is their disdain for what they see as his position as a pawn in service of white supremacist norms, black activists (including Carmago's brother, see Época, 2019) have used the term 'Bush Captain' (*capitão do mato*) in reference to Camargo, a title given to black or mixed-race freedmen who would hunt and return escaped enslaved people to the masters (Nascimento, 2016; Travae, 2019).

Placing a denier of racism in charge of an institute protecting black culture is, unfortunately, just a single page from the broader presidential playbook to further silence historically marginalised voices. In another clear example of coloniality inherent in government policy, the new appointment to head the department for isolated and recently contacted tribes at the Indigenous agency Funai, is a former evangelical missionary who spent a decade working to convert Indigenous groups to Christianity (Phillips, 2020). Such was the concern over the appointment, that the UN special rapporteur on the rights of Indigenous people voiced concern that it 'may have the potential to cause genocide among isolated Indigenous people' (ibid). It is worth noting that Bolsonaro's Minister of Women, Family, and Human Rights, Damares Alves, is an outspoken critic of feminism and access to abortion (Phillips, 2018), creating intersectional difficulties for black and Indigenous women and transgender people. Appointments such as these make a mockery of the bureaucratic systems that have been created to provide safeguards for historically marginalised groups, meaning that genuine grievances are minimised, overlooked, or silenced.

Before his election, Bolsonaro attacked the quota system and stated 'we are all equal before the law. I would not get on a plane piloted by a quota pilot, nor would I accept to be operated by a quota doctor'[28] (*O Globo*, 2011: np). Here, Bolsonaro highlights equality under the law and then immediately disregards it, illustrating his attitude of viewing it as if it were *lei para*

[28] My translation.

Inglês ver. He instead aligns himself with white supremacist philosophy that values the intellect and ability of white people and depreciates those of non-white people, whilst questioning the value of the quota system and by association, the argument for its existence.

In the same interview, Bolsonaro said that his sons do not run the risk of marrying a black woman or being gay 'because they were very well educated'[29] (ibid.). While simultaneously insulting black and gay people, Bolsonaro emphasises the higher status and education he aligns with the heterosexual, white family, echoing tropes that I previously highlighted when discussing Beattie's work on 19th century Brazil. This heteronormative conception of the family, headed by a married *pai de família* (family man)[30], and its accompanying assumptions of morality is one aspect to the contemporary notion of the 'cidadão de bem' (the good citizen). A term that has been used widely but has been recently mobilised by the extreme right to be held up as diametrically opposed to the *bandido* as well as 'social and political actors who differ from those perceived or portrayed as "communists", "petistas (PT supporters)" or "leftists"- seen as supporters of corruption – as well as "those who don't work"' (Kalil, 2018: 13). It is the figure with which all those who believe themselves to be upstanding, law-abiding citizen can identify. For a significant section of the Brazilian population, there appears to exist a culture of conditionality, whereby the notion of rights is reliant on a person's position as a law-abiding citizen, encapsulated by the popular phrase "direitos humanos para humanos direitos", or "human rights for righteous humans".

When Bolsonaro says 'the life of a good citizen does not have a price'[31] (Luc, 2019: np), he has a specific kind of citizen in mind; a very different citizen to those he hopes will 'die in the street like cockroaches'[32] (T Phillips, 2019: np). Kalil expands on the popular figure of the *good citizen*, and it is interesting to note that this conception mirrors that of the protected characteristics during the War of the Triple Alliance, providing a protective boundary around

[29] My translation. The phrase 'bem educados' directly translates to well educated, but also can insinuate *well brought-up*.
[30] Note the automatic patriarchal assumption of the referent object as male in all cases.
[31] My translation.
[32] My translation.

the wealthy, white heteronormative families, illustrating the continuation of the coloniality of power:

> 'The idea of a good citizen means thinking about a family configuration that is mostly white, middle class, and that excludes certain arrangements. The model is very restricted and includes elements that are racist; the good citizen has a very specific profile, a class profile'. (Isabela Kalil quoted in Rede Brasil Atual, 2019)

The rise of Bolsonaro is emblematic of an extreme right-wing populism that was latent but has now become explicit, and therefore we must be careful not to fall into the trap of suggesting that there has been a sudden shift to extreme views. To this point, Bolsonaro has remarked, '[p]eople say I'm homophobic, racist, fascist, xenophobic, but I won the election' (France 24, 2019), highlighting the fact that he has not hidden his views, yet was still elected to the highest office in the land. Rather than describing recent events in Brazil as symptomatic of a 'punitive turn', it is perhaps more accurate to describe a deepening of punitive rhetoric and an entrenchment of this position in government policy, as precedent for such ideas can also be found in policies from the left-wing movements of the 1990s (Karam, 1996, 2021). Indeed the post-dictatorship governments have created the structures of democracy, yet continued to assert power with oppression and violence, in what Zaffaroni described as a 'cool authoritarianism' (2006, in Darke and Karam, 2016: 4).

For example, in the years after the Carandiru prison massacre[33], São Paulo authorities took reformative steps, such as the creation of an Ombudsman that would investigate allegations of abuse by police. However, in Rio de Janeiro, policies were introduced that conversely increased killings by the military police (Ceccato et al., 2018: 536). Acts of 'bravery', which Ceccato et al note often meant the killing of civilians suspected to be criminals, were rewarded with a 'bravery pay bonus' or 'bravery promotion' (ibid.). As the Executive Director of Amnesty International Brazil stated, '[t]he repercussions of this inhumane approach are felt

[33] On 2nd October 1992, 111 prisoners were killed in Carandiru Penitentiary during an intervention by military police aimed at the suppression of a riot. Investigations found that many of those killed had been shot at close range. The first convictions were not made until 2013 (UN Office of the High Commissioner South America, 2013).

to this day. Instead of guiding the police to protect and preserve life, the state has reinforced the notion that the police's role is to kill' (Amnesty International, 2018: np). Such fear is born out in statistics as the year 2018 saw the highest number of police extra-judicial killings of citizens since records began in 1998 (HRW, 2018a) and this record was then broken in 2019 with police killed a record 1,810 people in Rio de Janeiro alone, at a rate of more than five per day (Bachega, 2020).

So, while the practice is not new, it is the unashamed nature of calls to kill un-tried civilians, assumed to be criminals and the promise of reward, that has emerged as an acceptable norm and perhaps federal policy. Indeed, the governor of Rio de Janeiro State, Wilson Witzel (and former judge) was elected on a platform in which he advocated extra-judicial killing, promising the authorities would 'dig graves' to bury criminals (Bachega, 2019). Once elected he appears to have set about doing just that, and in response to the fact that shooting people in favelas with snipers and from helicopters meant that the approach saw the deadliest raid in Rio in 12 years, killing 15 people, Witzel defended the approach as 'legitimate' (Ibid.).

This legitimacy of killing has a clear historical through-line from the colonial *just war* to the contemporary *tough on crime* policies, with the figure of the 'killable other' (à figura do outro matável), (Lemgruber et al., 2017: 35) whose death is acceptable and inevitable in the defence of the righteous. Afro-Pessimist scholars focus on this aspect of society in the conceptualising Black life as lived in death, and how 'Blackness is ontologically marked as the negation of sociality' (Alves, 2014: 144). Alves quotes Saidiya Hartman (1997) to explain that black people are appreciated as human 'only to the extent of their culpability' (Alves, 2014: 145), as can be evidenced by the consistent overrepresentation of black and mixed-race people in Brazil's prisons. Darke characterises this mass incarceration as 'just the latest in a long series of repressive institutions in the post-colonial era that have openly targeted sections of the population deemed criminally dangerous, threats to state sovereignty or simply poor, idle or dispensable' (2018: 71-72).

Alves discusses the conditional nature of human rights and the limited applicability to black people in Brazil and closely links the ideas of rights with citizenship, providing examples of

where black people are not deemed citizens or even humans. He cites an example of a mother who witnessed her son be beaten to death by police to illustrate that due to the prejudicial labelling of black people and residents of favelas as disposable and unentitled to protections of a normal social contract, neither mother nor son could 'claim membership in the world of citizenship', for rights as fundamental as that to life or justice for a murdered son (Alves, 2014: 147). If a person is unprotected by the police and an officer can choose whether to imprison or not, to kill or not, are they not dead as a citizen? If only citizens have rights and residents of favelas and detainees in prisons do not have the status of citizens, are they not prevented from living civically? In this "zone of non-being" (Fanon, 1970), civic death is permanent and a fundamental element of life. Arguments have thus been forwarded that high rates of police killings in favelas continue with a certain degree of public support because, as Alves contends, 'victims don't have rights if they are not considered fully human, and Blacks are not quite humans' (Alves, 2014: 145).

Ana Luiza Pinheiro Flauzina discusses the perception of black communities as the 'antonym of humanity' when examining the international criminal justice system's passive response to extreme violence against certain groups and how even at the most extreme level of genocide, there is a racial boundary to inclusion (2016: 128). Flauzina asserts that despite the clear championing of international human rights law by the international communities, there remains 'a clear naturalization of State terror targeting black bodies' and an 'overall detachment of international legal provisions from black suffering' (2016: 131). There remains a stark difference in treatment in response to crime, not due to the circumstances of the event, but connected to the inherent value of the individual. Nilo Batista notes that in response to an occurrence of child shop-lifting, if the child is perceived to be middle-class, it is deemed an issue for the family to resolve, yet a point of criminality where a poor child is involved (Batista, N. 2000: 77). Indeed, some people have felt that they can take the law and punishment into their own hands, as demonstrated by the whipping of a young black boy in public in 2019 accused of stealing chocolate (Phillips, 2019); an event that sparked outrage and was clearly reminiscent of the treatment of enslaved peoples.

3.5 Conclusion

This chapter has noted societal divisions within Brazil from initial Iberian colonial 'kidnapping' (Zaffaroni, 1989) and colonisation of the Americas of the South to modern-day. The continuing power structures, set in motion with the onset of colonialism and the emergence of race as a social delineator, are the manifestations of contemporary coloniality. These power structures are hierarchical, with European descendants privileged above all others, and the various groups of Others are maintained in relative positions of subjugation. As Jonathan Marks has contended in his discourse countering pseudoscientific racism, modern conceptions of race were formed in 'the heyday of European colonialism, when those in power had already decided on their superiority' (Saini, 2019: 50-51). I conclude this chapter by determining that discourses which have influenced the societal divisions in Brazil can be categorised into the two distinct phenomena of orientalism and occidentalism[34] and it is the conflation of these two categories that brings us to contemporary forms of coloniality expressed in Brazil.

During colonialism, the wide diversity of Afro-descendant peoples was homogenised and orientalised as inferior to Europeans, where even their status as humans was questioned. Whether as enslaved peoples, as members of a wider intractable poor, or collateral damage in state interventions, certain groups have always been conceptualised as *other*, and thus, inferior to the elites producing, legitimating, and circulating such knowledge. After almost 400 years of legalised and naturalised racial inequality, where people were not seen as members of different socio-economic or cultural classes, but literally as part of a different subset of humanity, we arrive at a socially constructed yet firm notion of separation by race, which Luiz Eduardo Soares describes as an 'ontological abyss' (Lemgruber et al., 2017: 36). In Edward Said's discussion of colonialists' orientalist focus on characterising of different peoples as unintelligent and lazy, as having criminal tendencies and in need of being ruled over (2003: 38-40), we see clear resonance with contemporary descriptions of the Afro-

[34] As defined by Maureen Cain (2000), relating broadly to a denial of difference, as I have explained previously in Chapter 3.

descendant populations and the state interventions resulting in their overrepresentation in prison and the mortuary.

This orientalising positionality that maintains the other at such a distance has led some scholars to question the neutrality of the contemporary notion of the human being, with Suárez-Krabbe arguing that it remains a colonial construction, 'formulated on the basis of a series of historically constituted hierarchies of race, gender and living beings' (2016: 2). Suárez-Krabbe goes on to state:

> 'The politics of the death project advocate for a global order in which the life and wealth of the few is defended at the expense of the lives and good living of the vast majority of the world's population, and at the expense of the Mother[35]' (Suárez-Krabbe, 2016: 7-8).

As we have seen in the overt statements from Bolsonaro and Witzel, they consider it legitimate to sacrifice some people via their labour, their liberty, or their lives, for the betterment of a specific group, a deserving group, the *humanos direitos* or the *cidadãos de bem*. State violence has become so normalised against certain groups, it has led to what Vera Batista (2010: 4) has referred to as the 'subjective adherence to barbarism'[36]. Yet even without such overt assertions, such dominant narratives of these privileged groups are circulated as unsituated, neutral truths: prejudicial narratives of white superiority and black criminality, so ubiquitous in the public consciousness, that they have passed from orientalising prejudice to received truths.

So pervasive are such assumptions that they were able to persist when the ruling classes changed tack from rationalising their own positions of power as divinely ordained or legitimated via the pseudoscience of eugenics, to stating that hierarchy did not exist. This occidentalising denial of difference via the passing of legislation and proclamation of racial democracy did nothing to address the structural inequalities that existed following centuries

[35] 'Mother' here represents respect for Earth/nature as a provider

[36] My translation.

of legalised hierarchy and can be argued to merely be *leis para inglês ver*. The myth of racial democracy provides for the subterranean perpetuation of exactly the opposite: a hierarchicalised society based in colonial ideals of white supremacy and black inadequacy. If the concept of racial democracy is taken to be true and all people are provided with an equal chance to live well, and yet black Brazilians are judged by key indicators to remain at the lower end of the socioeconomic spectrum, the underperformance is presented as evidence of racial inferiority. This means that rather than acknowledging the continuing structural issues, deeply divisive along racialised lines and due to profoundly ingrained colonial fallacy, such socio-historical factors are occluded by the pretence of meritocracy. While ignoring the evident inequality, the Brazilian national identity becomes infused with the notion that mixture equates to equality, hiding the reality of racism under a veil of conviviality. The assertion of a racial democracy has a silencing effect on the genuine grievances of Afro-descendant and Indigenous groups and the suggestion of racism becomes unpatriotic.

The modern-day *bandido* and *cidadão de bem* emerge as highly racialized figures in the Brazilian collective conscious as a result of historical asymmetries of power. A simplistic dichotomy based in orientalist thinking provides the foundations of the conceptualization, in the division of the good, righteous citizen, and the evil, dangerous Other. Layered on top of the opposing figures are contemporary fears linked to drugs and violence and notions of who is deserving of fear and who is deserving of protection, yet all the while, there remains a pretence that there is no difference in treatment. In subsequent chapters, I will be analysing the responses from judges and other key stakeholders about how decisions are made during custody hearings. Understandings of who is worthy of rights, who is considered dangerous are important factors in deciding which defendants should be released until trial and who should be detained. The impact of coloniality penetrates all aspects of Brazilian society and as I shall be discussing, judicial decision-making is no exception.

Chapter 4 | Pre-trial Detention: Establishing the Justice Landscape

4.1 Introduction

The previous chapter provided a historical account of the nature of citizenship since colonial invasion of the Souths of America and highlghted the centrality of a racilaised social hierarchy to oppress and protect elites' economic interests. This chapter now examines how the contemporary Brazilian justice system fits into this context and specifically considers issues related to pre-trial detention and the introduction of custody hearings.

The chapter begins by describing the scope and conditions of pre-trial detention in Brazil and highlights how its overuse contributes to severe overcrowding. The international human rights instruments and policies designed to reduce pre-trial detention and associated suffering are noted and considered for their relation to the Brazilian context. These topics are relevant for gaining an overview of the background policy envirnoment in which judges make their decisions about whether to detain until trial. The introduction of custody hearings as an innovation to reduce the overuse of pre-trial detention is then discussed, as well as initial pronounced resistance to the change from the judicial corpus.

The following section holds a lens to the role of the judge in Brazil: the demographic make-up of the judicary, the overrepresentation of peple from privileged backgrounds, and the high level of citizenship status that they enjoy. This is contrasted with the demographics of the prison population and the violent nature of Brazilian justice in practice. Specifc note is given to the structural inequity of the justice process and how underserved and racialised groups are managed by the criminal justice system. The realities of such imbalances are relevant contextual factors for considering the environment in which judges make their decisions.

4.2 Pre-trial Detention in Brazil

Scope and conditions of pre-trial detention

In Brazil, as in many countries, people are held in overcrowded and inhumane conditions for months and sometimes years for petty or nonviolent offences, many of whom have never been found guilty of an offence (Penal Reform International [PRI], 2013). The justice system in Brazil comes under much criticism from national and international human rights communities for systematic overuse of custody, the slow functioning of the system and for the abject conditions that people are held in (Mariner and Cavallaro, 1998; International Bar Association and Human Rights Institute, 2010; Csete et al., 2011; Flowers, 2011; UN General Assembly, 2014, 2014, 2016; Human Rights Watch, 2015b, 2018b; CESeC, 2016; IDDD, 2016, 2017; Rede Justiça Criminal, 2016; Neder, 2017; Amnesty International, 2018; Darke, 2018; Escritório de Ligação e Parceira no Brazil, 2019; Institute for Defense of the Right to Defense - IDDD (São Paulo), nd).

Despite the many global, regional and national guidance documents and rules related to pre-trial detention, and the emphasis of these documents on pre-trial detention as a last resort, many states have not made the progress hoped and as Schönteich and Varenik conclude during the course of a 269 page report on the topic, the fact remains that '[t]he global overuse of pretrial detention is a massive, if largely unnoticed, form of human rights abuse' (2014:174).

Roy Walmsley, who created and collates the 'World Pre-trial/Remand Imprisonment List' (2017b: 1), the most complete set of global statistics on pre-trial detention, defines the people held on pre-trial detention as:

> [T]hose persons who, in connection with an alleged offence or offences, are deprived of liberty following a judicial or other legal process but have not been definitively sentenced by a court for the offence(s). They will be at one of the following stages of the criminal justice process, although not all legal systems and not all cases will involve each stage:
>
> - the 'pre-court' stage, after the decision has been made to proceed with the case but while further investigations are continuing or, if these are completed, while 'awaiting trial' or other court process;

- the 'court' stage, while the case is being heard at court for the purpose of determining whether the suspect is guilty or not;
- the 'convicted unsentenced' stage, after the offender has been convicted at court but before the sentence has been passed;
- the 'awaiting final sentence' stage, when the offender has been provisionally sentenced by the court but is awaiting the result of an appeal process which occurs before the definitive sentence is confirmed.

Using these definitions, Walmsley states that latest data shows that 'more than two and a half million people are held in penal institutions throughout the world as pre-trial detainees/remand prisoners', although he includes caveats to explain that there are many more, as certain countries have not declared statistics and others do not include those held in police lock-ups, as opposed to remand prisons (Walmsley, 2017b: 2).

Pre-trial detention in Brazil is divided into two sub-categories, either 'temporary detention' or 'preventative detention'. The former refers to the phase of initial investigation and this can be used by judges in the case of 'certain serious crimes to protect the investigation or to prevent flight for five or 30 days (renewable once), depending on the nature of the crime' (Nascimento dos Reis, 2017: 6). The latter can be ordered either before or after formal charges are brought in the case of certain crimes 'to counter procedural risks or risks to the public or economic order, without a predetermined final term' (ibid.: 7). The focus of this study is related to judicial decision-making during 'custody hearings' (process explained below), which is the point at which *flagrante delicto*[37] detentions can be converted into 'preventative detention'. Therefore, this is the process referred to when the term 'pre-trial detention' is used throughout the thesis, unless otherwise explicitly stated.

Brazil has risen to third place globally in terms of countries with the highest number of people held pre-trial, sitting behind only the USA and China, both of which have far larger general populations (Walmsley, 2017). As of February 2019, there were 243,308 pre-trial detainees in Brazil (ICPR, 2019a), representing 33.8% of the overall Brazilian prison population. This is a

[37] *Flagrante Delicto:* Meaning caught in the act of committing a crime.

huge increase from the year 2000, when there were only 80,775 pre-trial detainees recorded (Ibid.). This increase is illustrated in Figure 1.

This increase cannot be accounted for by a rise in the country's general population during this time, as the number of pre-trial detainees per 100,000 of the national population also dramatically increased from 46 to 114 during this same period (ICPR, 2019a).

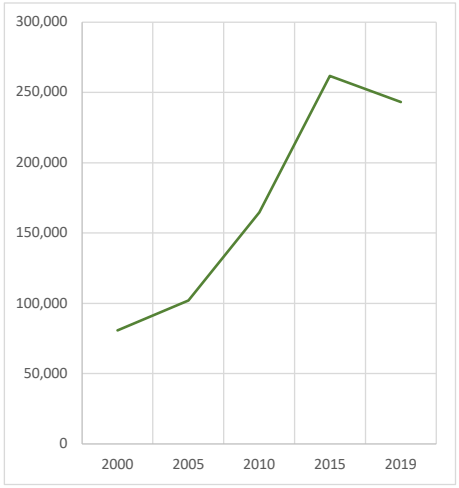

Figure 1: Brazilian Pre-Trial Population

A clear change in the population trend is observable from 2015 onwards, which is when key legilation related to pre-trial detention and custody hearings was introduced. The impact of this change in governement policy is discused in more detail below.

Data from the Conselho Nacional de Justiça (National Council of Justice - CNJ), show that as of 6th June 2018, there were 56,372 prisoners in Rio de Janeiro State, with 2,229 women (4%) and 54,143 men (96%) (CNJ, 2018). The prison population of Rio de Janeiro state is therefore larger than that of the entire prison population of Japan (51,805), or Kenya (54,000), or Malaysia (55,413) (ICPR, 2019b). This prison population is almost double capacity of the prison system in Rio de Janeiro of 28,688 (GloboNews, 2018) and the state system is therefore working at approximately 196.5% capacity. As can be seen by the percentage break-down by legal status in Figure 2[38], a significant driver of this huge prison population is the number of pre-trial detainees. Darke stresses the high level of pre-trial detention as first

[38] National Council of Justice (CNJ) Data as of 6th June 2018 (CNJ, 2018)

among four important 'indicators of punitivism'[39] and a key contributing factor towards why 'Brazil is becoming a world leader in incarceration' (Darke, 2014: 52).

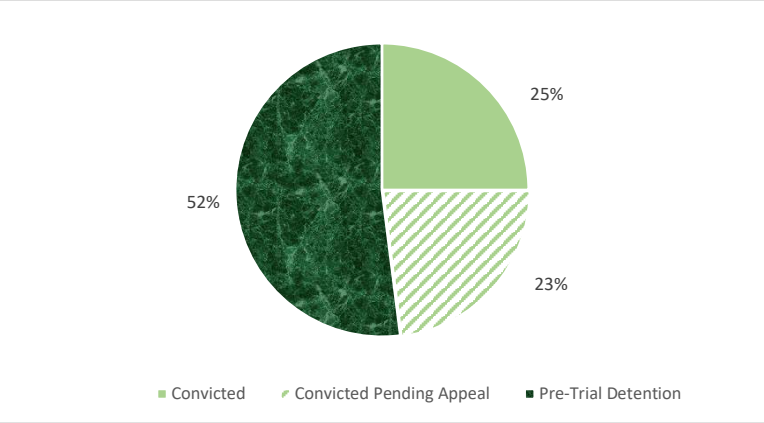

Figure 2: People Detained in RJ by Legal Status

It should also be noted that in addition to this substantial prison population, there are also a further 45,000 arrest warrants pending in the state (ibid.). The prospect of an influx of thousands of extra detainees to the system, only further highlights the need for a re-examination of how decisions are made about who should be detained by the state.

The vast and rapid increase in both convicted and pre-trial prison populations in Brazil has, of course, not gone unnoticed by national and international human rights organisations. A UN Report of the Working Group on Arbitrary Detention reported a 'worrying trend' that prison 'is being used as the first resort rather than the last, as required by international human rights standards (UN General Assembly, 2014: 12). The report describes the use of pre-trial as 'excessive', highlights the 'greater implications for detainees, who are exposed to threats

[39] The other three indicators relate to length of sentence; the harsh reactions to certain crimes such as robbery and particularly the sale of drugs as a 'heinous crime'; and the targeted nature of the justice system against the young, poor and racialised groups.

against their life, physical integrity, and health, and of abuse and ill-treatment by guards and police officers', and condemns that lack of effective separation of this population from convicted prisoners (ibid.: 18). A particularly important point of note for this research is that report found that in pre-trial detention was not sufficiently justified in 93% of *flagrante delicto* detentions across Rio de Janeiro and São Paulo states (ibid.:11). Research is thus clearly needed to understand how judges come to make such decisions.

The above has related to the scale of pre-trial detention in Brazil, but the conditions of detention itself are also a grave concern. A 2015 Human Rights Watch report details the conditions of Brazilian prisons and describes the inhumane situation and lack of positive functioning within the prison system as related to pre-trial detainees noting that:

> Brazil's prisons are a human-rights disaster. Detainees—even those who have not been convicted of a crime—are routinely held in overcrowded, violent, and disease-ridden cells. (HRW, 2015b: np)

Pre-trial detention is thus a key factor in the creation of a snowball effect, where the thousands of new detainees each month have become a driver of overcrowding, which in-turn, exacerbates an array of other rights violations including access to water, food and medicine and causes the rapid spread of disease.

The Ministry of Justice has previously estimated that 80% of prisoners in Brazil could not afford legal representation (International Bar Association and Human Rights Institute, 2010) and this lack of access to legal counsel perpetuates the time in prison and its effects and these trends have been discussed by Open Society Foundations (OSF)[40] in a series of reports under the banner of 'A Global Campaign for Pretrial Justice'. OSF highlight the 'unintended health consequences' for pre-trial detainees (Csete et al., 2011), as well as the socioeconomic

[40] Open Society Foundations is a non-governmental organisation who aim to 'work to build vibrant and tolerant societies whose governments are accountable and open to the participation of all people'. See https://www.opensocietyfoundations.org/about

impacts (Berry and English, 2011), on them and their families. Pre-trial detention can also be at greater risk of torture as one of the OSF reports describes:

> Pretrial detainees are particularly at risk of being abused because the incentives and opportunities for torture are most prevalent during the investigation stage of the criminal justice process. Pretrial detainees are entirely in the power of detaining authorities, who often perceive torture and other forms of ill-treatment as the easiest and fastest way to obtain information or extract a confession (OSF et al., 2011: 11).

To this point, the UN Subcommittee on Prevention of Torture (2016) highlighted significant concerns relating to torture during pre-trial detention in Brazil. The report documented allegations of 'use of force by specialized units of the military police conducting raids inside prisons and pretrial detention facilities', including 'allegations that police officers had threatened inmates, assaulting them with pepper spray, brandishing guns, beating them, and destroying their personal belongings' (ibid: 5). The mission report refers to government statistics that indicated that during 20% of the 186 custody hearings across the State of Rio de Janeiro between 18th September and 14th October 2015, detainees 'stated that they had been subjected to torture or ill-treatment by police officers upon arrest' (ibid.: 8). The report further laments the lack of access to basic necessities and health care (ibid.:12-13):

> The Subcommittee remains seriously concerned at the material conditions of detention in Brazil, especially concerning access to basic necessities. In several of the facilities visited, the Subcommittee observed that the cells were in such a state of insalubrity as to be unfit for use. A number of inmates reported that they did not have sufficient toilet paper, detergent, soap or toothpaste, and had to ask visitors to provide such supplies. In most facilities, the Subcommittee also observed a lack of clean bedding and beds, which were often shared by inmates due to overcrowding. The Subcommittee further noted a lack of proper ventilation in most prisons and pretrial detention facilities. Where present, fans were insufficient to allow for adequate circulation of air in hot, humid and overcrowded cells.

The conditions in Brazilian prisons have been directly linked to deaths of detainees and the Rio de Janeiro's Public Defenders' Office has reported that in their state alone, 266 people died in detention in 2017, mostly of treatable conditions such as diabetes, hypertension, or respiratory ailments (HRW, 2018: np).

Policy and practice of pre-trial detention

There are clear international and regional standards that specify that pre-trial detention should be avoided wherever possible and only when no other alternatives are available. For example, Rule 6 of the United Nations Minimum Rules for Non-custodial Measures (Tokyo Rules) states that pre-trial detention should be 'means of last resort', that it should 'last no longer than necessary' and 'administered humanely and with respect for the inherent dignity of human beings' (UN General Assembly, 1990: 3). Other relevant UN standards include the Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), specifically article 12 (UN General Assembly, 2015); the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) specifically Rule 57 (UN General Assembly, 2010); and UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (UN General Assembly, 2013).

The UN use these Rules as a form of soft law, as there is no legal mandate to enforce them, however, many states (including Brazil) have incorporated reference to these rules within their own legal system. On the 6th July 1992, two years after the UN General Assembly adopted the aforementioned "Tokyo Rules", Brazil incorporated the International Covenant on Civil and Political Rights (ICCPR)[41] into its legal system via Decree No. 592 (IDDD, 2016: 4). Later the same year, Brazil ratified the American Convention on Human Rights (Pact of San Jose, Costa Rica) (ibid.). Both of these international treaties are interpreted by the Supreme Court as 'above federal law and below the Constitution', meaning that it became law, whether or not it is acknowledged in the Code of Criminal Procedure (Nascimento dos Reis, 2017: 10), and is thus assigned a 'statutory, supra legal status' (IDDD, 2016: 4). The treaties promote the importance of the swift presentation of the defendant before a judge, yet the vagueness of the language used related to the length of time, has caused confusion. For example, Article 9(3) of the ICCPR requires that 'anyone arrested or detained on a criminal charge shall be brought promptly before a judge' (UN General Assembly, 1966, art9). Very similar language

[41] Originally, the ICCPR was adopted and opened for signature, ratification, and accession by UN General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force 23 March 1976.

is used in the American Convention on Human Rights, yet the notion of "promptly" is not defined in either.

While international standards advocate that all those detained by police must be presented before a judge as soon as possible, in Brazil this has been a rare occurrence (HRW, 2015a). As an Institute of Defence of the Right to a Defence (IDDD) report explains, common practice has been very different, in that rather than presenting the defendant to a judge to assess whether pre-trial detention is suitable:

> Brazilian judges follow the route currently defined in the Brazilian Code of Criminal Procedure, whereby "the records of the arrest will be forwarded to the competent judge within 24 (twenty four) hours of the arrest and, if the accused does not appoint a counsel, a full copy is to be made available to the Public Defender's Office" (article 306, Code of Criminal Procedure).
>
> The judicial authority, on receipt of a record of flagrante delicto arrest, will review its legality, after which they must: (i) reverse the illegal arrest, (ii) order their temporary release, regardless of the application of any preventive measure alternative to detention, (iii) order their temporary release with the application of any of the alternative preventive measures, established in article 319 of the Code of Criminal Procedure, or, finally (iv) convert the flagrante delicto arrest into pretrial detention, provided that the requisites specified in article 312 of the above-mentioned law are satisfied. (IDDD, 2016: 4)

While the records of the arrest may be seen by a judge within 24 hours, detainees can go weeks or months without being presented to a judge, and as a UN report stated, '[t]he Special Rapporteur is concerned at the high number of pretrial detainees (40 per cent) and the amount of time spent in pretrial detention (five months on average)' (UN Special Rapporteur on Torture, 2016). This average of five months cannot be construed as "prompt", nor does not come close to the 2014 update to the ICCPR, which states that pre-trial detention that lasts more than 48 hours without a custody hearing must 'remain absolutely exceptional and be justified under the circumstances' (UN Human Rights Committee, 2014, paragraph 33).

Efforts have been made to both provide clarity and reduce the level of pre-trial detention and in July of 2011 Federal Law No. 12.403, or the 'Preventative Measures Act' (Presidência da República, 2011), was passed to lead judges to order detention pre-trial only in extreme circumstances and instead make use of the alternatives measures. However, this policy did

not translate into the practice as judges did not reduce their ordering of pre-trial detention (Medina, 2016: 603-4).

Introduction of Custody Hearings

Throughout the 2010s, several NGOs specifically advocated for the introduction of custody hearings as a method for addressing mass incarceration. For example, the Human Rights Watch (HRW) Brazil Director emphasised that '[c]ustody hearings are not only a part of basic due process that is missing from Brazil's system, but can also help alleviate the country's appalling prison conditions by reducing the number of people sent to pretrial detention' (HRW, 2015a). Scholars also made similar points with Layla Medina outlining numerous ways that the criminal justice system in Brazil violates the International Covenant on Civil and Political Rights (ICCPR) (OHCHR, 1966), and asserting that '(t)he root of Brazil's prison system problem begins with a lack of custody hearings' (2016: 623). Medina specifically focused on the judges' discretionary practice of relying on police documents, rather than a hearing in which the accused is presented and heard (ibid).

In 2015, the National Justice Council (CNJ) and the Ministry of Justice (MoJ) signed a Technical Cooperation Agreement with IDDD, aimed at combining efforts to enable the effective implementation of the 'Custody Hearing Project' throughout the country and ensuring prompt presentation before a judge for all those arrested *flagrante delicto* (IDDD, 2016: 8). As a result, a pilot programme was introduced order to comply with the ICCPR and introduce in-person judicial reviews within twenty-four hours of arrest. The judge must then:

> (a) rule on the legality of the arrest; (b) determine the necessity of pretrial detention, orders release on bail or the detainee's own recognizance pending trial, or imposes measures on the detainee, short of detention, to ensure appearance in court; and (c) detects torture and ill-treatment. (Medina, 2016: 604-5)

The project was piloted in São Paulo in February 2015 and immediately faced resistance, especially from the São Paulo Public Prosecutor's Association and the National Association of Police Delegates, and two (eventually unsuccessful) law suits were initiated claiming that the new procedure had no legal basis (Lemgruber et al., 2016: 7). Six months later, in August 2015, the Supremo Tribunal Federal (STF) ordered that the project be rolled-out to the entire

country and that all states must introduce custody hearings and abide by the guidance within 90 days (ibid.). Then, in December of the same year, the CNJ made it obligatory for all those arrested in *flagrante delicto* to be presented before a competent judicial authority within 24 hours of arrest (ibid.).

In Brazil, custody hearings now consist of prompt presentation of a person detained *flagrante delicto*[42] before a judge, so that a decision may be made about whether to hold the person in custody until trial or to release them pending trial (with or without conditions attached to their release), and also to assess whether there has been any torture or maltreatment from police during arrest (Lemgruber et al., 2016)[43]. Initial reports from UN Subcommittee on Prevention of Torture spoke positively about the pilot project, noting that the 20,000 custody hearings that had been held by mid-October 2015 'had a significant impact on the reduction of pretrial detention' (2016: 8). The report provides Rio de Janeiro as an example, where 'almost 43 per cent of the 194 detainees appearing for custody hearings between 18 September and 13 October 2015 were released' (ibid.).

Lemgruber et al (2016) also conducted an evaluation to test the impact of custody hearings on the level of pre-trial detention in Rio de Janeiro. The study monitored 475 custody hearings (more than double the previous study), involving 560 defendants held *flagrante delicto* between 6/11/2015 and 29/01/2016, shortly after the state's launch of the initiative in September 2015 (Lemgruber et al., 2016: 9). As displayed in Figure 3, the vast majority of custody hearings still led to pre-trial detention. The study's authors did note that there was a modest reduction in the use of pre-trial detention compared to before the introduction of the initiative, but that the results did not meet the grand expectations of a significant drop in

[42] Medina notes that in an interview with Juan E. Méndez, Special Rapporteur on Torture, where he discussed that 'he was concerned about police using an elastic definition of flagrancia that does not resemble the circumstance of actually witnessing the commission of a crime, and instead often turns into a justification for illegal searches and seizures or illegal investigative measures', and therefore arrests classified as *flagrante delicto* are sometimes as a result of anonymous tip-offs (2016: 603).
[43] References to this text are my translation from the original Portuguese.

the number of conversions of *flagrante delicto* arrests into pre-trial detention, nor the reduction in time before a detainee was brought before a judge (ibid.: 71).

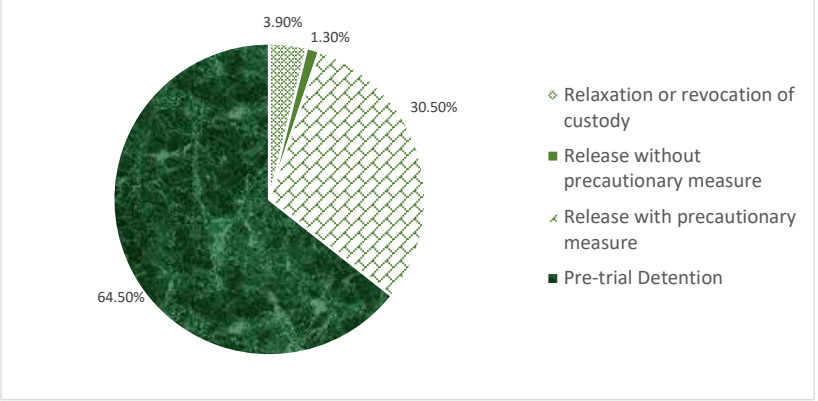

Figure 3: Outcomes of Custody Hearings

Observations from the study also noted that some judges were clear about the outcome and decision before the prosecution or defence had even spoken, reducing the actual hearing to a matter of protocol, whereas other judges, designated by authors as more 'progressive' appeared to genuinely value the interactions with the accused and legal actors (Lemgruber et al., 2016: 49-50). The former sentiment is echoed by another organisation which undertook ethnographic observations of custody hearings, and concluded that for some judicial decision-makers:

> [T]he concrete situation in which the person was arrested matters little. The decision to keep them imprisoned during the process is often based on assumptions about the abstract nature of the offense or the allegation of the lack of proof of housing and work (ISER, 2016).[44]

[44] This text was originally written in Portuguese and all discussion related to this text is my translation.

Thiago Nascimento dos Reis conducted an evaluation of the introduction of the custody hearing process in the neighbouring state of São Paulo between December 2015 and March 2016, by interviewing 17 judicial actors and observing 160 custody hearings concluding that:

> Despite the multiple and significant challenges, the findings herein support the conclusion that bail hearings improved pretrial proceedings' compliance with Inter-American human rights standards. On personal liberty, bail hearings help to abbreviate illegal or unnecessary detentions by: (a) assuring the immediate judicial review of arrests; (b) improving the assessment of suspects' personal conditions; (c) allowing them to provide their version of the facts directly to the judge; and (d) guaranteeing a mandatory prior defence [sic]. The hearings fell short, however, of making pretrial detention exceptional due to a systematic disregard for suspects' right to presumption of innocence. (Nascimento dos Reis, 2017a).

Findings from studies such as those above suggest that despite some positive improvements to the process, the greater legislative compliance with international human rights standards, significant levels of pre-trial detention persevere, and human-rights issues remain.

In their assessment of the two years since the introduction of custody hearings, IDDD reported that Rio de Janeiro was the state where judges chose to use alternatives to custody the least, with 63.4% of decisions favouring pre-trial detention (IDDD, 2017: 31, 34). The report explains that in comparison to studies before the initiation of custody hearings, there has been a small decrease in the use of pre-trial detention, but that considering that detention is meant to be an exceptional measure, the authors resolve that it is not the ideal scenario to detain more than half of the people appearing at custody hearings, especially when recognising the internationally condemned conditions and extreme overcrowding (ibid.: 34). They assert that while the progress to date should be acknowledged, what is urgently needed is the altering of judges' logic in perceiving what constitutes conduct that requires the extreme measure of detention (ibid.).

4.3 Understanding the role of the judge

Judicial Apparatus

The Federal Republic of Brazil, the fifth most populous country in the world, is home to more than 212 million people (Worldometers, 2019) and consists of 26 states and a Federal District. Each state is subdivided into many autonomous politico-administrative unities, known as municipalities, which are governed by mayors (prefeitos) and municipal councillors (vereadores) (Pretrial Rights International, nd). Brazil's constitution came into force in 1988, after the end of a period of dictatorship and a return to democracy (International Bar Association and Human Rights Institute [IBAHRI], 2010: 39). There is one Criminal Procedure Code (Código de Processo Penal) for the whole country, but the administration of prisons is devolved to state level (Medina, 2016: 600). The judiciary is one of the three branches of power granted by the constitution, alongside the executive and legislative branches, and the Supreme Court (Supremo Tribunal Federal – STF), is the highest judicial authority imbued with the power to interpret the constitution (IBAHRI, 2010: 41). Eleven judges constitute the STF after being nominated by the president and approved by the Senate (ibid.).

The role of the judiciary and the structure and powers of the courts are set out across 43 separate articles in the 1988 Constitution (IBA, 2010: 41). This extensive detailing of powers reflects the post-dictatorship sentiment that the judiciary must be independent and that the courts can hold the government to account via judicial review (ibid.). However, as Fiona Macaulay argues, due to the active role of the judiciary in the drafting of the Constitution, the strength gained by the judicial branch has been at the expense of the executive branch in what she describes as 'a classic case of producer capture', resulting in the Brazilian judiciary gaining the greatest level of operational autonomy of any Latin American state (2003: 86).

In a later article, Macaulay notes that during the Fernando Henrique Cardoso government (1995-2003), moves to reform the judiciary were made in three discernible ways, 'those intended to improve [state] economic performance, those aimed at human rights protection, and those affecting penal policy' (2007: 32). Macaulay asserts that the reforms related to economic performance were most prominent and an attempt by the Cardoso government to

bring Brazil in-line with the neoliberal policy agenda (ibid). She explains that the economically focused elements of the international community threw their weight behind such initiatives to build on structural adjustment policies[45] from the 1980s and organisations such as the Inter-American Development Bank, World Bank and USAID all provided funds to reform the judiciary, to bring about a modern, efficient system (ibid). This focus on the provision of an economic landscape that foreign investors would consider more stable and predictable, meant that attention to the impact of the judiciary on human rights and penal policy concerns (such as access to justice and fair trials) came much lower down in the institutions' agenda (Macaulay, 2007; Fonseca, 2018).

Judicial Make-up

The domination of this group by white judges remains clear with 78.6% of first degree state judges[46] and 85.2% of second degree judges identifying as white (AMB, 2018: 323). In the overview provided, the report compares the white group to those identifying as having multiple heritage (parda/o) or as black (preta/o) (18.6% first degree, 11% second degree judges). The common conflation of these two groups (in comparison to the white group) can hide the significant issue that only 1.6% (first degree) and 1.9% (second degree) identified as black (ibid). The proximity to whiteness of those within the multiple heritage group may facilitate greater accessibility in comparison to the group identifying as black. As Maia and Reiter (2021) argue in their study of behaviour in a gated community in Salvador, in formal contexts, those of mixed heritage (pardas/os) share more of an identity with the white group, which is conceptualised directly in contrast to black Brazilians (pretas/os). The authors identify the racial capital benefits of whiteness for those able to claim it, noting that social hierarchies are 'routinely constructed and maintained through constant performance and display of

[45] 'Structural Adjustment Policies'. These were often far- reaching economic policies adhering to a very specific model introduced by recipient countries as a necessary condition for gaining a loan from international donors such as the IMF or World Bank, however, the narrow set of instruments heavily constrained the capacity of developing countries to experiment with their own models (Pender, 2001).

[46] I concentrate on state judges as those involved in custody hearings, but the report also shows data on federal, military and labour court judges.

"white" habits' and that 'whiteness becomes an unstable attribute that has to be anxiously guarded and cultivated' (Maia and Reiter 2021: 3).

Criticisms related to overrepresentation of those from privileged backgrounds within the judicial body remain broadly accurate, however, data suggests that there has been some increase in social mobility over recent years. For example, 27.1% of first degree judges are children of parents who did not complete high school (AMB 2018: 313). Remnants of the domination of certain social classes do remain, however, as 22.5% active first degree state judges and 31.4% of second degree judges have a relative who is a judge, and around 15% have a relative working for the public ministry (ibid: 369-372). Further indication comes from the fact that more than 85% of judges questioned employed at least one domestic worker in their homes (ibid: 313).

Judicial Status

It is worth returning to Souza's work here to consider judges' point of departure for interaction with their own groups and with detainees. Souza places the subcitizen (precarious habitus) below that of the citizen (primary habitus), but also offers a "secondary habitus" category at the upper limit of citizen status (Souza, 2007: 25). Those in this category embody all the presumptions associated with primary habitus but attract further levels of distinction. With value still related to productive performance, elite groups enjoy 'a type of invisible currency, transforming both the pure economic capital as well as, and especially, cultural capital, "disguised as differential performance," based on the illusion of "innate talent"' (Souza, 2007: 25). This group therefore imagine themselves naturally more talented and worthy of being the decision-makers and power wielders.

Souza adds that under an ideology that connects performance to worth and morality, those of the secondary habitus are also conceptualised as most able and worthy of adopting the position of moral arbiters (Souza, 2007: 25). It is this final dimension that 'allows the entire process of fabrication of social distinctions', and legitimates the actions of judges to that above the law – something designed rather to be used by them, against the primary and

precarious habitus. The selective nature of the use of law is captured in the well-known phrase "aos meus amigos, tudo; aos meus inimigos, a lei" ("for my friends, everything; for my enemies the law") (Darke 2018:71). This phrase was popularised by Getúlio Vargas, the longest serving president of Brazil, including through periods of dictatorship and highlights the sentiments expressed across much of Latin America's elite classes that the law is 'a hindrance to be circumvented' (Luciano Oliveira in Newton, 2018: np) and that following the law 'is [seen as] something that only idiots do… to be subject to the law is not to be the carrier of enforceable rights but rather a sure thing of social weakness' (O'Donnell 1998:9). In this sense, the law can be understood as a legitimate tool for oppression of 'the hostile' (Zaffaroni, 2006: 11), to be wielded by elites (Aniyar de Castro, 1987; Zaffaroni, 1989; Darke, 2018) as a form of 'vertical discipline' (Zaffaroni, 1989: 23).

For this elite class of 'over-citizens', the law does not limit their actions, but rather can be 'used, misused, or left in disuse by them' (Neves, 2007: 69). In this way the constitution performs 'the role of an alibi' where elites are able to gesture towards the principles of citizenship with rhetoric and points to the constitution, whilst citing "society" as the cause of any obstacles, and stealthily diverting critique away from themselves/their group (Neves, 2007: 74-75).

In terms of problems within the prison system, such as the insalubrious conditions, the over-citizens of the judiciary are able to annul themselves of any responsibility by hiding behind the illusion of the rule of law (Caetano, 2015; Casara, 2018). The constitutional focus on citizenship thus 'covers up a reality of noncitizenship' for the majority (Neves, 2007: 74), as well as the impunity enjoyed by the elites. Thinking specifically about custody hearings, an AMB report shows that 50% first degree judges disagreed with the statement that "the custody hearing is an important procedural guarantee mechanism for the accused and should be perfected", with over a third (36.1%) strongly disagreeing. Only 20% of second degree judges disagreed.

In 2019, two judges were summoned to explain their actions by the CNJ, because they disregarded the custody hearing process and immediately ordered pre-trial detention

(Migalhas, 2019). Both judges argued that presentation of the detainees was not necessary and the resolution bringing the content of an international treaty into law was unconstitutional and violated the autonomy of the courts (ibid). Another judge went one step further than this and sentenced a detainee during a custody hearing, arguing that she was improving efficiency (Silva 2019). Such acts of defiance in the face of national resolution are illustrative of the independence and power that some judges assert for themselves.

4.4 Management of Brazilian Justice and Subjectivities

Practice of Justice

The Brazilian Constitution clearly states that all fundamental rights are to be constantly maintained, including the presumption of innocence and instructs the judiciary to use detention as a last resort (Medina, 2016: 616). However, while the Constitution and subsequent legislation does advocate for human rights and that those convicted of a crime should be treated with dignity and respect, many scholars feel that, 'such an expression is limited to the field of legal fiction' (de Souza, 2017: 264). The IBAHRI provide further context to this point, which mirrors historical disregard of inconvenient rules from abroad as *leis para inglês ver*:

> One of the paradoxes of Brazilian society is that while the state formally adheres to liberal democratic norms, the bodies tasked with upholding them have frequently disregarded them. Successive Brazilian governments have a long history of implementing reforms at the formal level, while maintaining policies, practices and institutions that rested on a denial of basic rights. This context is crucial for an understanding of the current challenges facing those involved in criminal justice reform. (International Bar Association and Human Rights Institute, 2010).

The mass incarceration and consistent violation of rights through the way in which the penal system is managed cannot be delinked from systematic violations of rights experienced by the public (some specific populations more than others) through the manner in which justice is managed throughout Brazilian society. Darke contends that violence has always been enacted to control those deemed less worthy and notes the symbolic significance and continuity of state violence when, in 2014, specialist state forces were granted licence to kill

in order to secure Complexo de Mare, the largest favela in Rio de Janeiro, almost 50 years to the day since the military coup of 1964 (Darke, 2018: 80).

To take the symbolism one step further, this operation to militarily occupy the favela, carried out by Unidade de Policia Pacificadora (Police Pacification Unit - UPP) was referred to as 'pacification' of favelas – the same term used by colonial Portuguese when invading and violently occupying Indigenous peoples' land. Indeed the language used at the time of people being 'reduced to peace and civil conformity' (Langfur, 2005: 440) would not have been out of place with politic rhetoric during UPP operations. This violent occupation of favelas, justified as being for the greater social good and in an effort to impress on the world stage[47], has clear echoes of colonial logics of legitimation.

In a bid to manage criminality in the state, using a method not seen since the years of dictatorship, in 2018 the government deployed military police to the streets of Rio de Janeiro and replaced civilian authorities with army generals (Child and Simoes, 2019), leadinig to the previosly mentioned record-breaking number of police killings. Lethal violence is thus legitimised through the politics of fear and a continued state of exception (V Batista, 2003; 2010). Punitive and populist rhetoric calling for harsh punishments have been strengthened by notions that they have worked elsewhere and the resulting problematic effects of importing Western/Northern punitive policies such as zero tolerance policing (Wacquant, 2003; Cavalcanti, 2017; Dos Reis Peron and Oliveira Paoliello, 2021) and war on drugs rhetoric (V M Batista, 2003; Lemgruber, 2016; Darke and Garces, 2017) have led to a criminalisation of poverty, specifically targeting communities most underserved by the state. When discussing the 'failed' war on drugs, Lemgruber comments:

> The root cause of this calamitous prison situation is Brazil's unfortunate adherence to some of the worst policies from the United States: mass incarceration as a result of a vicious drug war that disproportionately deprives poor, black young men and women of their freedom. (Lemgruber, 2016: np)

[47] 2014 and 2016 saw Brazil host the Football World Cup and Olympic Games respectively. Many felt at the time that the move to *pacify* the favelas was a short-term strategy that aimed to present Brazil in the best light while the eyes of the world were watching. See Saborio and Costa, 2018.

Markus-Michael Müller discusses the effects of the importation of zero tolerance policing, penal populism and a war on drugs and underlines how this leads to a criminalisation of poverty, specifically targeting communities of the underserved in neoliberal urban society, and where 'the prison has become the central state institution in charge of warehousing urban marginality' (Müller, 2012: 72). This is also situated within a political economy that brought about market deregulation and shrinking of welfare provisions, to which Fonseca contends '[t]he increase in crime and prison rates is surely interrelated with the adoption of these new strategies of governance' (2018: 335).

Wacquant goes as far as to suggest that in such extreme conditions of socio-economic deprivation, deploying and enlarging the penal state and applying the huge weight of the police and judiciary 'amounts to (re-)establishing a veritable dictatorship over the poor' (2008: 62) and that the prisons are:

> '[M]ore akin to concentration camps for the dispossessed, or public enterprises for the industrial storage of social refuse, than to judicial institutions serving any identifiable penological function – be it deterrence, neutralization or rehabilitation' (Wacquant, 2003: 200).

In summarising the recent policies of the justice system, the Brazilian NGO Institute of Defence of the Right to Defence (IDDD), describes the system as a 'prisoner factory'[48] and a 'prisoner making machine', where each year more people are confined to prison in a cycle with no conceivable end (IDDD, 2017: 9). Scholars have suggested that this period of Brazilian history may be reflected on as "the great incarceration" (Batista, 2016: 3), where Brazil was the leader amongst 'the new [Latin American] mass carceral zone' (Darke and Garces, 2017).

Subjectivities

Beyond the initial arrest, there is evidence to demonstrate the structural inequity at the pre-trial stage. Due to a legal right introduced in the 1941 Penal Code, detainees from a selection of elite professions or with degrees from top universities are treated as "VIP" prisoners and

[48] References to this text are my translation.

are held on remand separately from "common prisoners" or under home detention in a clear demonstration of the greater value attributed to a certain strata of society (Zapater, 2017). As well as stratification by class, there are obvious intersectional issues illustrated by the differential treatment of racialised groups. For example, in 2016 it was shown that Rio de Janeiro's white population represented 48.9% of the general population, yet only 27.7% of those held pre-trial in *flagrante delicto* (caught in the act) (CESeC 2016). Figure 4 displays the population distributions of different ethnic groups across the categories of the general population, the pre-trial population, and the overall prison population. Of those held *flagrante delicto*, 68.6% were recorded as either black or mixed-race[49], while the same groups reflected only 50.2% of the general population in Rio de Janeiro (CESeC, 2016)[50]. The same pattern of disproportionate representation of black and mixed-race people can be observed when assessing the overall prison population in Rio de Janeiro, as the data shows that 27.8% of prisoners were white and 71.6% were black or mixed-race (ibid).

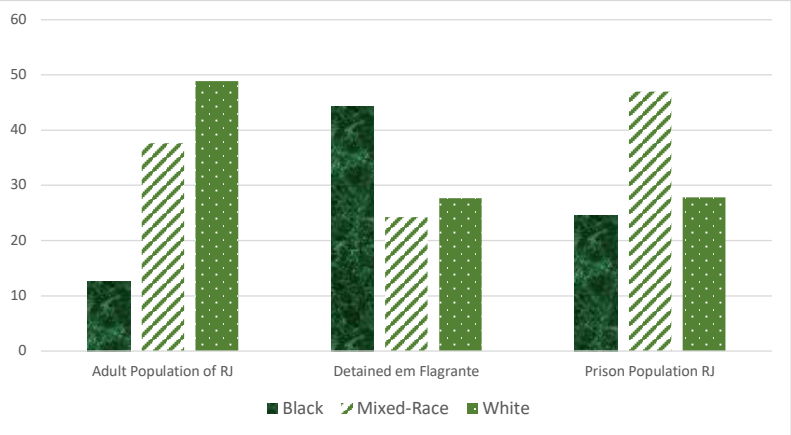

Figure 4: General and Penal Populations in Rio de Janeiro by Ethnicity

[49] The term mixed-race is my translation from the Portuguese word 'parda'.
[50] This is an overview document of the Lemgruber et al (2016) study and is cited here as it clearly represented the principal statistical findings. This text was originally written in Portuguese and all discussion related to this text is my translation.

Differences in treatment of along the lines of ethnicity are also observable at the decision stage, as the research found that 26% of black and mixed-race detainees were released as a result of the custody hearing, while 35.3% of white people in the same position were released (ibid).

The differential treatment according to racialised conceptions or the 'ethnoracial stratification' within the criminal justice system (Wacquant, 2003: 199) has been highlighted in many different ways. Adorno analysed the distribution of judicial sentences for violent crimes committed by black and white defendants in São Paulo, finding that while committing violent crimes at equal rates, black people are harassed more by police, were less likely to receive basic guarantees and were more likely to be punished than white defendants (Adorno, 1995: 45). More recently, ethnographic research revealed a related trend in Torinho and Vitoria, where young Indigenous and black people were both the most victimised and criminalised by police, creating a cycle powered by institutional racism (Cavalcanti, 2020).

Jaime Amparo Alves speaks to this cycle and talks of a 'favela-prison pipeline', which explains the increase in the use of prisons as 'a political choice to target some geographies (favelas) and some particularly abject bodies (brown/blacks) as the scapegoats for state-produced urban insecurity' (Alves, 2016: 235). There are synergies here with Wacquant's sentiments about the negative effects of a neoliberal globalisation on the justice landscape of Brazil. Alves provides thoughts around how spatial and social inequalities are deepened and that in deploying *more state,* such as through the increased militarisation of police and a punitive increase to sentencing, the government legitimises itself through creating 'fantasies of urban order through radicalized narratives of crime and through surplus managements of population through expansion of punishment', fuelled enthusiastically by media sensationalism and calls for tougher popularist rhetoric (Alves, 2016: 232).

Alves does go further than Wacquant in terms of an emphasis on ethnicity and calls on what Rita Segato (2007) defines as the 'coloniality of justice', whereby norms and power dynamics from the colonial past are manifested in the post-colonial present, with the disproportionate over representation of white (mainly men) in positions of power 'just one expression of this

carceral continuum between slavery and the present-day penal system' (Alves, 2016: 231). Alvez challenges the received argument of the political left wing, which sees the increase of popularist approaches and increasing penal punitivism as a symptom of a dysfunctioning democracy and states that black activists have instead 'identified permanent violence against blacks as an essential dimension of Brazil's regime of exclusionary citizenship' (Alves, 2016: 231).

4.5 Conclusion

The level and conditions of pre-trial detention continue to be issues that attract concern from national and international quarters. Custody hearings have been introduced partly in an effort to reduce the overuse of pre-trial detention, however, since their inception, the initiative has faced resistance from significant sections of the judiciary. Despite an initial reduction in those held pre-trial, the introduction of custody hearings has not generated the decrease in pre-trial population that advocates had envisioned. Questions thus remain over what influences judges to continue to order pre-trial detention, despite the protocols indicating its use only as a last resort.

An examination of the judicial corpus reveals the overrepresentation of white Brazilians from privileged backgrounds, a pattern which is reversed for the pre-trial population, whereby black Brazilians are detained pre-trial more frequently. As well as demographic disproportionalities, this chapter has also considered the importance of the status of judges and the discretion that this allows them. Building on Souza's (2007: 25) conception of the citizen and subcitizen from the previous chapter, this chapter has considered the notion of the 'secondary habitus' or 'over-citizen' as useful for examining the elevated position that judges enjoy. This group of elites imagine themselves to be naturally endowed to make moral decisions for society and that the passing of difficult formal exams has legitimised such assumptions. This allows many judges to feel comfortable to make decisions contrary to the constitution and see themselves as sitting above the law and able to wield it to fit their own philosophies.

A final point to emphasise is the violence imbued within the management and practice of justice in Brazil. Whether the legitimisation of military police invading, occupying, and executing people in favelas, or the normalisation of brutality and torture during arrest and detention, the disregard of rights for specific demographics (i.e., people of black and plural heritage) and geographies (i.e., those from favelas) by state justice actors is clear.

Now that the specific context of pre-trial detention and custody hearings have been examined alongside the make-up and status of the judiciary, and the important historical context has been investigated in relation to colonial dynamics, hierarchies and assumptions, the next chapter will outline how empirical data was collected and analysed to consider how coloniality informs judicial decisions.

Chapter 5 | Methods

5.1 Introduction

This chapter restates the central research question for this thesis before providing detail of the approach to empirical data collection and analysis. Methods for semi-structured interviews with court actors are presented alongside observation of custody hearings as the central approaches, and sampling techniques are explained. Description and explanation of the seven phases of thematic framework analysis used illustrates the analytical approach and how this is favourable for the interpretive and decolonial theoretical framework. The chapter also reflects on access to interviewees and court, on positionality as a researcher and the realities of conducting research in a *live* and changing environment. As such, limitations are discussed *en route* where they are most relevant, rather than as a separate section. The chapter concludes with some final ethical considerations.

5.2 Research Question

At its broadest interpretation, this thesis aims to contribute towards the understanding of how the international criminal justice communities can better support reform efforts to reduce the overuse of pre-trial detention in the global South. This long-term aim speaks to Aliverti et al.'s second aspect of "decolonizing the criminal question", which considers how to 'contribute to building alternative paths, both at the level of thinking and intervention (2021: 229). Such a goal is beyond the scope of this thesis; however, the research can contribute towards the larger goal by questioning globally normative methods and with a close examination of the realities of a specific context.

This thesis aims to directly answer Aliverti et al.'s (2021) call (as the first aspect of "decolonizing the criminal question") for research that exposes and explains how colonialism informs criminal justice policies, practices and institutions, as well as normative criminological methodologies and theorising. The research question for this thesis is thus:

To what extent are judicial decisions during custody hearings in Rio de Janeiro, Brazil, informed by coloniality?

The research is structured to explore this question by asking those actors working most closely to custody hearings about their opinions via semi-structured interviews. These interviews are complemented by non-participant observation of custody hearings. During these hearings, I witnessed the decision-making processes in action and observed the court dynamics. The following sections will now describe the research approach.

5.3 Empirical Data Collection

Interview Access and Sampling

One year in advance of the fieldwork, a preliminary research visit established initial contacts with relevant parties in May 2018. This scoping visit enabled me to assess the planned research's viability with experts and ensure that I would not be replicating existing work. The discussions about the reality specific to the courts of Rio de Janeiro informed my thoughts in preparing interview questions over the subsequent year before returning to conduct the research. I received positive feedback that the study would genuinely provide a unique contribution to knowledge and the encouragement that the subject matter and direction of thought would be useful to the criminal justice reform communities. Therefore, I felt comfortable returning to these groups, representing the cross-section of key stakeholders related to custody hearings and pre-trial detention to help facilitate access to court hearings and in making initial contacts with some interviewees when arranging the interviews for the core research.

In total, 26 interviews were conducted over three months. As the research focuses on judicial decision making, judges were, of course, the chief stakeholder of concern. However, interviews were also held with other important and relevant stakeholders through 'contextualist triangulation' (Madill et al. 2000: 9). Acknowledging that diverse standpoints were likely to lead to a variety of opinions, rather than one *true* or complete position on the topic, this approach embraced a more holistic view, with the emphasis on collecting a range

of empirical information being 'completeness [of understanding] not convergence' (Madill et al. 2000: 12).

For analysis purposes, interviewees were divided into four categories: 'judges', 'prosecutors', 'public defenders/lawyers', and 'subject matter specialists' (NGO experts and academics). Identities of interviewees are anonymised in the following analysis chapters. A simple code containing a letter and a number are used to denote each interviewee. For example, any identifier starting with a 'J' relates to a Judge, prosecutors are replaced by 'Pr', Public Defenders are described with 'PD', and 'S' is used for Subject matter Specialists. All criminal justice actors interviewed were either directly or recently[51] involved in or researching custody hearings. Academic and NGO subject matter specialists were engaged in a broader understanding of the workings of the judiciary and its relationships with society and human rights. Given the expert knowledge of this group, their testimony is included in the following empirical chapters where it has been helpful to provide greater understanding of the statements and opinions of the court actors interviewed.

While detainees are central to the custody hearing process, I decided not to include them as a group to be interviewed. During the preliminary research visit, I observed that detainees often appeared to have very little understanding of what was happening during the entirety of the process. This research examines the long-term impact of colonialism on decision-making, meaning it was essential to speak to those who have built up a body of experience with custody hearings, who could speak to their perceptions of what informs judges' decisions. Detainees could only comment on what happened in their hearings, whereas the selected interviewee groups could consider differences in judicial approach across multiple hearings.

[51] For example, a judge may not have been conducting custody hearings during the time of interview, but all those interviewed had been involved in custody hearings in some form within the last two years.

Gaining access to courts and those working in them is more easily facilitated when the pathways are enabled by personal recommendation. I, therefore, combined direct introductions with other methods to meet with relevant parties. The word 'jeitinho' describes the Brazilian notion of *finding a way* via formal or informal connections to achieve one's aim. The use of informal networks is a normalised way of doing business in Brazil, so, as well as formal introductions, I also gained access to relevant stakeholders by attending relevant events, talks and forums and then introduced myself and the project.

While I also contacted those with whom I had no previous working relationship, such *cold* approaches bore significantly less fruit than the *warm* approaches facilitated by a respected member of the Brazilian criminal justice community. However, one concern with using such a *warm* approach was that it could lead to a similarity bias, where the original criminal justice professional may introduce me to like-minded individuals to themselves. My initial contacts were those with a specific interest in ensuring equality of justice, such as members of organisations like *Associação Juízes para a Democracia*, the Judges for Democracy Association. Contacting such groups was extremely helpful as they were aware of relevant reports and research into custody hearings, pretrial detention and judicial decision making. However, I also wanted to speak with those judges (and other stakeholders) holding vastly differing opinions. In order to mitigate against bias, I used three different sampling methods. Table 2 illustrates the breakdown of interviewee category and sampling method.

Table 2: Interviewee Categories and Sampling Methods

Role	Interviewees	Direct	Opportunity	Snowball
Judge	7	1	2	4
Prosecutor	4	0	4	0
Public Defender/Lawyer	8	0	4	4
Subject Matter Specialist	7	6	1	0
Total	26	26.9%	42.3%	30.8%

Firstly, there were some interviewees whom I approached directly. These 'direct' participants (26.9%) were mainly NGO experts and academics, where it was clear that the individual had a history of expertise in the subject matter. Only one judge was approached directly. The

second group, designated 'opportunity' sampling (42.3%), were those whom I met whilst observing court hearings. These individuals did not come recommended to me by previous contacts, and I had no way of assessing whether they had a particular political agenda or inclination for or against reform. This method was used for all the prosecutors interviewed, half of the public defenders and two of seven judges. I often gained the interviews with these court actors after I had observed them in court hearings. Some interviews took place minutes after an afternoon of hearings, while others were scheduled for other times. The final sampling method employed was a 'snowball' sampling technique (30.8%), used where an interviewee recommended another person whom they thought would be relevant to the study. Recommendations came from various sources, including suggestions from my original contacts, from those I contacted directly and those I met at events or in court.

Across all groups except the prosecutors, I was able to recruit fairly even numbers of women and men for interviews, detailed below in Table 3. The prosecutor interviewees were gained purely via opportunity sampling, and I did not meet any male prosecutors at court.

Table 3: Interviewee Sample by Sex

Role	Women	Men
Judge	3	4
Prosecutor	4	0
Public Defender/Lawyer	4	4
Subject Matter Specialist	4	3
Total	15	11

I did not feel that it was socially appropriate to ask interviewees their racial identity or ask them to complete a separate demographic questionnaire. I felt that this would compromise the critical relationship-building phase at the beginning of interviews and would likely have been interpreted as an impolite question or as introducing a level of formality that could be obstructive. Race often came up in discussion, however, and some interviewees did disclose their identity. One judge and two subject matter specialists self-identified as black during interviews, all of whom are women. All other interviewees had a visible proximity to whiteness and while some may have recent plural heritage, none identified as such during interviews.

Approach to interviews

Interviews were semi-structured and related directly to overt opinions about decision-making and broader notions of justice and human rights, allowing interviewees the space to express their underpinning ontology. Semi-structured interviews are a particularly favourable technique for use with judges. This is both because it allows each judge to focus on the area that she/he is most knowledgeable about or comfortable with, and because of its fit with interpretivist research, aiming to understand the socially constructed nature of behaviour in specific contexts (Jaremba and Mak 2014).

The interviews were all between 45 minutes to two hours. All consented to be recorded, and 22 of 26 were conducted in Portuguese. Interviews tended to begin with general questions related to custody hearings as a relatively new process introduced in 2015, and follow-up questions were adapted to the flow of the conversation. Appendix A provides a set of indicative questions illustrating the main topic areas introduced via interviewer questioning. In most cases, the questions were not phrased exactly as written in Appendix A, but rather phrased in whatever manner best naturally fit with the course of the conversation. Open questions were used throughout to avoid influencing the interviewees, and questions were designed to facilitate discussion and allow the interviewees to speak fluidly and openly about their thoughts.

I asked judges how the topics relate to their own thoughts and behaviours and whether they believed that other judges felt similarly. When interviewing all other actors, I asked about their thoughts on judges' behaviours in general. On several occasions, this led to discussions about majority or minority views within the judicial body. While the conversations were fluid, there were several broad angles of inquiry:

Custody Hearings

I began many interviews by noting that custody hearings were introduced in 2015 and asked how the interviewee felt about the introduction and whether they felt it had been a success. I often combined this with acknowledging that there had been recent discussion in the media about the possibility of removing custody hearings and asked interviewees what they thought

about the arguments. I started with this set of questions for several reasons. Firstly, this allowed the reiteration that my focus was on custody hearings specifically, rather than other kinds of judicial processes. It also indicated from the beginning that even as a foreign researcher, I was aware of the legislation and understood the up-to-date discussions on the topic. These were also non-threatening questions that let us ease into the interview and demonstrated that I was interested in their opinions rather than testing their knowledge or critiquing their performance. Asking general questions about the process and perceptions of success often revealed other points about underlying assumptions, such as how interviewees felt about what the correct justice procedures should be or what behaviours are considered normal.

Role of the Judge

In some interviews with judges, I asked explicitly, "what do you feel is the role of the judge during custody hearings?" In other cases, this information came up naturally, without me needing to ask. I also asked judges how they dealt with the balance of public security on the one hand and the individual rights of the detainee on the other. In these instances, interviewees described their approaches (or, if non-judge stakeholders, what they believed the approaches of judges to be), which provided insights into their philosophies of justice. I believe that grounding the question in how judges grapple with the balance of public protection and individual rights is both particularly relevant to the understanding of judicial decision making at this stage, but also more likely to elicit considered and specific answers than if I were to ask directly "what judicial philosophy do you follow?" I also asked interviewees about media coverage of judicial decision making and whether public opinion affected judges' decisions.

Detainees

I asked open questions about who is presented in court, and sometimes these details were revealed without questioning. This approach included asking whether a particular example that the interviewee gave was typical of the detainee cohort or whether the social context of the detainee made a difference to decisions. When interviewees voluntarily spoke of the

difference in treatment for racialised groups, I asked why they believed this happened and how it manifested in court.

Decision Making

The crux of the thesis is to understand how judges make their decisions during custody hearings, so I did directly ask judges how they come to their decisions. Similarly, I asked non-judicial interviewees how they believed judges came to their decisions. I asked interviewees what they thought helped or hindered with the decision making and whether factors such as the behaviour of the detainee or the conditions of pre-trial detention entered into thinking during the process.

Human Rights

I was interested in several aspects for this wide area. Broadly, I asked whether interviewees believed that human rights discourse is an effective vehicle for discussing justice or for driving reform (if interviewees had indicated that they desired reform). Where the conversation allowed, I asked whether human rights discourse is relevant to the Brazilian context and their thoughts on the anti-human rights rhetoric. I also questioned interviewees about their views on human rights protocols and whether this helped with decision making.

Coloniality

I did not ask specific questions related to coloniality. Some interviewees introduced racial inequality, and I explored their perceptions of this. Several specifically made comparisons to power hierarchies during the colonial periods, and in such instances, I facilitated further discussion on the topic area to understand their views better.

Court Observation

To complement information gained from interviewing key stakeholders of the pre-trial detention process, I also observed 64 custody hearings in the Benfica courts in Rio de Janeiro. The intention was not to conduct a conversation analysis of the content of the hearings, nor was the goal to determine whether the hearing rigidly abided by the set criteria and procedures as Nascimento dos Reis (2017) has. My aim was rather to observe the judges

during the decision-making process, noting the court dynamics and examining the comportment of the court actors.

Such observation was complimentary to the data gathered from interviews on several fronts. Observing custody hearings furthered my understanding of processes inside the courtroom and during the periods before and after hearings. Logistically, being present at the hearings allowed me to gain access to more court actors, whom I would not otherwise have had access to, leading to additional interviews. Conducting the observations concurrently with interviews, rather than in a separate period before starting or after completing the interviews, meant that I was also able to consider points made in interviews when observing the hearings. I also asked questions about what I had witnessed in the hearings when interviewing court actors.

5.4 Reflections on Access

Access to Interviews

The relatively informal manner of business in Brazil manifested both advantages and disadvantages. On the positive side, I did not have to apply to a formal body to gain permission to speak with individuals as I would in other countries. Brazilian judges and other stakeholders are generally free to speak their minds in person and in the press. I found that most interviewees were usually willing to speak with me upon hearing that I was a researcher from a British university. I was also aware that my position as a European scholar positively impacted the granting of access to people and places. I suspect that the fact that I approached and spoke in Portuguese may have been intriguing and perhaps lent me additional legitimacy in the eyes of some. Other researchers and NGO experts commented that they knew of Brazilians who had attempted to gain access to custody hearings or solicit interviews from judges and prosecutors but had frequently been rebuffed. I was, therefore, conscious of my privileged position to have the opportunity of access.

I am reminded of the work of Nelken and his observations on either being 'virtually there', 'living there' or 'researching there', (2007: 144). In this discussion, Nelken highlights those

'living there' and certainly those native to a culture and context will have substantial advantages linked to cultural nuances, compared to researchers from outside, but that the '[t]he ability to look at a culture with new eyes is, after all, the great strength of any outsider' (ibid: 147). During the three months, there were moments, both in interview settings and in more casual conversations, when people reflected that they had not before been asked about a certain aspect in the particular way that I had asked them. Such moments reassured a self-conscious mind that an outsider's approach could bring additional value to the wider conversation, while not attempting to speak for local culture.

It is also worth noting the difference in ease of access when considering the different interviewee categories. Those interviewees in both the Public Defender group and the Subject Matter Specialist group reacted similarly to requests for interviews. These participants almost exclusively expressed great interest in the project and suggested that despite their busy schedules, they would find time to have a conversation with me, as they believed it to be an important topic. Interviewees from these groups frequently appeared to have already considered judicial decision-making issues during custody hearings and were therefore open to discussing their thoughts on the matter.

The experience of gaining access to judges for interviews was not as consistent. An introduction from a colleague or a short conversation post-hearing was sufficient for some judges to agree to participate. However, accessing others meant scheduling appointments with secretaries and a providing a detailed account of the background of the project. On all occasions, information about the project was made available to potential interviewees in Portuguese and English. As mentioned, I suspect that my position as a researcher from a UK based university may have played a part in securing a place in some judges' diaries.

The 'prosecutor' group were by far the most challenging to access. Several of those I approached by email did not respond at all. Many I spoke to in person appeared wary of speaking with researchers or seemed uninterested in talking about the subject matter. On occasions that I secured an interview, the appointment was frequently missed or cancelled at the last minute by the interviewee. When speaking to other actors (outside of interview

settings) about my difficulty in accessing this group, the opinions generally fell into two categories, both of which were unsurprised at the lack of response. One set of responses emphasised that many politically right-leaning prosecutors presume academics to be of the left and therefore either do not want anything to do with them or have concerns that academics will portray them negatively. The other major opinion voiced was that many prosecutors are generally not interested in reforming the system and therefore have no interest in talking to academics who are typically interested in how things might change.

My intention had been to conduct interviews with one person at a time so that each interviewee did not have to consider the thoughts of anyone else present; however, on one occasion, I did compromise on this, where two prosecutors said that they would be more comfortable if they were interviewed together. Declining the offer would have risked having little representation from this group in the data and may have harmed relationships in the court setting where I was conducting observations. The result was an interesting conversation with two prosecutors, where I observed the influence of the more senior colleague setting the tone for responses to questions.

Access to Court

Gaining access to the gated Benfica court complex required permission from the Custody Hearing Coordinator (also a judge). Due to the connections I had forged during the scoping trip conducted a year prior, I was introduced favourably to the appropriate authority and was granted access. This meant that I could use the transport provided for judges that left after lunch each weekday from courts in the city centre to the Benfica complex on the city's outskirts. I discovered that, in reality, judges do not use the transport, which is a small campervan style bus that tends to be used by social workers. All judges that I encountered at the court had driven privately. I include some of my reflections on discussions with the social workers that I encountered on these journeys during the analysis chapters. I did not include these interactions as formal interviews because social workers do not participate during custody hearings and, therefore, cannot provide informed opinions on judicial decision making. Ethically, I also had not gained informed consent from them. However, such

impromptu conversations did inform my understanding of the broader ecosystem of the custody hearing environment.

I mention the granting of access to the transport from the proper authority because it only got me as far as passing the initial boundary of the gated compound, which also contained a prison and a separate building with pre-hearing holding cells. A message had been left with the public defender's office that I was arriving on the first day, yet all further access needed negotiating once inside. These 'boundary negotiations' (Jefferson, 2021: 209) were ongoing and precarious in gaining access to the complex on other occasions, to the custody hearings, and to speak with every additional court actor. For example, it was not always clear whether my admittance had been granted for a specific day or whether I could visit for several weeks. This meant that I had to directly call the responsible judge to reassure the transport driver that I was cleared to gain access on multiple occasions.

Once in the compound, I had to ask the presiding judge of a specific courtroom if she or he would be willing to allow me to silently observe the custody hearings that they would be holding that afternoon. On average, judges tended to arrive an hour or less before the custody hearings, and therefore there was only a small window to request permission. I explained my project and that I had verbal permission from the Custody Hearing Coordinator, but it was each judge's prerogative whether to grant access. On some occasions, I requested the permission myself, and on others, another court actor pleaded my case for me (such as the social worker I met on the transport). While it did not happen often, there were times when I was denied access. On these occasions, I was not given a reason why. My impression was that no reason was given to the person representing my request to observe the hearings. My speculative feeling is that the hierarchical dynamic is such that the few judges that said no, felt no need to justify their reasoning to a social worker or a public defender.

Armed with no more than verbal permission from the coordinator, each interaction with a new judge, prosecutor, or public defender to request an interview or access hearings required a new strategic gamble when considering what to mention first. When reflecting on his ethnographic research in Tunisian prisons, Andrew Jefferson refers to the interaction with

authorities as a 'dance of concealment and revelation' when negotiating boundaries and access (Jefferson, 2021: 214). This sentiment rings true with my experience in Benfica. There was always a choice to be made about first mentioning the permission previously granted, explaining where I was from, or the research aim. Each decision had to be made in the moment, and continuous calculations needed to be made as to whether more or less information would help or hinder my chance of access. The negotiation of space was therefore always *live* and never settled or completed. The research was conducted with the knowledge that access could be revoked at any given moment.

A critical moment arose when the Custody Hearing Coordinator (also a judge) was replaced towards the end of the three-month fieldwork period. At this point, my previous permission to access the Benfica complex was no longer valid. I applied via the official channels to meet with the judge newly responsible for custody hearings, yet despite emails and visits to the offices, I was not granted an interview with this judge nor access to the courts. While I would have continued to visit the court complex and attempted to negotiate further access to custody hearings had the situation not changed, I was content with the number of hearings I witnessed. This denial of access late in the process has not limited the data from this part of the methodology. However, it did illustrate how quickly the court environment can change, as I will address in my analysis.

5.5 Analytical Framework

A 'thematic framework analysis' was used for interpretation of this data. Braun and Clarke (2006) explain that while this form of analysis is a research method in its own right, it has been variously misunderstood. They note that the method tends to be described as just a part of more prominent research methods, such as grounded theory, or used without due acknowledgement (Braun and Clarke 2006). While the method lacks a unanimous definition, I adhered to Braun and Clarke's clear methodological approach and definition as 'a method for identifying, analysing and reporting patterns (themes) within data' (ibid.: 79).

A key positive attribute of the thematic framework analysis is its malleability and thus ability to be applied to any theoretical framework. The authors point to the method's application with constructivist methodology, noting that it allows for 'the ways in which events, realities, meanings, experiences and so on are the effects of a range of discourses operating within society' (Braun and Clarke 2006: 81). Such a framework with minimal imposed structuring allows the freedom to facilitate a broad topic area containing many interlinking and overlapping issues and concepts. From the outset, the intention was to be attentive to any intersectional analysis and conclusions and avoid constraining rich data with structure.

The decision on analytical themes was not taken before the data collection, thus avoiding the channelling of thematic analysis into particular assumptions by making such choices in advance. Adam Trahan and Daniel M. Stewart refer to this approach as 'letting the data "speak for themselves" in that there is no attempt to fit data into preconceived typologies or theoretical constructs' and instead themes are driven by the data (Trahan and Stewart 2013: 67). However, to suggest that the themes *emerged* from the data is too passive an explanation. As Braun and Clarke remind us, as much as we may attempt to act impartially as researchers, we are subject to our own ontological positions and that 'data are not coded in an epistemological vacuum' (2006: 83). My constructivist standpoint dictated that I did not search for some manner of objective truth hidden in the data, but that rather acknowledges that the world is understood through social constructions. An inductive or bottom-up approach to analysis is therefore favourable to the facilitation of a detailed interpretivist account, concerned with understanding of a specific context on its own terms, rather than in comparison to other contexts or trends identified elsewhere. Adopting a decolonial lens meant that I entered the analysis phase conscious of the assertion that legacies of colonialism are a central point of consideration and relevant to the an interpretivist examination of the Brazilian context.

The unit of analysis was the individual justice actor involved in custody hearings, as outlined in the above section on interviews. I did not attempt to investigate each interviewee's consciousness but was interested in how they perceived judges' decision-making and how socio-cultural and historical factors shape it. Therefore, analysis focused on latent themes in

their responses to questions, rather than remaining at the semantic level of interviews to categorise them 'according to their explicit or surface level meanings' (Trahan and Stewart 2013: 67). The authors note that the choice of latent analysis is 'particularly useful for research attempting to uncover and understand the ideologies, cultural beliefs, and/or assumptions underlying the data' (ibid.), thus fitting comfortably with my research.

Rather than waiting until the end of collection and interrogation of the data, themes were identified as part of an ongoing process and then finalised before detailed analysis. The data interrogation, coding and analysis took place across seven phases via a broadly linear process, with occasional overlapping or returning to previous phases where this was relevant. This framework is based on Braun and Clarke's six-stage process (Braun and Clarke 2006). Table 4 provides an overview of the seven methodological phases.

Table 4: Theoretical Framework Analysis Phases

	Phase	Phase description
1	Reflection	Ongoing consideration of content and conduct of interactions
2	Familiarisation	Transcription, translation & immersion in data
3	Initial Coding	Points of note, repeat topics
4	Initial Themes	Collating a list of codes and arranging into themes
5	Reviewing Themes	Reassess themes against research question and data
6	Defining Themes	Refine and finalise themes and subthemes
7	Analytical Discussion	Data presented thematically with relevance & implications

Phase 1: 'Reflection' began the moment the first interview and observations were completed and continued throughout the entire process. Activities related to reflecting on what was said and how it was said; the manner of the interviewees or those being observed; and identifying any novel of unexpected talking points or actions. As far as possible, I spent time on the same day as an interview or observation, reflecting on the interaction and writing field notes in a separate journal. I also spent time on other days revisiting these to consider my ongoing thoughts. Towards the end of the three months of fieldwork, I also began identifying reoccurring themes and points of note to return to in the analysis period. Reflections

continued throughout the entire analysis process concerning the content of the interactions and my positionality as the researcher.

Phase 2: Once data collection was completed, 'Familiarisation' marked the point of returning to the data. This phase involved the transcription of interview recordings and translation to English for most of the interviews, as 22 of 26 were conducted in Portuguese. In this period, I spent time re-listening to and re-reading the data, with a deep level of immersion in the data.

Phase 3: 'Initial Coding'. Once I felt a strong familiarity with the data, I began to assign codes to certain parts of the texts. For example, I highlighted specific sentences that pertained to positive opinions about the use of human rights discourse as 'HR Positive', or where a public defender voiced concerns about the close social and personal relationships of judges and prosecutors, I used the label 'social proximity'. At this point, I was not attempting to highlight themes but topics of note or repeated issues.

Phase 4: After completing coding across all interviews and observations, I identified 'initial Themes' from my ongoing notes. I created a long list of codes and collated them into groups to form several provisional themes. Some codes could have been assigned to more than one theme due to the overarching or intersectional nature of the subject matter. The borders between themes at this point were not always firm or obvious. However, I was aware of previous research such as that of Ryan and Bernard (2000: 780), who discussed themes as abstract notions that change and adapt before, during and after analysis and how they have a 'fuzzy' quality.

Phase 5: 'Reviewing Themes'. During this stage, I reassessed the themes to ensure that they fit the intended analysis inherent in my research question and reviewed them against the full data set. Inevitably, this is a subjective process. Therefore, I acknowledge that there is a certain quality of curation to the process of creating themes, whereby the researcher is making distinct choices in what to include. In my case, decisions were made in line with my theoretical framework.

Phase 6: The 'Defining Themes' phase concerned the finalising of themes. I drilled down further within each theme to create subtopics for discussion. This overview then provided the skeleton framework for the full analysis. For example, a core theme of 'Citizenship' includes subtopics of 'Space and Place' and 'Centring Whiteness'. As with other phases, there were minor refinements to titles and theme boundaries as my analysis progressed.

Phase 7: 'Analytical Discussion'. In the following analytical chapters, I explain how the thematically presented data relates to the research question. For many discussion points, the most evocative or representative examples are presented to illustrate a position rather than including all examples. On other occasions, I have included opinions or statements that were not overtly shared by the majority of interviewees but that were particularly insightful or provided an important additional layer of analysis. I was careful, however, to avoid giving disproportionate emphasis to personalised or infrequently occurring phenomena.

5.6 Ethical Considerations

Interview questions were formulated to focus on the professional opinions of interviewees and not to solicit personal details or political opinions. Interviews took place in the office of the interviewee or another private location. Informed consent was gained in writing, and a description of the project was made available in advance in both English and Portuguese. Interviews were audio-recorded where consent was gained, and all information was anonymised for discussion and analysis. This planned anonymity was expressed to the interviewees, both to reassure them of confidentiality and as a means to attempt to reduce social desirability bias. Coding procedures have ensured that no individual interviewee is identifiable in any part of the project.

While observing custody hearings, I witnessed detainees who appeared to be in great physical and psychological pain. Some claimed to have been beaten or tortured by the police. I observed how they were handcuffed arm-in-arm with other detainees and held in dark, overcrowded holding cells and then made to stand in line with their faces millimetres away from the wall until it was their turn to enter the courtroom. I saw how many were taken

to court without any shoes, and I witnessed their frustration at not having the opportunity to give their own account.

These detainees were not asked if they agreed to an external observer sitting-in on this critical moment in their life. My role in that space was to observe court procedures and how judges came to their decisions. While a silent and inactive observer in the court, I was still present in the small room and to some extent *active* in witnessing the decision about each individual's fate. I did not feel that there was a realistic avenue to request the consent of each detainee, and it did not seem of concern to other parties in the court. I briefly introduced myself or was introduced to each prosecutor and public defender or lawyer that came into the court, but it was clear that it was the judge who claimed ownership of the room and the process, and it was only their permission that was required. The power imbalance between the detainee and all other court actors – including a researcher – is brought into sharp focus in these moments.

Chapter 6 | Citizenship

> In Brazil, people have a clear idea about the place of everybody. If you're a body somewhere you shouldn't be, people don't know how to deal with you. They observe you, try to buy you or tokenise you... Or erase you. – J6

6.1 Introduction

Although the interviews were framed specifically in relation to judicial decisions during custody hearings, the thoughts, and actions of those within them obviously do not exist in a vacuum. Many of the interviewees[52] moved swiftly to discuss how the dynamics of the courtroom and the social relations that play-out within them are symptomatic of wider societal issues. Several felt that such historical power-imbalances were a core element to understanding judicial decision making and the overuse of pretrial detention. This chapter focuses on how the practice of justice intersects with naturalised assumptions relating to multiple levels of citizenship, and thus, how judicial decision making is influenced at an ontological level by coloniality.

The chapter begins by noting assertions from interviewees relating to dichotomous societal divisions. Some interviewees discussed their belief that difference in treatment in court is accepted as normal or even felt to be correct in some influential quarters. Further interrogation of how a hierarchy in treatment is formed leads to discussion of who is presumed to belong in what place and how association with certain spaces leads to differing outcomes during custody hearings. Several interviewees make distinct links to colonial practices or highlight similarities in power asymmetries and physical treatment. Some clear

[52] Please note, 22 of 26 interviews were conducted in Portuguese and therefore all quotations from these interviews are my own translation of their words. On occasion, where I believe it to be relevant, I have included the original Portuguese as a footnote. Interviews with J6, S1, S4 and S5 were in English and therefore, quotations attributed to them are their exact statements.

assumptions around criminality are examined and I discuss how this is linked to the centring of whiteness and the normalisation of black pain.

6.2 Space and Place

To state that there are significant social divisions in Brazil is nothing new. However, when asked about the factors which influence judicial decision making during custody hearings, many interviewees reached for society-wide explanations and wanted to express how access to fundamental elements of citizenship are barred to many due to socio-economic status. For example, J3 spoke of inequality in access to healthcare as demonstrating similarities with access to justice, noting that the difference is not necessarily with the super-rich, but that "even the middle-class and poor don't share the same hospital. You must have health insurance, or you're screwed… It's not luxury, its survival."

Via this logic, we could say that the poor, or the underserved, are priced-out of survival and cannot be said to have an equal level of citizenship. Other interviewees made this point directly in reference to custody hearings, for example, S1 expresses here what many noted in that, "those with money don't end up in custody hearings because they can bribe the officers. But if they do, they can afford a good lawyer, a good suit and are treated differently". This is not to suggest that it is as simple as to say that access to resources in custody hearings will inevitably lead to better outcomes for defendants, but rather I wish to emphasise that interviewees repeatedly referenced a macro-level acceptance of inequality, and while interviewees often asserted that they personally did not accept it, that there was a sense within society that it was inevitable.

Others used alternative illustrations of normalised status differences. J5 spoke about how it remains very common to find 'social' and 'service' entrances to buildings and elevators. Not only does this provide a literal division between people, with a value judgement attached,

but it is emblematic of access to citizenship. One group have an official residence, CPF[53] numbers and work within the licit market. Another group – who often travel long distances from favelas to work, for example, as cleaners – whose work is not part of the formal job market and who therefore do not have official workbooks and are less likely to have CPF numbers or a residence recognised as official. I make note of the official residence, CPF and workbook, as these are key elements that prosecutors stated that they use to decide on whether to recommend pretrial detention during custody hearings. Pr1 and Pr2 discussed the formalities of custody hearings and presented the centrality of such documentation to their own decision making as evidence of a lack of prejudice within the system. Neither prosecutor reflected on the structural discrimination in a defendant's access to temporary release being dependent on elements that are largely out of their control.

Interviewees regularly mentioned spatial delineators such as favela/asfalto[54] and the city/periphery while discussing the differences people experience in their treatment at the hands of state justice representatives. Some mentioned these terms in passing as if they were natural divisions, while others highlighted them as constructed boundaries, symbolising the places where the reality of citizenship changed. PD1 expanded on the different realities for different groups with particular mention of policing strategies and stated that this illustrated how "repressive power remains against those in favelas". He was very firm in his assertions that what happens during custody hearings is an extension of the divergent realities of those located both physically and socially in different spaces:

> PD1: [There is] a logic of different languages, they are different spaces that each of these groups of people occupy. The reality of a guy in a favela is completely different. I don't know if you have heard about the issues of 'violation of domicile'? In the favela, the police arrive with their foot through the door. In the South Zone, where the judges live, it will not be like that, it's completely different. For him, this is inconceivable. Fuck, there the police kill, the police beat, the police violate rights. So, they are different realities… completely different worlds. In a country so unequal, putting such a person in a position to judge is problematic, because they cannot understand reality.

[53] Jobs within the licit market require a CPF 'Cadastro de Pessoas Físicas' (Natural Persons Register) the Brazilian individual taxpayer registry identification. To gain a CPF, a citizen must be registered to an official residence, yet many homes in favelas are not classified as such by the state. Access to CPFs for residents of favelas has increased, however, for those working outside the official jobs market, it is not relevant to daily life and so many do not memorise their number and thus cannot recall them when asked by criminal justice officials.

[54] The literal translation of *asfalsto* is simply *asphalt*. The meaning in this case is to compare the planned and paved streets of officially recognised areas with the informal spaces of favelas, unrecognised officially by the state and with streets gradually created with available materials.

I will explore the social distance between *the judges and the judged* in the following chapter, yet the disparate realities identified by PD1 are important for the discussion here. For one section of society is it inconceivable that the police would kick down their door, or shoot first and ask questions later; but for others it is their reality. Several interviewees discussed how this different relationship with the state extends beyond the favela into the courtroom. They suggested that judges – normalised to accept that the reality of pain and police intrusion of domicile and rights – do not find it incongruous with the passage of justice to choose a further impingement on rights by detaining people from favelas in inhuman conditions because they already conceptualise favela residents as dehumanised.

Indicative of the in-grained nature of these constructed boundaries, was the fact that interviewees across all stakeholder groups – whether presenting with liberal or conservative views – referred to some notion of naturalised division. Some overtly highlighted the disparities to be critical of the realities, while others talked of differences as logical or without interrogating their validity or significance.

Several interviewees spoke about space as it related to assumptions of criminality. They discussed how the favela has become synonymous with crime and therefore just being in such a space, even if it is your place of residence, is enough to presume involvement in crime. The words of J1 provide some insight into this view:

> J1: And even today [referring to the custody hearings that I had witnessed], there were some cases where the seizure of the drugs was in a context of extreme violence. A place where there has been exchange of fire between them and police officers. So, in crime there has been indirect violence. As much as the person was not apprehended with a gun, he is part of a group that is armed, and he was caught. So, the trafficker is responsible for a large

> part of the (provisional) pre-trial detention, and it is understandable, even more in our city that the trafficking is quite violent. It's not a casual trafficker that doesn't present a great risk. Unfortunately, trafficking here in Rio de Janeiro, traffickers are associated with factions that use weapons that the state doesn't have access to, and many arrests are made in that context.
>
> So, the issue of trafficking is a complicated issue, and the issue of robbery is also here in Rio de Janeiro, because that's how we were talking, theft here is with a knife, with a gun. No-one will come stealing, pushing you, punching you. The instruments that are used are of very great offensive potential. And this situation is complicated too. The vast majority is theft and trafficking. So sometimes the fact of it being the defendant's first offence and having a good background alone does not rule out the need for detention, especially in those contexts we have seen. A person who exchanges shots with police officers in the middle of a community where there is a stream of people all day is a dangerous person. So, this type of crime must be analysed case by case, the circumstances to make a well-informed decision.
>
> Interviewer: Are most of the people you receive from communities[55] or favelas?
>
> J1: Oh, yes. No, here there is a lot of trafficking - Here in Rio most of the seizures are in communities. You do not have - It's hard for us to pick up an occasional dealer who is at the door of a high school, who is at a bus station. Most of the traffickers end up here in custody due to police operations in poorer communities because there is more surveillance in those places. No one comes to Leblon stopping a lot of cars to see if they have drugs. But in communities it really is monetised in a bigger way. Consequently, there is a greater number of arrests in the most deprived areas.

J1's responses were interesting, as he was aware of the criticisms e.g., linked to how traffickers are treated differently or differences in policing approaches: "No one comes to Leblon"[56], yet still maintained that even if it was a first offence, there was no weapon involved

[55] In this context, 'communities' and 'favelas' refer to the same places. In recent years, the term *communities* replaced *favelas* in public and academic spaces as *favela* was seen to have a derogatory sentiment and that *communities* were more respectful. However, most of the residents of favelas and NGO activists that I have spoken to felt that this switch was a way of veiling realities and that *favela* represented what they knew to be true more accurately. I offered both words here to allow the interviewee to feel at ease with whichever he was comfortable with.

[56] Leblon is one of the most expensive and exclusive neighbourhoods in the city of Rio de Janeiro and is often used as the place emblematic of where *the rich* live and spend their time.

and the person had a good record, this does not rule-out detention if they were arrested where violence is known to have been. Here we gain a glimpse of the judge's beliefs about who is dangerous or likely to commit crime. There is a conflation between a space associated with violence and somebody arrested with drugs but no weapon. J1 described this as "indirect violence" and presumes the person to be part of a gang with no evidence beyond the place where the person was arrested. He speaks of robbery with guns and knives, not merely pushing and punching and this heightened level of violence associated with Rio de Janeiro creates a glaze of danger that covers all those linked to the space associated with those crimes.

J1 contrasted the situation in the above quote with that of "a casual trafficker that doesn't present a great risk". When I asked him to expand on what he meant by this, he provided another example from the set of hearings that I had witnessed that day. One of the hearings was for a truck driver found with drugs and J1 explained that he "does not have the context of criminal association". In this case, J1 granted conditional release until trial, even though the prosecutor asked for conversion to pretrial detention. This "criminal association" is what J1 held in mind and led him to decide on pre-trial detention in the initial case discussed where he deemed there to have been "indirect violence". J1 expanded by saying, "so, we do not look at the crime, we look at the circumstances of arrest and the facts. That's important. The crime itself makes no difference."

Such a statement reaffirms the assertion that subjective interpretations of circumstances – in this case, as they relate to space – are significant in influencing judicial decisions relating to pre-trial detention. It appears that merely being present in a favela, existing in one's own space – even without a weapon – may be enough to be associated with a gang/faction and thus lead to a greater likelihood of pre-trial detention.

S4 connected this line of thinking to government policy decisions and the ensuing consequences of the targeting of certain communities with a *war on drugs* policy imported from the global North.

> In the 90s there was an avalanche of punitiveness coming from the social question transformed into a criminal question. And that's what the war on drugs does because the poor kids work there to get the money. It's a strong economy, a very strong economy and you criminalise not only the people but also spatially. So, it brings the association that poverty is criminal and with that we had terrible situations of police acting violently. – S4

Here S4 illustrates how the presence of the drugs trade in the favelas leads to the criminalisation of the entire space, enabling the *guilty by association* logic demonstrated by J1. S4 also notes the criminalisation of poverty, something that I will discuss in more detail below, but at the same time also introduces the notion that there are both physical and metaphorical boundaries.

6.3 Bounded citizenship

Many interviewees presented the accepted sentiment that it was not merely that particular people occupied particular spaces, but that these were the places where they *belong* and that these people were deserving of treatment with which the space was coupled. Several interviewees suggested that there are large portions of the population, including many judges, who believe that there are certain people who are deserving of prison or of pain, or of death. J7 used the phrase the "miserable classes" to contrast with the privileged class who have their rights respected. J7 explained how other judges often express their views that certain people are deserving of prison and pain and when challenging colleagues on such positions, noted:

> They don't want to know where these people are being sent. "Ah, they deserved it. They did it in that place, so they deserved it. If they're there, it's because they committed crimes." The trials have been like that. – J7

S7 also linked a deserving/undeserving dichotomy to the popular discourse where there is a conflation of punishment for those who commit crime with a judgement on what value people are perceived to offer society. S7 explained that those adhering to this discourse say things such as "they don't produce, they don't add to the economy, they don't add value to anything, they just take, they take handouts, and they rob... So, no need for them to live".

The concern for public security was emphasised by almost all those interviewed with many citing it as an overt preoccupation for judges (to be discussed more in Chapter 7), but also as a constant preoccupation that permeates all of society. It is relevant to this discussion as with several interviewees I posed the question of *whose security counts* as part of the citizenry that is deserving of being protecting? As with the assumption of criminality attached to space, several interviewees mentioned that if a person can be labelled as a "bandido" or "traficante"[57], then this marker can be used to justify pre-trial detention beyond the scope of recommendations during custody hearings (and even extra-judicial killings).

> This obsession of public security. The fear… what the drug dealer became in peoples' fantasy! Someone not human, not born from mother and father, who could do anything to them. So, you can kill 5, 10, 20, 55 on the street or in a prison… Yesterday the police killed a man here in Copacabana. Nobody protested. If you say it's a trafficker, a drug dealer, you can do anything. It's naturalised… You used to have civil police and now the mentality is like they are going to war. – S4

> There, this figure of the drug dealer appears. This figure of the trafficker appears, closely related to armed power, so, even though trafficking is a crime without violence, in Brazil, for example, it is a heinous crime. I think since- I don't know exactly when, but I think '95, the heinous crime law. And then, it turns out that you create in the social imaginary the idea that the drug dealer is the guy who is armed in the favela. – S3

Both S3 and S4 consider the development of a specific character within the societal imagination. The label of drug dealer/trafficker goes far beyond a simple financial transaction for illegal substances, to a vision of someone much more dangerous. The level of perceived danger to those citizens deemed worthy of protection is levied as justification of the murder another group of citizens unworthy of an equal level of citizenship.

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[57] *Traficante* refers to someone accused of the crime '*traficar' (to traffic)* and can refer to drug dealers or drug traffickers. In Brazil, even those arrested with a very small amount of illegal substances can be prosecuted as a trafficker. This has meant that the legislation designed to punish those involved in large-scale organised trafficking of drugs has been used to prosecute those delivering or dealing a small amount of drugs. The common usage of *traficante* is a conflation of the diverse actors within the illicit drug market that leads any involvement in drugs to be associated with gun violence.

J7 explained his observation of how many of his fellow judges have naturalised such differences and taken these assumptions into the court room.

> For example, in situations where a boy from the periphery who abuses his girlfriend, he is justifiably called a rapist. A middle-class boy who abuses his girlfriend, he is *a boy in training, developing, discovering sexuality*. The speech changes. When it's the rights of those unworthy people, in his point of view, it is all about killing. Why arrest? Kill them quickly. Why pay for the prison system? Kill at once. Why judge? Condemn right away. – J7

J7's representation of the popular assumptions about the worth of people demonstrates a connection between the space where someone comes from, the place where they belong and thus, what they are deserving of. The sentiment is presented as being so strong that not only should guilt be assumed, but that extrajudicial killing would be the most efficient action for society, saving money that would facilitate their hearings and imprisonment.

Many of the interviewees used the phrase *bandido bom é bandido morto* (the only good bandido is a dead bandido) to illustrate the strength of desire to eliminate a group that are perceived to be unredeemable. PD4 expanded on the context of the phase:

> This speech that is currently in force in Brazil, "Bandido bom, bandido morto." It has always existed. Always existed. It existed in the '80s and' 90s, used by deputies here in the state of Rio de Janeiro. This phrase was even used by a deputy named Sivuca, who was a former police officer. He was part of a group called 'Scuderie Le Cocq', which was a death squad that dates back to the '60s, which was used by the dictatorship. Death squads were groups that practiced assassinations, massacres. Coming from the Baixada Fluminense, which will lead to what we now call militia. – PD4

PD4 explained how it would be wrong to think that it is merely a throw-away comment used by members of the public, as it has been used by state officials. Neither is it solely connected to the recent right-wing populism as it has a history reaching back over a long period of time. As so many stakeholders used the *bandido* or the *traficante* as vehicles for explaining the societal level differences in treatment, I asked the interviewees *who are the bandidos*?

Some interviewees drew definitions that were specifically linked to crime, including both extremes of petty theft and corrupt politicians using public funds for their own gain. Others offered more conceptual definitions linked to who is deemed to be obstructing what the powerful believe should be theirs.

> This is the white elite that thinks they occupy these places by right, they think they have the right to power in Brazil. So, it's not a question of merit. They were born almost with a hereditary right to power. And the bandido is the one who stands in the way, whether stealing a cell phone, using a firearm, or occupying the university that his son would like to occupy – making a mess. – PD6

Discussions with PD1 illustrated the connection between stereotypes of physical appearance to what police deem to be reason enough to suspect a person of being a bandido. He used a phrase that translates to *the police car's brake*[58], suggesting that the mere appearance of the person is enough to cause the officers to react. In the following extract of our conversation, PD1 also clearly highlights the structural racism within the police, through into the courtroom and notes that this is because it remains an issue at a societal level.

> Interviewer: Yeah. And how do you think the judges decide who is a bandido?
>
> PD1: Dude, there's one thing that's interesting, which is this. Look, if you're going to do a study, for example, on the arrest records, you'll see that the cops are always like this. "Ah, the boy was suspicious." In the common slang it is said that this is the brake of the camburão. Camburão is this police car. But it's an attitude that nobody knows how to define, which is the supposed police discretion, but it's always a black man, it's always the guy you see there that is badly dressed.
>
> Let's say, with this rationale alone, there is structural racism. If a guy comes in, for example, there in the courtroom, smelling bad, black, you see he receives a certain kind of treatment. If it's a guy, let's say, ah, he's a white man, he's tidier, the treatment is completely different. So, there it is. We have not overcome slavery; we have not got over it until now.
>
> Interviewer: And you noticed that within the hearings? The differences in treatment?

[58] "O freio de camburão"

> PD1: Look, May 13th is the day the abolition of slavery is celebrated in Brazil. I was in a hearing here on May 13th. It was about 74% or 75% of the people presented here who declared themselves black or brown. So even that question of difference - no matter how much the guy says, "No, I have a black friend." But it's rooted in him. It's from our very story. It's a stretch that we have not solved yet, Brazil has not solved it until today.
>
> So, I think that's how it works; the question of how to see the bad guy. [They think] "Is that crime a robbery, or a barbaric crime? Let me see what colour he is, how's he doing, does he smell? Ah look, the prisoner smells".
>
> You were there, you were feeling it. The chains stink. For example, today you were in the courtroom, you have seen three consecutive cases of tuberculosis. So, this construction of the image of the bandido takes this question, the question of race, of schooling. You can see that some [defendants] say, "Ah, I have a son, but he is not registered". They question of the place where he lives, but it's difficult to explain his address – it's not because he doesn't know, he doesn't have it – in the formal city, that address does not exist. It may be, I don't know, the alley of the favela without an official name.

Here we see that PD1 notes racialisation as key factor in what he believes to be how many judges decide who is a bandido, and thus, unconsciously, what rules to apply. He also points to the clothing worn, the health and hygiene of the person and their level of schooling as contributing factors. What is deemed to be *well-dressed* is clearly subjective and likely highly dependent on class sensibilities. If a detainee cannot explain where they live because the state does not formally acknowledge their address, then the fact that they have been underserved by the state counts against them again in terms of access to justice, generating a form of double state failure to the detriment of that individual.

S1 also highlighted assumptions about poverty as a key link in understanding who is deemed to be a bandido noting that the middle and upper classes "look at very poor people with a lot of distrust. So, in order to survive, they must have committed this crime". According to combined accounts of several of the interviewees, the notion of the bandido is partly constructed using information about the individual's place of residence, schooling, job, clothing, smell, and race. However, where immediate impressions are made, such as with a police officer deciding to stop a person, or a court actor observing a person entering court, some of the interviewees noted that it was clear that some factors were more important. In

the extract above with PD1, it was clear that race and physical presentation were key factors in the treatment from police and in court. J6 also shared some personal accounts that emphasised race over other aspects.

> J6: People say, "ah its social, its poverty not race". The other day I was with my car - and I have a very good car - and I was with my brother and my sister-in-law. We were coming back from the beach. We were in Jardim Botânico, a middle-class neighbourhood. I was with my car and then the police pulled me over with guns in my face. You know? So, this is not social, because if it was social, my car would protect me, because my car is a sign of wealthiness... This is not a question of money. It's a question of colour of the skin.
>
> Interviewer: Do you think that this links in any way to the decision making of the judges today?
>
> J6: I guess yes. Less or more. What I'm saying, I'm not demonizing my colleagues, nothing like that. What I'm saying, that we have to be aware that we are immersed in this vision – in this way that society was designed – and it must be a daily effort to see. You have to do the effort to see it and to break this. Because if we go just with the crowd, we will repeat the prejudice, the cycle of prejudice. I'm not taking myself out of this. All of us are immersed this vision, but it must be our effort to see beyond… So, for the people who say to you, "It's social prejudice, not race…"
>
> Interviewer: What do they mean by social prejudice?
>
> J6: People don't even recognize that racism exists because to be cured, you have to realize that you are ill.

Two important points are covered here. J6 notes that assumptions about criminality and thus the apparent legitimisation of certain treatment from police cannot purely be based on poverty or some form of social prejudice, otherwise her expensive car would have protected her from such treatment. J6 believes that in this case, the officers felt that the threatening act of questioning her at gunpoint was deemed an acceptable thing to do to black people. J6 did believe that such assumptions are related to actions in court, not due to any overt racist intentions from her colleagues, but because there is a societal level Brazilians are "immersed" in a way of experiencing the world which accepts such difference in treatment as natural.

Occasionally, however, such views are made overt. In 2020, a judge was forced to apologise after it was made public that in sentencing a black man to more than 14 years in prison for theft, she used the phrase "[he was] certainly a member of the criminal group, due to his race", as part of her justification (UOL, 2020)[59]. This instance of overt association of race and criminality is illustrative of the subterranean beliefs held by judges described by several interviewees. Other interviewees shared similar views in terms of the societal-level schema about racialised groups. The below account with PD6 speaks to these systemic issues and the intersectionality of race and class:

> PD6: So, I think this is also a problem for the Public Defender, that in Brazil race determines class. So, it is a deeper problem than material inequality. Studies in the social sciences throughout the twentieth century in Brazil, have several scholars who showed that regardless of economic development, the increase in the country's income level, in certain periods when Brazil developed, it managed to universalize some services; race remains an obstacle for black people to integrate into society.
>
> So, I think that this idea of the good citizen and the criminal is related to the way racism builds people's minds and imaginations. This is not said, that the bandido is black and that the good citizen is white, but it is implied.
>
> Interviewer: I see, no one explicitly says that.
>
> PD6: Nobody says it, yeah.
>
> Interviewer: As you know, I've been observing the hearings; do you notice any difference in behaviour towards white detainees and black detainees?
>
> PD6: Yes. I don't know if you followed the case of Evaldo[60], a musician who was murdered?
>
> Interviewer: Just yesterday someone explained to me-

[59] Judges can increase sentence lengths if it can be proven that the defendant is part of a criminal organisation

[60] On the afternoon of 8th April 2019, Evaldo dos Santos Rosa, was killed while driving his family to a baby shower in Guadalupe, a low-income area of Rio de Janeiro. Evaldo, a security guard and musician died, and two others were wounded when ten soldiers shot 80 bullets into the car carrying the family. Witnesses reported that the army patrol mistook the car for a similar car stolen nearby. Initial claims from the military command had stated that the patrol had been attacked by criminals, but it later changed its position (Phillips, Dom, 2019).

> PD6: Yes. He was a musician who was with his family riding in a car close to home.
>
> Interviewer: Ah, with 70 shots in the—
>
> PD6: Yes. And he was machine-gunned, machine-gunned. He died. He had a baby in the car, who survived and everything, but I keep thinking, people don't identify him as a good citizen. He has the whole profile, is a musician, has a job, has a salary, had a house, had a traditional family, son, wife, but he doesn't fit the good citizen. So, in truth, a bandido is this contingent of the population that hinders the enrichment of this group, this colonial elite that continues to operate in Brazil, to perpetuate its power.
>
> For the Judiciary, Evaldo was not a good citizen. He put himself in the Army's path, he took the risk - he put himself at risk. As if he were guilty of his own death for being there in that neighbourhood, in that dangerous region, at that moment he was not considered a good citizen.

PD6 contrasts the notions about the criminal bandido with the good citizen, the *cidadão de bem*. Many interviewees juxtaposed these two figures to illustrate the imagined divisions between those deserving of rights and protection and those who are imprisonable and killable. J6 explained that her expensive car was not enough for her to be deemed a *cidadão de bem*, for the same reasons that PD6 explains that Evaldo was deemed killable without even questioning him. In both cases, other than the racial signifier to the contrary, the people involved fit the profile of a *good* citizens with a traditional families and paid employment, yet that signifier was enough for differential treatment.

In response to the question of whether they felt that there was any kind of difference in treatment in custody hearings, PD2 explained the noticeable difference on the occasions when detainees are interpreted as *cidadãos de bem*:

> PD2: There is [differential treatment]. No doubt. This week we had a boy here, a white boy here, very young. He was arrested for drug trafficking, and at the end of the hearing he said he was the son of a judge, in another state of the Federation, in Amazonas. And two days later, now, I found it curious, I found it emblematic that one of the professionals who was in the hearing that determined his detention - evidently, I made the request for freedom. He showed this concern, "Gee, I am worried about his mother, she must have lost her mind because she does not know about her son, she has no news."

> But at the same time, the person said, "Now it's weird, right? I'm worried, because I'm putting myself in the shoes of this mother or father, but as a rule, I don't do this exercise." You see? Then the person said, "This is for me to reflect on, because I, in fact, am establishing consequences in my head differently in relation to the people being introduced."
>
> So, there is a very clear, very clear distinction. Their concern is different, because they see them as different people, they don't see the way I see you and you see me, as an equal human being, someone who, I don't want you to suffer anything, that I just want good, because I know that your good will somehow have a positive impact on my being too. They don't have that perception. In fact, they see themselves as isolated who are on another level, on another dimension.

The example given by PD2 illustrates how certain citizens evoked a response of concern, for the detainee and their family to the extent that court actors admitted to "establishing consequences in my head differently in relation to the people being introduced." PD2 made it clear that it was rare that other court actors showed concern or reflected on the differences. PD2 explained that this is because they are used to considering the detainees as fundamentally "different people" and not as "an equal human being", worthy of being prevented from suffering.

I asked S3 who the good citizens are, and she laughed and said, "not me!". S3 then explained that as a black woman, she had been stopped by the police many times. In S3's view there are two kinds of *good citizens*, although the media portrays her first group as killable.

> For example, when we take the narrative of journalistic programs in Brazil, then you will see. They say that you must kill, that you have to throw a missile, that you have to shoot, that you have to kill, that you have to arrest, no, no, no. But we know that 90% of the people who live there are good citizens, which is the idea of the worker. The idea of you working, submitting to terrible working conditions, terrible mobility conditions, lack of rights basic sanitation. Or, a white, middle-class citizen, a worker, who worked hard to have his wealth and who needs to protect his assets. I think these are two versions of good citizens. – S3

According to S3, it is the second group that occupy the place of the good citizen in the imagination of those with power: a middle-class worker who has assets and wealth to protect

and is deemed to have worked hard to have gain them. However, S3 maintains that 90% of the people living in favelas are also hard-working citizens, striving in terrible conditions, yet this group are not highlighted as good citizens by the media or wider society.

When reflecting on how and why the public and the media are accepting of such violence towards certain groups, S4 concluded that protections from such violence are privileges and not rights. I will analyse the interviewees' thoughts on basic guarantees and human rights in Chapter 8, but it is important to highlight that several interviewees underscored how understanding of in-court decision making necessitated understanding of multiple forms of citizenship; and that such a bounded nature of citizenship could only be understood with reference to legacies of previously normalised hierarchies of power.

> People here think guarantees here are a privilege. That comes also from our colonial heritage. Accusatorial, slaughter of native people, the slavery, these are things that don't disappear. – S4

6.4 Centring whiteness: Space, place, and race

> There are many white only spaces, and these are different to black only spaces. This should shock people. But they think that it is normal. "*It is our space*". It is a challenge to de-normalise these kind of things. – J6

J6 related her experience of other judges and court actors by discussing the norms and expectations in court and in society broadly. She explained how the sense of ownership over space and who should and should not occupy that space remained robust and highly racialised. J6 maintained that institutions such as the judiciary and the university remain places where the expectation of whiteness is so naturalised, that when someone racialised as something other than white occupies a position, it is not only noticeable but is often interpreted as incongruous.

> J6: In Brazil, people have a clear idea about the place of everybody. If you're a body somewhere you shouldn't be, people don't know how to deal with you. They observe you, try to buy you or tokenise you... Or erase you.

If you are someone that don't, how can I say? *Let this happen*, people go crazy because people don't know how to deal with you. Sometimes of course they will try to erase you but sometimes they can't. I'm a judge. They can't erase me, so they will have to deal with me. They try every day to put me on a shelf or try to buy me - You know what I mean?

Not to buy me in an illegal way. What I mean is trying to say, "*You are so kind. You are my friend. You are one of us.*"

Interviewer: An exception.

J6: An exception. It's very difficult to deal with this and very tiring. Nobody has called me to be a judge, I applied for this. I also have to deal with this. For instance, I start to teach at university this semester. The first day, I arrived there 6:30 in the morning. Then I met with another professor. [To him] there was a strange body in the place that it shouldn't be. I was a strange body. I was a virus woman. Then he couldn't help himself.

Professor: "Are you teaching here?!"

J6: "Yes, I am."

Professor: "Have you done criminal law?" … "How did you get here?!"

J6: I said, "I just finished my PhD."

Professor: "It's so good to study."

J6: "Yes, it's good to study. It's helpful."

Then he couldn't help himself. "*Where did you come from?!*" He said this line. In Portuguese it's much stronger.

Interviewer: As in: De onde você é?

J6: He said: De onde você saiu?

Interviewer: Ah. What does it mean?

J6: How can I say it good?... How did you *sprout* here?! How did you [just] *appear* here?! [61]

An idea that you just appeared with no – it makes no sense, is what he was saying. Makes no sense *here*. *How* did you get here? This is the idea of the phrase.

[61] J6 switched to Portuguese to express herself more clearly. The exact phrases J6 used were: "Como se *brotou* aqui?! Como você *surgiu* aqui?!"

Interviewer: Thank you.

J6: This person works in the system. That's the way he sees the world. When he sees like a black woman in the university to teach it's "Where are you coming from?! You're not supposed to be here."

Interviewer: How could you *possibly*--

J6: How could you *possibly* be here?! With *me*?! In the professor's room with me taking coffee! That's where the phrase. I know I always prefer people like him because I'm sure everybody is thinking the same thing, but he couldn't help himself. [Laughs] So I thank him. [Laughs]... I don't think when he's getting to his office in the afternoon to be a public defender, the way he sees the world will change.

This was one of many examples J6 provided to illustrate the racialised expectations related to positions of power and assumptions about where certain people belong. While J6 recounts this encounter outside of a courtroom, she was clear that she believed that such core beliefs were carried by court actors into the formal and supposedly objective justice system.

It was interesting to note that all prosecutors interviewed showed awareness of historical racialised power structures, but almost exclusively denied their relevance to contemporary proceedings; or where there was an acknowledgement of some possible resonance, they maintained that it was not a factor in their own thinking or actions. Both Pr1 and Pr2 referred to racial inequalities as 'historical' or 'social' issues and distanced the possibility of a difference in treatment. Pr1 mentions the collection of statistics and conceptualises it as a map of those arrested, rather than revealing any systemic patterns. Both linked higher rates of poverty and lower rates of education with an increase in likelihood of committing crime, but did not offer any explanation beyond what was presented as logical and expected. There was no interrogation of policing practices or wider justice issues that may disadvantage certain groups to the extent that they appear in custody hearings more often.

Pr1: Maybe the defender has a different view, but I speak very calmly. Maybe if you asked the same question, the answer will be different with the defender. It has no influence on the proceeding – the criteria that they ask about people: colour of person, social status, financial condition. Our presentation is based on the concrete case of what appears, read and written on the paper and not based on-- Because these are questions that

> are asked by the defence, mainly, the colour, the level of education, this gives you a map of the number of people being arrested. People with less education tend to be more imprisoned than people with higher education.
>
> Pr2: It is a much more historical than a prejudiced question.
>
> Pr1: It is an analysis that brings statistical data, but for the expression of a prosecutor-- And here I believe that all judges also have this profile, it has no relevance, it is a statistical and historic issue that must be changed at the base level, for us to arrive at a point of change in practice, whether people are arrested or not. But it makes no difference whether you will remain detained during the process or not.
>
> Pr2: As you said, a social issue, a historical issue. Any country, which had a recent slavery regime, you think of abolition, there has been very little time. If you compare with other countries, there is obviously a slow evolution, it is slow and gradual. And when we live in a country that invests little in education, you have a reaction, obviously, in the result, including crime. So, it's not like the Doctor said[62], there is no discrimination in the statements of the prosecutors, we can say that. The judges are another thing but the prosecutors that we work with or talk to directly. So only based on the specific case.

Both are very clear that any difference is not a question of prejudice, while at the same time arguing that a country only relatively recently free of enslavement is bound to carry some residual discrimination. Pr2 rules out such impact on the prosecutors, but insinuates that this may not be true for judges. S3 spoke to the issue of the cognitive dissonance shown by Pr1 and Pr2:

> We have this discussion: "I understand that everyone is racist, but *I am not racist*". So, we have a process of erasing the functioning of racism as something systemic. And I think it goes on like this, but now with a much more violent discursive question, which is an explicit racism, not only from the president, but here in Rio we are with the governor. - S3

[62] I came to learn that in a recent meeting, one of the lead Public Defenders had discussed the overrepresentation of racialised groups being held in pretrial detention. It appeared that both prosecutors had interpreted this as an insinuation of a racial bias in their work. 'Doctor' in this instance is a term of respect, rather than a title.

S3 identifies how many people, including those with influence in the custody hearing setting, recognise there is a certain level of disadvantage for racialised groups, but overlook the systemic nature as well as the possibility that they themselves may have been conditioned into particular beliefs. S3 further lamented that this issue has been compounded in recent years by the explicit racism of President Bolsonaro and Governor Witzel.

Pr3 also spoke of systemic racist practices as something that happened in the past, although she noted that this was as little as twenty years ago. It was interesting to note that Pr3 called on the past twice during our interview. The first time was a reflection that it was safer to be out in public in the past, but the second time was to note that racism was more obvious before. So, the question here is *for whom* was the past safer for, if racism was more overt? These pair of reflections are illustrative of how conceptions of public security centre whiteness and the experiences of racialised groups are treated as peripheral side-issues.

The below discussion with Pr3 relates to my question about whether people are treated equally within the custody hearing process.

> Pr3: Long ago it was said that justice was for 'the three Ps', those who are *black, poor and whores*[63]. Nowadays we don't talk of this anymore. When I started my career, 20 or so years ago, it was said that Criminal Court belonged to the three Ps, today it is not that, but the fact is that the Public Defender's Office, which is the free justice service, acts in 80, 90% of the crime cases, because they are people who are unable to pay a lawyer.
>
> Interviewer: Ah, I see.
>
> Pr3: Because they are poor, because they have no schooling, many reasons. But I think, yes, the black population is disadvantaged. Women not so much, because they suffer violence, but at home, so don't go – in fact, it is men, young men are the defendants, in terms of statistics, they are young, and they are men.
>
> Interviewer: And do you think there is a reason that this specific group are arrested or detained more?

[63] The derogatory phrase was '*pobre, preta e puta*'

> Pr3: Black, poor and whores, who would be women without honesty. But it is historic, because they are in the favela because they were slaves and had no place to-- The real estate was expensive, they went to the hills, and the hills made their cultures. The Sambistas are from the hills, and they started to make a place that they could live, because they had no resources. So, we have the quota law. Do you know the quota law? At the university, it is exactly to rescue all this black population that has been excluded from the growth of Brazil. So why black people? It's because black people don't have – I'm talking but I don't understand black [experience] very much, no, it's not my specialty the racial issue, but it's because black people didn't have opportunities. So, blacks are without school, without education, without housing, without a lot of things. I think that's it, that's why – If you see who the poor are today, most are black and mixed-race people.

Although Pr3 says that there is no longer an overt focus on those previously disparagingly termed the *three Ps*, it appears that the sentiment remains relevant in the shared imaginary of citizens, meaning it passes into preconceptions and judgements. However, when asked about why these groups are still detained more than others, there was the same emphasis on historical and situational factors, rather any consideration of discrimination. Again, we see the naturalised logic that those who are poor and black are more likely to commit crime, rather than any link to difference in policing practices or treatment within the courtroom.

The prosecutor admits that she is not an expert on the 'racial issue', in reference to the reality of the lives of black people. This too is indicative of the centring of whiteness as an unspoken assumption in many discussions. Many white interviewees discussed race only when speaking about black, Indigenous and people with multiple heritage, but overlooked the white categorisation. There is an inherent ontological positioning in many cases where justice is considered for a core group – i.e., white people, and justice for others is part of a racial issue.

The three Ps phrase was also raised by S3, who noted that she grew up hearing such phrases, used as indicators of who deserve to go to prison or who prison is for. S3 explained that this shows that people understood the use of the law was a targeted practice and yet they still overlooked that the targeting was and remains highly racialised.

> So, we end up entering a process that is to erase racism as something structural. And, at the same time, with this issue of classes, even though

> everyone knows why, sometimes, you have heard-- I don't know if anyone has already said, or if I said it myself, that I grew up hearing that it was-whoever goes to jail are three P's: black, poor and whore. So, people always know that it exists, but they ignore that it is racism, there is still a difficulty to say that it is racism.
>
> Why are class issues to me racism? Because the working class in Brazil, or the poor class, or whatever people read, it is black. We are the majority of the population. We are black women, we are workers. The black population is larger in Brazil, even so, we are still treated as a minority. – S3

S3 continued by explaining that the focus on poverty without the analysis of how it intersects with race means that part of the reality is ignored. S3 also noted the intersection with gender:

> In the case of women, this is even worse, because they will be punished in theory for committing a crime and they will also be punished, because if they are mothers, they are terrible mothers, they need to be punished, because she left her children while she was committing the crime. – S3

Here, S3 alerts us to the additional moralising characteristic imbued in the condemnation of women who appear in court. Patriarchal assumptions that essentialise women as mothers and demand compliance, purity, and passivity lead to an additional layer of denunciation and labelling as 'doubly deviant' (Cain, 1990). While earlier, Pr3 noted that women do appear less in court, S3 emphasises – in line with the continuing relevance of the three Ps phrase – that there remains a stigma attached to underserved, black women, and that this intersectional issue negatively affects outcomes in hearings.

S3 described how the phrase "criminal tendency" was heard a lot when monitoring custody hearings. She explained how it was often used in connection with racialised detainees who lived in favelas, to suggest that there is a natural or inevitable element to their alleged offending. S3 expanded, "it is almost a premonition that this person will offend again. '*So, I need to remove him from society, so he doesn't offend again*'." In Chapter 3 I investigated how the eugenics movement had a strong impact in Brazil and S3's comments suggested a clear legacy to those debunked claims:

"We have figures in the Brazilian university who are still treated as reference, who have the courage to say that race is a biological concept, even after everything we have lived up to now." – S3

6.5 Normalisation of black pain and death

Centring whiteness is just one side of a coin which on the other, marginalises blackness and normalises pain, danger, and death for black populations. PD6 spoke about the concerted effort from the Brazilian government to whiten the population and how white European immigration was encouraged while noting vagrancy laws and the criminalisation of capoeira as examples of overt state oppression specifically directed at black populations. PD6 spoke to the legacies of such state policies and stated that "Colourism in Brazil is very strong. The darker your skin is, the more racism you will suffer".

In our discussion about custody hearings, PD6 also reflected on the safeguards within the process that are aimed to prevent torture and provide detainees with an early opportunity to disclose harm. This short passage outlines how such protections manifest in ways which both centre whiteness and also normalise black pain.

> PD6: While you were talking about the custody hearing, I was thinking here with the core human rights… one thing I was thinking about is the role of torture in Brazil, of coping with torture. Generally, people who are involved in combating torture think of torture from the military dictatorship. And that historic moment is a moment when torture hit white people. Torture is specific and violence experienced by black people doesn't count. So, there is no concern in the fundamentals of policies to combat torture with a enslavers' culture of corporal punishment. So, the problem, in fact, is much earlier for us, it is a problem of colonialism, of slavery in which the power to impose a penalty was exercised by the white master on the body of the black person.
>
> And I think this is also a difficulty - this difficulty of mentalities colonised in law, including in the progressive fields, in the Defender's Office. Even when thinking about policies to confront torture, this thinking is committed to a white epistemology, because it thinks from the perspective of military dictatorship, and this is very incomplete. Because the problem of the military dictatorship was very serious, but there is an earlier moment that continues to perpetuate in democracy, which is torture against black people at the time of detention, which is not barracks torture, of political persecution, it has another bias, a bias to punish the black body. So, this type of commitment, the Brazilian Judiciary has not yet managed to make.

Here PD6 is clear in exposing the white supremacy inherent in the acceptance of corporal punishment of black people to the extent that it influences the point of departure even for progressive fields such as the public defenders' office; it is all "committed to a white epistemology".

Shortly after my period of fieldwork was over, video evidence emerged of a black teenage boy in São Paulo, tied-up, gagged and stripped in public being whipped with an electric cord by two white security guards (D Phillips, 2019). News reports talked of public outrage, while also conceding that scenes of young black men 'being tied up, tortured and even murdered are common in Brazil' (ibid). The fact that such torture – whipping being the quintessential form during colonialism – could be considered common in contemporary Brazil illuminates the clear resilience of racially hierarchicalised colonial notions of what is acceptable to do to black people. Returning to his thoughts about custody hearings, PD6 concluded that such "dehumanisation is only possible if you don't recognise yourself in that person, judges don't, they're too distant"[64].

J6 also wanted to underline the relevance of the legacies of colonial violence for understanding contemporary treatment of racialised people.

> J6: Yes, and to understand this kind of things, we have to understand the very way we as society were organized from the beginning. I don't know if you had the chance, but here we are in archaeological place, this area. Just the Valongo Wharf it was declared by UNESCO humanity-
>
> Interviewer: A world heritage site?
>
> J6: Heritage, yes. Not for his material interest but the place of memory they call. Like Auschwitz place to remember to never repeat, because this was the largest number of slaves who arrived in Brazil, arrived in this port, in this door. Just nearby, we have a cemetery of the slaves who didn't

[64] I will discuss the distance between the judges and the judged in the next chapter

> [make-it] and the cemetery was lost. A few years ago, a woman bought a house and was doing the reformation and she founded the rest with her money, because the state didn't get interested. She did a museum that she maintained with her money. She bought another house to live, and she transformed this house in a cemetery.
>
> Now, today we call these *cemeteries* in respect of people who rest in peace there, but in fact, there was, in Brazil we call it 'lixão'. It was a place where people just dispose all the garbage. The corpse of the slaves--
>
> Interviewer: What a metaphor!
>
> J6: Yes. The corpse of the slaves were put in the same place where they dispose the daily garbage, because in their ecological [dig] they found the chicken bones, broken glasses, where people disposed the garbage. So, as a society we're designed in this very beginning this way that he used to see these black people as garbage that could be put in the garbage. We had in 1888 the abolition. Do you really think in, from then until now they instantaneously deserted this way to see these people? Of course not.
>
> That's why people think that is acceptable to see children dying in the favelas, it's a collateral effect. People think it's acceptable to the prisoners to live in the conditions they live because it's acceptable. We as society we accept because we are designed to understand that there are people of different levels. That's it. There's no other way to put. I don't think we can move forward if we don't face this reality.

J6 expressed her view that society is conditioned to believe there are people of different levels of worth and that is why it is acceptable to see people dying in favelas and why judges are willing to detain people, knowing the inhumane prison conditions. J7 also likened the carceral system to "concentration camps" and "modern slave quarters" and variously evoked the hierarchical systems and institutions of slavery or the systematic approach to lethal removal of the "undesirable" by the Nazis when discussing the justice system.

Several of the public defender group commented that judges were so accustomed to the sight of black pain, that it did not bother them. PD6 encapsulated this sentiment most clearly.

> PD6: Yes. I think that in Brazil's justice system, this division of power is very naturalized. So, the judges are not bothered to see an injured, tortured, bruised black prisoner in front of them. It does not cause discomfort. Nor does it bother to keep that person deprived of liberty and to legitimize this suffered violence, because it is the natural division of power in Brazil, this is

> it. So not only in the Judiciary, but in the whole of society. So, they feel entitled to exercise this violence, I think, for the institutions, for society as a whole. They are not committed to the rights of that person who is there before them. They are committed to ensuring that the potential iPhone theft will be incarcerated. Much more an exercise of jurisdiction aimed at protecting their own class and racial group interests than promoting human rights. I think that the institutions of the Brazilian Judiciary are most responsible today for human rights violations in Brazil, because they do not have the dirty job of pulling a trigger, they are comfortable behind the paper to legitimize who is pulling the trigger. So that's basically it. It is a very violent justice.

It was clear that many of the public defender group were frustrated with the perceived acceptance of the inhumane detention conditions for those held pre-trial. Yet several did emphasise that judges are not made or exist in a vacuum. As PD1 put it:

> Brazil, it has an authoritarian history. The judge is not taken out of nowhere…, his grandfather, the great-grandfather of this guy probably had a slave, and now has a service elevator for the employees and a maid's room. – PD1

Those from the judges' group who were critical of colleagues also conceded that systemic issues cannot be undone quickly or by individuals. J6 said that she did not want to demonise her colleagues and accepted that it takes daily effort to question deeply held beliefs. J6 said that she understands that it is far easier to go with the crowd, but that this creates "a cycle of prejudice", meaning that people do not recognise that racism exists, "because to be cured, you have to realised you are ill".

6.6 Discussion

> The situation has not changed because our culture is a culture of violence against poor and black children. We have a cultural history of slavery. So, although we have decreed the end of slavery, it is still in the subconscious of our population, and we still treat black people as second-rate people. Although we are a miscegenated people with a black majority - Our population is black – our racism is much more embedded and within some subterfuge behaviours, than American racism itself. – J7

As this quote notes, while laws are in place to ensure equality of treatment, the racialised social and civic hierarchy created under colonial hegemony "is still in the subconscious" of the Brazilian population. According to many interviewees, judicial decision-making cannot be examined in isolation and due consideration must be given to the assumptions made within the broader public consciousness. The chapter speaks to Aliverti et al's (2021: 302) 'temporal dimension' of decolonising the criminal question by illustrating how colonial assumptions inform everyday court practice and is thus indicative of the broader coloniality of justice.

Aliverti et al's (2021) spatialised dimension refers to the Euro-American dominance of epistemological space, yet this concept is made relevant in this context via examination of the treatment of physical space and how plays a foundational role in determining a person's relationship with justice agencies. Several interviewees spoke about the different favela/asfalto worlds, where violation of domicile, violence and even extra-judicial killings were normalised in the former and inconceivable in the latter. This division of treatment is extended into the courtroom where the stigma of the favela as a place synonymous with crime can be enough to overlook fundamental rights such as assumptions of innocence. J1's thoughts relating to a "context of criminal association", revealed how merely being present in a favela, existing in one's own space – even without a weapon – can be enough for the presumption of guilt by association and thus, lead to a greater likelihood of pre-trial detention. The divisions are not merely physical but markers constitutive of values. Those of the asfalto space are imbued with a 'Europeanness' in Souza's (2007: 24) sense, whereby they are considered rational, moral and above those of the favela, connoted with stereotypes born of colonial origins, such as assumed dangerousness, criminality and immorality. The epistemic

colonial era differentiations are thus made manifest in relation to physical space and the construction of the boundary around who is deemed to be worthy of protection and who can legitimately be caused pain.

Interviewees reflected on the evident assumptions that underpin the difference in treatment of those deemed to be a "bandido" or "traficante", in comparison to a "pessoa de bem". Testimony revealed what amounts to a criminalisation of poverty, where judges orientalise those from favelas and assume that if a person is poor or does not have a job within the licit market, they must commit crime to survive. Many interviewees presented the accepted sentiment that it was not merely that particular people occupied certain spaces, but that these were the places that those people *belonged* and that that those people were *deserving* of treatment with which the space was coupled.

Interview testimony strongly suggested that the figure of the bandido is heavily racialised within the shared imagination, demonstrating the legacies of the racist colonial and eugenics movements associating black people with crime, and thus the findings are also indicative of Aliverti et al's (2021) subjective dimension. The notion that the mere appearance of a young, black man is enough for police to hit the car breaks and investigate also indicates the additional gendered element to the construction of the bandido. While women appear less in custody hearings, interviewees suggested that those who did were also perceived according to longstanding constructed stereotypes of underserved, black women as immoral, promiscuous and bad mothers, all of which are inferences with orientalist, colonial origins. In either case, the intersectional nature of race and gender coalesce to create enduring and criminalising stereotypes.

Some court actors were overtly aware of the inherent coloniality via the continuation of a stratified access to justice, while others revealed their implicit bias via their discussions. In the chapter's third section, the centrality of whiteness within the justice system was illustrated and exemplified in the reflections of Pr1. While denying that institutional racism was an issue, the prosecutor reflected that in the recent past it was safer to be in public, whilst also stating

that racism at that time was worse. The reflections demonstrate whose experience remains centred in conceptualising justice practice.

While those deemed worthy of protection are spared the violence of the justice system, those marginalised in terms of their access to civic rights are the main recipients of carceral pain. The final section highlights the normalisation of the expectation of black pain, danger, and death, with several interviewees making explicit link to racist colonial practices and their clear echoes for contemporary justice. In making clear the overt relevance to custody hearings, interviewees contended that judges are so accustomed to witnessing the pain of black people, that they have no issue with remanding them to inhumane conditions.

This chapter has contributed by illustrating how colonial era assumptions about the character and value of people according to spatial and racial indicators are important informers of judicial decision making during custody hearings. This chapter has focused on attitudes towards detainees, and the following chapter moves the lens to investigate how judges view their own position and the philosophies they employ to make decisions.

Chapter 7 | Gatekeepers & Philosophies of Justice

7.1 Introduction

This second empirical chapter responds to interviewees' reflections on the position of the judge in custody hearings and each of the three sections examines an aspect of the judge as an actor and how this informs decision making. The first section focuses on what interviewees believe about the purpose of the judge and the philosophies employed by them. Themes examined include the active nature of fighting crime (rather than acting as a neutral arbiter), and the genuine belief in punitive responses to crime. The second section considers how the process of selecting judges limits the range of positionalities that decision makers adopt, and the influences of key gatekeepers for custody hearing decisions. It also considers the social and empathetical distance between the judge and the judged. Thirdly, the chapter examines external influences on judges and how this impacts their in-court decisions. The impact of increased media surveillance of judicial performance is examined alongside the emboldening of far-right groups and attitudes.

Recalling the aim of this thesis to understand what factors inform judicial decision making, this chapter is important for examining how institutional cultures shape the behaviours of court actors. While the first empirical chapter considered the society-wide schemas attached to citizens as detainees, this chapter considers interviewees' reflections on judges and how their differential citizenship influences decision making practice. The chapter concludes by considering the relational status interplay between the racialised and spatialised Other (outlined in the first empirical chapter) and the elevated status of the judge, leading to a conceptualisation of an 'anticitizen' to be eliminated by society-defending judges.

Understanding how judges make decisions requires an insight into what judges believe their role to be and what philosophies they employ to carry out their duties. Some interviewees responded directly to these questions, while others emphasised the importance of critically

examining how the judicial corpus remains a fairly homogenous group and how this has consequences for the philosophies employed by these gatekeepers.

At times during the flexible interviews, I asked judges directly about how they made their decisions and to what extent they felt the wider judicial corpus mirrored such views. The chapter also includes the opinions of other court actors about the philosophies employed by judges according to what they have seen in hearings. When asking interviewees about the judge's role in custody hearings, some answers were very specific to the decision around pre-trial detention, while others, in the natural flow of conversation, touched on this but related their thoughts to wider views about the judge's place within the justice system. Most judges emphasised the importance of "neutrality", "impartiality", and how focus is given to "the facts" as presented. Several interviews started with this more formal approach to the questions, before developing more personalised ideas. Putting aside these *by the book* responses, this first section of the chapter addresses those aspects raised as significant for understanding why preventative detention is overused, in comparison to guidelines emphasising release and normative interpretations of presumption of innocence.

7.2 Role of the Judge

The cape or the robe

Several interviewees, including several judges, explained that they believed that the self-image of the average judge is not that of an impartial arbiter, but of an agent empowered by the state to actively address crime and criminality.

> J6: Many judges think they're a part of the fight against crime.
>
> Interviewer: Do they actively say that or it's just in their actions that you see that?
>
> J6: In their actions, but some of them say these exact words. Many of them do, often.

The notion of the judge actively fighting crime or being a security agent, was a clear theme. Many interviewees spoke about public security as being conceptualised as part of the judge's

role, contrary to the constitution. This was spoken about with reference to the criminal justice system broadly, but interviewees were clear that this was acutely relevant to custody hearings.

> So, it was only in 2015 that they started to organize custody hearings. The resistance is very strong, because the judges, they imbued themselves with a culture of not just being judges, but of being responsible for public security. When a judge gets in his head that he is responsible for public security, he does not judge because he takes on one side, the police side, the persecution side, the prosecutor's side. - J7

The point here is that many resisted the introduction of custody hearings, considering them – and the assumed desire for release – as antithetical to public security. J7 paints an adversarial picture, whereby – rather than sitting separately – judges centring public security are partial and aligned with the prosecution, leading to the detainee's persecution. J7 continues and describes how the justice system upholds societal divisions.

> Because we are living in a moment when what matters is that you guarantee your share, regardless of what it will cause to your fellow man. If someone on the periphery is hungry, cold, it doesn't matter, as long as you have [everything] and earn more and more and have more and more rights. And justice, to a greater extent, became an arm and an instrument of maintenance of this status quo. So detaining is like a hunt for the judges, it's almost fun. We are hunting beings to remove from our coexistence. – J7

The metaphor of a hunt is powerful, calling to mind the image of a dominant group organising for the capture or elimination of a target or perceived threat[65]. This statement, along with many others, emphasised the active role many judges take in attempting to remove those they deem dangerous.

The prosecutors had less to say about the overstepping of judicial functions and noted that judges generally acted on the evidence presented to them. However, Pr1 explained that judges do pay more attention when the crime is a violent act, but that generally they do not

[65] It is also difficult not to also hear echoes of how powerful European descended elites would organise hunts to recapture enslaved people who had escaped their situation of subjugation.

form their opinion until the "H-hour". This is an interesting choice of phrase as 'H-hour' is a military term to describe the specific moment of attack – an aggressive act of war. It seems to neatly illustrate the attitude that the judges' decision can be wielded as an offensive act towards a person representing a threat. When asked directly about whether public security is involved in decision making, Pr4 stated that there was no strong connection, yet later in the interview, when discussing issues of organised crime, Pr4 spoke of the connection of her work to that of the Special Police Operations Battalion (BOPE)[66] through her involvement with the Special Action Group in Combating Organized Crime (GAECO)[67]. Even in the title of the group, 'Combatting' is the operative word contributing to the war-like schema. In the below quotation Pr4 explains her involvement, representing the Public Ministry:

> I once took a course at BOPE, on some Fridays, where we learned some fundamentals of self-defence, how to shoot and everything else. We did a simulation of an operation in a community, which is in Tavares Bastos, which is a community that is practically attached to the BOPE site, so it is a pacified community in theory. We went there with blanks - naturally not live weapons – to simulate the capture of a suspected drug dealer. It was all a simulation, it was theatre. It was so stressful. A level of stress, and anxiety that give the impression that you are going to be killed at any moment, that there are going to be people coming from everywhere, it's a different geography. When you enter a community, you are a walking target, with people being able to shoot you everywhere. – Pr4

Links between the Public Ministry and the military police are so strong that prosecutors are taken to residential areas occupied by BOPE, and simulate military manoeuvres. Aside from overlooking the trauma to the families living in the favela, the framing of a shared cause between the Public Ministry and the military police demonstrated Pr4's adherence to the logic that says crime must be actively fought.

[66] Batalhão de Operações Policiais Especiais (tactical unit of the Military Police of Rio de Janeiro State)
[67] Grupo de Atuação Especial no Combate ao Crime Organizado.

Many public defenders spoke about their perception that judges and prosecutors work together as part of the same attack in what is framed as a defence of society (this is relationship is examined further in Chapter 9).

> I think that in Brazil we don't live an accusatory system, we live an inquisitorial system. It is not a process of defending and prosecuting parties; I don't think there is fair play. – PD3

> They don't understand themselves as instruments to contain punitive power. They are allies of that power. …Judges and prosecutors are frustrated when they have to release someone, as if that criminal case had come to a tragic end, a defeat. – PD4

PD3 likens the realities of the justice system to the approach taken by the Iberian inquisitorial system, to highlight the unconstitutional behaviour displayed by judges when they overstep their judicial functions and align with prosecutors to assume guilt. The violent logic of the Inquisition allowed for a *by any means necessary* approach, and this is echoed in interviewees described judicial attitudes towards security. PD4 notes that a punitive approach is so deeply imbedded that any release of a detainee as interpreted as a defeat, a failure of the system.

If each defeat can be interpreted as a micro failure of the system, the combination of high rates of violence on the street and reported corruption in government develops into perceived system failure at the macroscale. S1 described how this lack of trust in politicians has led to public appetite for judges to play a greater role and this has lubricated the path to expanded judicial powers. Frustrated with what they saw as the overstepping of the judicial role, S1 expressed his feeling that judges are "are inebriated with their power", explaining that while they are not allowed to create law, they have encroached on the roles of the executive and legislative branches. However, rather than being interpreted as renegade actors disregarding the constitution, judges stepping out beyond their neutral mandate have been heralded as heroes. Many interviewees referred to former judge Sérgio Moro[68] as the

[68] Sérgio Moro was the judge during the Lava Jato Case (Operation Car wash) that examined governmental corruption and oversaw the imprisonment of former President Luiz Inácio Lula da Silva. Moro was praised by many as a national hero and images of him wearing a Superman

archetypal example of a judge lionised for overstepping their mark. Individuals from all interviewee groups (except the prosecutors), mentioned the problem that Moro represents for the validity of the judicial system.

> He believes that judges are agents who should fight against crime or against corruption. This is not how I see the role of a judge. For me, this is the role of a police officer or a prosecutor, not a judge. I think he's a judge with a police officer's soul. – S1

> So, I think there is a confusion of functions. I think Moro represented this in a very emblematic way: the judge dressed as Superman. The moment the judge puts on a Superman cape, he takes off his robe. There is no way, he stops being a judge. – PD3

As PD3 presents it, a person can wear the robe of a judge or the cape of a crime fighter, but they cannot wear both. J7 also noted frustration at societal celebration of "superhero judges":

> Today, we have judges there who are standing out as superheroes, they are certainly judges who are breaking the law. They are breaking the law, they are doing political work, using the law as an instrument of making politics. These are the heroes of modern society. Judges do not exist as officials to be heroes, but only to enforce the laws. When you meet hero judges, be wary of these heroes, because they are not judges, they are heroes only. Heroes in the conception of a hate society, a society that seeks enemies, and these enemies must be slaughtered preferably through false applications of the law, false interpretations of the law. So, we are living in a dangerous society. – J7

In J7's eyes, the wilful misuse of the law means that they are no longer judges, but political actors. J7 names "Heroes in the conception of a hate society", whereby those in power aim to eliminate certain groups and use the law to do it. They are considered heroes for including the security context in their decision making and taking actions (beyond their mandate) deemed to be in the public interest. There does, however, seem to be a limit on what

costume were widespread. Subsequently, evidence emerged that Moro had been advising the prosecution during the trial rather than maintaining his mandated neutral position. See Fishman et al. (2019).

contextual information is valid for consideration. When asked if the overcrowded prisons and conditions factor into the decision to detail pre-trial, J2 responded:

> It is a difficult question, you know? I think we- I try not to be influenced by external factors, like the prison system. …Of course, you have this - our personal conviction, which I expressed [that prisons are not the solution]. But I think that above all, we have to kind of stick to what the orders say, you know? What the laws determine. And this possible non-agreement, the dissatisfaction with the overcrowded prison system, I think it has to be directed in other ways, not exactly at this moment here in the custody hearing. – J2

In this case, the conditions that the detainee will be held in before trial are deemed to be "external factors", which should not influence decision making. This line of thinking appears to employ a different logic to where external factors such as the wider public security situation are deemed relevant for decisions.

This subsection has considered how judges have swapped the gown and confines of the constitution to take up the cape of the crusader, placing public security above everything according to inherent punitive logics. Although several interviewees noted limitations of punitive approaches, as will be explored in the next section, many were confident that for a substantial percentage of judges and prosecutors, belief in punitive approaches is entirely genuine.

Punitive philosophies and justice as social mediation

> When you bring people to reflect on the problem, then alternative non-custodial sentences are good, but the vision is detain, detain, detain as the solution. – PD5

While the previous section highlighted notions of the judge as a hero, this subsection presents interviewees' reflections on how the justice system is used as a tool for social mediation. Whether an uninterrogated assumption, or a considered conclusion, it was felt by several interviewees that a punitive stance is the point of departure for many judges. As PD5

suggests, with an attitude of "detain, detain, detain", this position is also the end point. J5 explained how he felt that there is a great difference between "ideal custody hearings and the concrete reality". He expanded that for many judges there is a punitive philosophy that accompanies any policy or practice developed.

> Unfortunately, what is very clearly perceived is that many Brazilian judges, not only here in Rio de Janeiro, but as in the whole of Brazil, have a very punitive philosophy and culture. Not in bad faith, in any way, you understand? I think they are convinced that the punishment is positive. And the custody hearings are "falling short" not on account of the hearing, but because of the philosophy that judges bring to it, adopting the philosophy that punishment is legitimately welcome, that prison is welcome, incarceration is welcome to try to solve the violence, when we have seen that it is the other way around. It's kind of a vicious circle. – J5

Here J5 underlines that those adopting punitive beliefs and practices, do not do so "in bad faith", but genuinely believe that they are proactively acting in protection of society. As described in the previous chapter, the notion of who is worthy of protection is highly boundaried and many interviewees described a clear us and them attitude among court actors, where we need to be protected from them. Several interviewees spoke about the normalisation of judges' discretion to enact their personal philosophies. For many, this means a pre-emptive action to remove those who are perceived to pose a risk. J7 described this as a "phenomenon that mischaracterises justice as a power of social mediation", whereby society is made safer by the expungement of certain groups, specifically young men from favelas with observable black or plural heritage.

> Well, our penal system is undergoing a very big change, because we have principles that are inscribed in our Constitution that have been, in the last two, three years, relativised due to political issues. The Penal Code has been used as an instrument of policy making. So, there are people who are being arrested, persecuted, accused, and others are not, according to the ideology of the courts and judges. We are almost experiencing a real dictatorship of the Judiciary. – J7

Dictatorship is not a term used lightly in Brazil. J7 caveats his comment by saying "almost" a dictatorship of the judiciary, but the reference infers the weight carried by the point that the judges have the freedom to make decisions with little to no consequence. J7 lamented that

"custody hearing logic is inverted in practice" as people are arrested and detained through a presumption of guilt, only to later be acquitted.

PD2 noted that this presumption of guilt was closely aligned with stereotypes of black criminality and that the assumption from prosecutors and judges that removing people before establishing guilt is beneficial for their personal safety amounts to a "collective selfishness".

> We are in a country where today the thought implemented by the custodians is the prevailing thought, it is the thought of the majority. People think that "Oh, when in doubt, you are a favela resident, black, brown, poor, and did not study, so you probably did it. So, it is better to leave you in prison." People want this, because they think it is for their own good, for their personal safety. It is the collective selfishness that really exists, of a very large, very large portion of the Brazilian population. People feel better that way, and they are not aware that behind that decision to imprison there is a person and behind that person there is a family, there are children who are dependant, nobody is concerned about it. It's difficult. – PD2

PD2 speaks to how this is a perspective adopted by a large amount of the population and several interviewees spoke explicitly about how the attitudes of judges and prosecutors were often inseparable in presenting this punitive position and accusatory style. PD2 talked about how this resulted in a "detachment from the provision of the law" and J3 stated that:

> "Regardless of the clarity of the law, they call for conversion. I think they mix their personal opinion with their job and say, *'oh but tomorrow it could be me that he attacks'"*. – J3

Several interviewees noted a heightened level of concern from judges for those whom they identify as their own *in-group* and how this was observable in the use of discretion in court. Some, including PD4, highlighted the creative application of certain important terms and spoke of statements made by judges.

> "Guarantee of public order" is an indeterminate legal concept that lends itself to anything. And it is this guarantee to public order that it is the cane used by the judges to maintain the detention of these people on the arguments, more or less, on the arguments without factual basis of that

> situation that is put there, which is what you should be seeing in decisions. "I keep that person in prison to prevent criminal replication". Yes, but that person has a life history with no previous crime. How did you deduce that their freedom will necessarily result in criminal replication? So public order, it lends itself to this concept, it lends itself to feeding this logic of the judge as a public security agent. – PD4

Indeed, in a separate interview a prosecutor (Pr4) used this exact reasoning provided by the public defender above to legitimate pre-trial detention in a situation using justification beyond that written in legislation.

> Generally, theft is imprisoned, because you have a victim who is there and may be disturbed by the perpetrator if he is released, so to guarantee the public order, the subject remains in prison. – Pr4

Several interviewees mentioned how any presence of an identifiable alleged victim tended to be sufficient for detention, even where there was no evidence to suggest any relationship between the parties or any likelihood that the detainee would attempt to contact the alleged victim. Interviewees spoke of an apparent genuine belief that detention pre-trial was an efficient method of crime prevention. Many noted that emphasis is frequently placed on the *flagrante* nature of alleged offences, i.e., that detainees are meant to be those *caught in the act* (often solely according to police testimony[69]) and so judges focus on what they perceive to be the likelihood of guilt, rather than the risk that the detainee poses to the public if they were to be released on temporary licence until their trial. In responding to a question about the choice to detain pre-trial and whether this is a good way to maintain public security, Pr2 responded:

> It is a difficult question and obviously removing a person from social life and keeping them in prison, does not directly influence the degree of criminality that has been seen in Brazil, but on the other hand, an answer, sometimes it is necessary to be given. We use terms, more technical questions of the person, …but speaking in a layman's way, the person

[69]Rodas (2017) found that in flagrante delicto cases related to drugs 74% of cases purely relied on police testimony, and of these cases, over 90% of cases led to prison sentences.

> himself must know that the system will respond when he commits a crime, that his conduct will not go unpunished.

This statement demonstrates a strong belief in deterrence and that pre-trial detention serves as part of this system of deterrence. The prosecutor suggests that if a suspect is released, this is seen as a failure on their part and on the part of the system and that the conduct will "go unpunished". Such a statement is illustrative of the belief that pre-trial detention is part of the punishment in and of itself, as well as a deterrent for others, rather than a precautionary measure of last resort.

Prosecutors appeared acutely aware of how they can be represented in this overtly aggressive way and were by far the group most cautious about being interviewed. Pr4 spoke directly to this representation of extremely punitive judges and prosecutors.

> There are a lot of people who think that the prosecutor is that guy with the knife in his teeth and with blood in his eyes, and he wants to punish because he wants to. There are half a dozen that are like that, yes, but at least those I associate with and those I have a greater affinity with are not. I think people want to work and try to find out what happened in specific cases, try to get as close to the truth as possible. Of course, I am more punitive than (judge's name removed), for example. It is the culture of the Public Ministry that you have this more condemnatory bias, but I'm not there to screw anyone's life.
>
> It is difficult sometimes to be in the Public Ministry too. We joke that it's seven - one every day! Remember Brazil's seven - one loss to Germany? [laughs] – Pr4

Considering that the focus of the conversation was not on criminal trials, but custody hearings, I found the use of the phrase a "condemnatory bias" an interesting acknowledgement when assessing suitability for detention before trial. It was also interesting that Pr4 acknowledged that there are some court actors who do aggressively look to punish. In a later section of this chapter, I explore interviewees' discussions about how the rise of the far-right in Brazil has emboldened those with intensely punitive stances to feel freer to express and enact such views. Pr4 also jokes that the Public Ministry feel that they are losing "seven-one" every day, referring to the humiliating defeat Brazil experienced in their home football

World Cup. Over the course of my observations of custody hearings, I witnessed quite the opposite, with most decisions going in favour of the prosecution. The detention statistics from earlier chapters also point to the high percentage of pre-trial detention.

Prosecutors regularly referenced the high levels of violence in Brazil and Rio de Janeiro in particular when discussing approach to custody hearings and this helps to illustrate the connection between the notion that many court actors genuinely feel that they must do something in the micro confines of the court settings in order to mediate macro-societal issues. PD5 was able to bring several of these points together, relating to discourse at a societal level:

> And these people who are there, the funniest thing is that they think they are doing good. They trust that the decision they are making is the best one, for society, because they are within this thing of, "Society thinks". So, they're not bad people, I can't see that Machiavellian way. I think my colleagues, can come down a little heavy there… they say, "Ah, what a bad person, they are worth nothing" [the punitive actors]. It's not like that, they're actually representing an idea. It's true, they should have more impartiality, act more according to what they have learned, according to what is in the law, the treaties, in short, that is the theory, but they are people. When we do research, we say, "We have to distance ourselves from the epistemological object, from the thing that is being researched." But it is difficult, you who are researching now, you cannot get away and say, "I'm 100% removed", because you are a person with experiences, you are not a robot without any feeling.
>
> So, it's impossible. That person is invested there by the state, and he brings a whole experience in society, all this social thing that is hovering now, a lot of punitivism, imprisonment and everything. …You see that they believe that they are doing the best, perhaps even due to a lack of knowledge, of their lack of approximation to this other reality. – PD5

The public defender identifies the faults in the thinking, but also recognises that those with punitive attitudes are "representing an idea". PD5 speaks to the reality of humans as subjective operators and how we are influenced by features of society. Here the punitiveness is highlighted as "hovering" in society and impacting how judges make decisions.

Interviewees including S1 wanted to be clear that not all judges follow such clear punitive epistemology but that "the extreme authoritarian mainstream" does. I found it interesting that S1 and others unflinchingly associated the mainstream position with extreme authoritarian temperament and a later section of this chapter examines this in further detail. It should also be noted that some interviewees asserted strong opposition to such punitive positions. One judge (J4) recognised the high rate of detention but felt that this was a point of pragmatism due to a lack of other realistic options, rather than an overt choice to operationalise punitive philosophies.

7.3 Judicial Body and Soul

> "Our job is to read and apply the law, but we interpret the law, so, of course, there's a lot of *us* in the outcomes" – J6

Here a judge succinctly highlights the tension in the subjective interpretation of what is considered objective law. If there is a lot of the judges "*in*" the outcomes, then it is important to consider who those judges are, what experiences they bring, and what impact these have on outcomes.

Selection: Pipeline & Training

Many interviewees reflected on the financial demands of becoming a judge and how this restricts who can apply. Interviewees from all groups mentioned how applicants must study for five years without pay in order to enter the competition. This is a clear socio-economic barrier to a large proportion of the population, but there were also other consequences to this socially-selective process.

Several interviews put forward the notion, represented here by S1, that as a result of passing the exam, many judges have a specific self-image that imagines themselves as the "most pure" and worthy. Interviewees explained that this has led to the presumption that judges' opinions cannot be questioned, while also promoting a certain elitist attitude.

> They tend to see themselves as the purest class of people because they gained their position by a public exam and so only they have merits, and the other [successful people] are not [in their positions due to] merit, maybe luck, but probably some kinds of shady scheme. – S1

This distrust of others, while uncritically assuming supremacy, was a theme that was clear in how people spoke about the structure, selection, and training of the judicial body. A significant part of the issue for many interviewees was the lack of critical thinking within the training process. PD1 felt that judges do not take human rights training seriously and noted that it does not feature in initial training, but rather that the training is primarily about how to do well at the competition stage. J2 confirmed that there was no "comparative element" in the training received and that it was "only positivism that we learned in college".

One of the public defenders gave and an example of how the lack of critical understanding of the nature of institutional racism caused problems in court. PD3 explained that in representing a client, a fellow public defender had stated that the defendant, who was found with a small quantity of drugs, had only been randomly stopped because he is black and that the police have problems with systemic racism. PD3 explained that the judge interrupted the speech and made such a commotion about whether the public defender what accusing the police officer of the crime of racism, that she had to intervene:

> And then it was a mess. And so, I said, "No, it is obvious that she was not accusing the police of any crime. She was just denouncing a selectivity of the system, which is a basic principle, something so elementary in criminology. How come you never heard talk about it? How is it causing a huge mess in a hearing just because my colleague reported that he was approached because he is black. Such an elementary business".
>
> So, they do not see what the Criminal Justice system is. What is behind it, what moves everything, they have no idea. So, I think it's a- what I miss most here, I already told them that a few times, they don't know anything about criminology. Nothing. Not the minimum. They need to know that the penal system is selective. You can't see that? …Man! So, I think it there is a lot of ignorance - I think it takes a lot, in fact, to assume an uncritical position, also disinterested and alienated. I think it's a little bit like that. It's alienation. – PD3

PD3 points to the lack of reflection from judges on how the justice system works in practice and that many are "disinterested" or so far removed that they are "alienated". The sentiment suggested was that many judges gave the impression that they believed that they were beyond the need to study or reflect. These sentiments were also represented amongst some judges interviewed, as J5 expresses here:

> Because when the judge enters the magistracy, it seems that he takes a pill the next day he enters and that he thinks he is the one, the all-powerful, like, "Now I have the pen in my hand. I decide. And what I understand is the purest truth and nobody is going to change that". – J5

J5 felt that many judges believe that they are uniquely placed to understand what is true and correct, and that it is deeply rooted thinking that needs to be adjusted. J5 spoke of this thinking as something built over centuries and emphasised that change needs to happen before a person qualifies as a judge and they are "the all-powerful one". J5 reflected that as a middle-class trainee, who came from a background based in punitive views, it was the college process where there was a progressive judge teaching the class that changed his mind:

> And it was college that changed me. When I went to college and had contact with Verani, then I stopped to think, "Whoa, wait a minute. Let's see if that's right. Wait, let's think. There's a different position here. I've never heard that. Wait there, I will read about it". And there I changed. – J5

As well as socio-economic limiters and the subsequent fortification of a certain class view amongst judges, many interviewees stated how clearly racism continues to play a key role in selection.

> Interviewer: What do you think about the argument that some people say, "It's not really racism, it's more about poverty and class- "
>
> J6: No, it's racism… A racial democracy, [sighs], nobody serious uses this argument. Someone who uses this argument does so in bad faith, or is very, very ignorant and neither case should not be taken seriously.

J6 continued to explain that despite the 26 states and a Federal District containing millions of people, there are only 11 black women who are federal judges:

> J6: If this is not racism, I don't know what it is. When I say this is racism, I'm not saying that people are intentionally racist, no, but because it does not depend on what you want, what do you think, if you're a good person, if go to the church and pray you can be a wonderful person, you do charity, it is not about that. It's the way we are designed, and our society is designed like this.
>
> You have two options to have this design. To say, "Oh, black women are not capable to take the bench." This is a racist argument or, "Black women don't want to take the bench." This is a crazy argument [laughs]. How to explain a country where more than 50% of the country is black, we only have only 11 black women. We have a systematic organization that designed this reality.

J6 makes the point that these are systemic issues and when judges make their decisions in court, they may be well intentioned, but if a country has well over 200 million inhabitants and only 11 black women federal judges, then we have to ask questions about how they system selects candidates.

PD3 made a similar point in the extract below and brings together race and class issues and the systemic obstacles presented by the manner of the public tender for positions:

> PD3: The question is who are the judges today? Who passes a judiciary contest? Anyway, 74% of our prisoners are black or brown, and I have no black or brown judge here. 74% are poor. I have no poor judge or one who has had a history of coming from a poor family. So, I think there is a question of class.
>
> I think there is a question of race, which is not discussed, which is not thought about, which is veiled. But who has access today to the best universities? Who can compete in the public competition, which requires many hours of study? But more than that, how is this public tender done? Whether you have a more critical contest or not. This is a very big concern for us in the defence.
>
> I cannot have a public defender who does not have critical thinking. I can't have a public defender who doesn't like the poor. Who has a problem-- Do you understand? Today, all of this is considered in the contest. So today we

> have a contest that includes human rights tests, criminology in a specific way, because I need someone in the defence that has a critical thinking.
>
> In the judiciary, for example, we have a contest. So before, you had judges responsible for the selection, judges with thought and critical eyes. And this is reflected in the test, and it ends up being reflected in the choice of the type of candidate, who will enter. What I perceive- I stopped following this for some time, but in the previous competitions of the judiciary- this we had excellent judges, you know? … Judges who have respect for the process and such, even though they are in a very punitivist environment. But that ends and a group of people came in, with a change of administration, who, how- is it okay for me to say names here or not? You'll put—
>
> Interviewer: I won't use any names.
>
> PD3: Okay. Like X, …she is the worst judge for people on fire, she is terrible. And she was on the panel for the last competitions. And then we realize that whoever is on the panel will direct the type of response. So, from there, you are already training and bringing in judges who will respond to what she wants, which is of no rights, total punitivism.
>
> And then? …judges have already told me that she has a notebook. The Public Prosecutor's Office alert her and she calls the judge and says, "How did you release the prisoner?", and "look, if you continue like this, I will not promote you." So, she explicitly directed the decisions of the young judges. That for me, when I heard about it, I said "Man, this is so absurd. The judge has no functional independence." That he gets a call like that and gets scared and changes the way he decides. I think this is so surreal. But it exists, people know it and that's that.
>
> …So, I think they really think what they write… And in the end, the judiciary ends up choosing a white elite, who has a way of thinking that is portrayed in the process. And that's that.

In this excerpt, PD3 explains that when selecting candidates for the Public Defenders' Office, those who dislike underserved communities or do not think critically are not considered for positions, but laments that this is not the same for judges. PD3 also touches on how influential those in positions of power are in choosing who will be among the next group of judges (reflecting their own class and race, and political inclinations). This influence then extends beyond selection whereby senior judges can exert a threatening power to the extent that judges in custody hearings have "no functional independence".

Selection: The King's friends & philosophies

The above subsection has considered the restricted pipeline into the judiciary, and I move now do discuss another aspect of selectivity at a meso level of analysis to consider how institutional cultures can be impacted locally and have important consequences for pre-trial decisions. This sub-section examines how the personal philosophies of key gatekeepers have influenced custody hearing decisions.

The introduction of custody hearings has been witnessed through a political lens from the outset. Prosecutors and public defenders presented vastly different takes on the impetus for the introduction and its appropriateness. While public defenders embraced the idea that custody hearings were introduced purposely to mitigate the use of pre-trial detention, prosecutors were very clear about how they believed that the introduction represented the imposition of a political "mechanism" (Pr1) to artificially reduce the prison population. Interviewees, including the judges, mentioned how judges have broadly been split between these two camps.

J3 explained how at the outset in 2015, custody hearings began with an enthusiastic team in Rio de Janeiro, with strong multidisciplinary assistance, such as healthcare support. This group of judges volunteered to be involved and were thus in favour of the initiative. However, when the president changed, the team was removed and replaced. PD3 gave her summation of what happened:

> I think that the court, despite initial resistance, realised that the custody hearing was ultimately - Whoever is in the custody hearing has control of the front door. So, if you were arrested before, it was a matter of luck if you were going to get a good judge or a more severe judge, but they realised that they could choose who the judges are. Before, it was a control that they didn't have. So, I think that the court saw that custody hearings was also a matter of criminal policy and that there was a lot of power in controlling who was here. – PD3

The convention for selecting judges alternates between appointment according to seniority or positively accrued scores in examinations and work, yet these conventions were not

followed for custody hearings. S1 explained that when a judge is appointed to office, they cannot be moved, but custody hearings were not seen in the same light: "it's not an office, more like a service". After the initial enthusiastic judges had left the posts, the political leaning of the judges had been "a matter of luck" (PD3) or "a roulette wheel" (Pr3) as is the case for other courts. However, with the power to appoint a custody hearing coordinator left to the President of the Court, the general political direction of the hearings could be set and thus the "front door" policies could also be decided. J3 noted that this is particularly relevant for judges of criminal cases because "criminal judges have sensitivity that civil court judges don't have. If you give a decision contrary to the coordinator, it is like cursing their mother". This strong sentiment around the expectation that custody hearing judges follow the lead of the coordinator was presented by several interviewees and thus the importance of this role for decision making at pre-trial hearings was underscored.

J3 explained that there were never any public notices for the positions in Rio de Janeiro, which would allow for open competition and transparency and that this has meant that those appointed "are always the king's friends". J3 noted that when more punitive judges were in charge, several members of AJD (Association of Judges for Democracy) were overlooked for positions, but also noted that the same occurred when AJD judges had the power, "bringing in their own people – so for good and for evil." Several interviewees spoke about the fluctuations between punitive and liberal judges creating a "seesaw effect" (Pr3).

Many of the public defender group spoke about either judges or the custody hearing coordinator being removed from their roles if they didn't fall in-line with the philosophies of those above. PD3 gave specific examples of judges who were moved on from their roles after regularly taking decisions to release until trial and noted that whether the reasoning given is explicit or veiled, the message still received clearly. In fact, during my fieldwork, the Custody Hearing Coordinator who had approved my observations of hearings was also abruptly replaced. It was a common understanding amongst court actors that the removed coordinator was more "liberally minded" or "progressive", whilst the new appointee was variously described as "conservative", "strict" or "punitive" (field notes 17th July 2019).

In terms of selection for custody hearings, J7 made it clear that while there have been fluctuations that have favoured both extremes of the political spectrum, the more punitive mindset has been dominant, both in custody hearings, and more broadly across media and society. This section has focused on the socio-economic distance between the judge and the judged, leading to the political preferences of elite groups to dominate. The following subsection continues to examine the consequences of the overrepresentation of this group in the judicial seats but focuses on interviewees reflections on the social and empathetic gaps between the judge and the judged and how this influences decisions.

Identification, Experience & Empathy

A lack of critical thinking and reflection on the part of the judges have further consequences beyond judicial positivist self-assurance. Several interviewees spoke at length about how this lack of reflection on positionality means that judges centre their own experiences at the expense of others. As previously discussed, the significant majority of judges are from privileged backgrounds and identify as white, and the detainee population form a very different demographic.

Interviewees talked about the lack of understanding that many judges have about the realities of those who they judge. Various examples were given of hardships endured by underserved communities and residents of favelas; each held up as experiences that judges could not relate to or are detached from. As outlined in previous chapter, the prosecution centres documentation about work and residence in a context where this is extremely difficult to provide for those working in the informal economy or resident in a favela. S3 talked of witnessing a mother imprisoned for a fourth time for stealing nappies for her children. S3 noted the *attack as a form of defence* logic, as well as the lack of understanding of reality.

> We have judges who are extremely young, that's how it is. She learned everything on paper, she doesn't even know, I don't know, she doesn't know what it's like to think like a mother with three children, without a way to feed them. How she would work with drugs to be able to feed her children, know that it's illegal and she could be arrested in front of her children. – S3

S3 noted that while custody hearings do not allow for actions such as considering the social issues that underpinned the problems, this lack of appreciation of the realities resonate in the pre-trial setting, where judges focus on the criminalising the act, rather than considering the consequences of imprisoning that individual before trial. S3, like many interviewees, looked for other examples from outside the courtroom to illustrate their sentiments.

> When we discuss here in Rio, for example, the UPPs[70]. The thinking heads who were introducing a neighbourhood police, a less violent police; they are thinking from their own position, because the police's relationship with those who live in the favelas is completely different. So, these people who thought about it don't have this experience of being violated all the time by the police. They think it's possible to build something new with the same police in those places, and completely ignore a whole history of relationship that is, I don't know, is already 200 years of police in Rio de Janeiro. – S3

S3 likened the approach taken in court by judges to the that of policy makers of policing practices in favelas in terms of their centring of their own experience and lack of understanding of the realities faced by people. S3 suggests that judges similarly disregard how, in comparison to their privileged experience, detainees often have a very different relationship with police, the justice system and the law in general.

PD5 also makes the case that it is difficult to be a positive force for change for the majority if you have only known the reality of the asfalto:

> Brazil has several Brazils within Brazil. It is obvious that you say, "Ah, it is so developed on Avenida Paulista". Gee, don't talk about Avenida Paulista, let's talk about Santa Catarina. No, but let's talk about Maceió, understand? Let's talk about the peripheries of Rio de Janeiro. There are several Brazils inside Brazil…
>
> When judges arrive, what do they know about the world? Just that. Who did they live with? Only people from the same place. So, if you expect her to have a different view, she won't, but it is not because she is a bad person, it's because she doesn't know, she exists within that scope. That's how it seems to me from the interactions I have. – PD5

[70] Unidade de Policia Pacificadora (Police Pacification Unit).

PD5 emphasises that the complete unfamiliarity and subsequent un-informed decision making is not due to nefarious intentions on the part of judges, but is merely the logical conclusion of a selective system. Other interviewees represented similar views, yet some questioned this further. More than a lack of experience, other interviewees contended that there is a distinct lack of empathy for those from different circumstances. For example, PD4 highlights how judges see themselves as fundamentally separate from the detainee population.

> Interviewer: You mention that judges know about conditions inside prisons and are aware of human rights problems, do you think that this affects their decisions?
>
> PD4: Look it's very interesting. It is obvious that there is a class component for me. He doesn't recognize himself in that other, he doesn't recognize himself in that person. That person is fundamentally not his colour, not his social origin, does not have an intellectual background like his. He doesn't recognize himself in that person.

This fundamental separation relates to the worthy/unworthy divide, and the perseverance of the perception of a hierarchy of humanity, as described in the previous chapter. The division runs so deep that as another public defender stated, the judge that adopts such positionalities has an "inability to see himself in others' shoes":

> Another thing that goes a long way in the head of the judge is this: His inability to see himself in the others' shoes. Where do I want to go with this? The crime we see here, let's put it this way, the crime considered most foul, is the corner dealer, it's the robber; the judge will never see himself in that position. So much so that sometimes a crime arrives here, - I don't know, an alcoholic direction and you immediately see that the treatment is already different. – PD1

So, more than an ignorance of the reality, some interviewees contended that the judges do not extend the same level of humanity to detainees, especially where crimes where the defendant is immediately appreciated as the dangerous traficante or bandido. J3, among others, suggested that it takes some relatable personal experience for many judges to question the processes and their consequences.

> Maybe they never gave it that much attention, but then you see that there is a certain humanity that just needs to be worked on. But many are like that, and do not want to change. Unless something happens in their personal life and it makes them review the concepts, that sometimes happens too. So sometimes you find yourself with a drug-using child, and you begin to rethink "Where did I go wrong? Is it due to the way I've acted here [in court]?". You'll rethink the more human issue. It's kind of counting on luck as well. – J3

The argument offered by many was that most judges will not have relatable personal experience and instead immediately side with the alleged victim. J3 suggested that judges will often imagine that they could be next and so act to prevent an imagined crime against who they see as deserving of protection, at the expense of the reality of the case in front of them.

> So, they take the victim's point of view. "There's no use guaranteeing the rights of the detainee - and the victim is left how? Nobody thinks about the victim, nobody thinks about the dead policeman, nobody thinks I don't know what". So, like this, they go through this victim's speech. You must give the victim more privilege than the perpetrator, who is presumed guilty in this situation. – J3

This small quote brings together several points. That the judge identifies as part of the wronged party and sides with the victim and prosecution. This means that the detainee has a reduced level of rights in comparison to others and is presumed guilty rather than innocent. Here we see again, the similarity with inquisitional practices of an onus of proving one's own innocence in front of a judge taking an accusatory standpoint, as opposed to neutral.

Again, the interaction of class, race and gender was a consideration for some interviewees. According to the argument of many of the interviewees, shared experience and identity are conduits of empathy shown by judges, and in these situations, certain identities carry greater ability to illicit or prevent such empathetic responses. Here, J6 recalls a specific conversation with another judge:

> She was on call on the weekend and there was a hearing to do, and she called me, "Oh, you are more used to it, give me some tips". And then we talk, and I asked her "Is everything okay?" She was like, "Oh, it's so sad, in

> the hearing, everybody cried. The policemen who were escorting the defendant cried." I said, "The police cried?!" "What crime was it?" "Oh, it's a drug dealer. They were arrested on a cruise going to Spain. Arrested with five kilos of cocaine in the cabin. "Then everybody and the police cried." I asked if it was a woman? She said, "Oh, yes." "She was white?" She said, "How do you know?" …The police would never cry with a black young man who would be arrested with five kilos of cocaine. It's that unequal. – J6

Here J3 highlights that the patriarchal nature of society interprets the white woman as worthy of protection and empathy in a manner that would never be afforded to a black man, who is antithetically interpreted as a threat and unworthy of empathy. This last section has presented interviewees views on how judges' personal privileges, biases, and preferences – whether overt or unconscious – influence both who is able to ascend to positions of power, and subsequent decision making during custody hearings.

7.4 External influences

As noted above, J2 explained that he tries to keep "external factors" separate, however, interviewees regularly referred to considerations external to the court hearing which influence decisions. This section therefore examines responses related to political influences, the security context and how fear can be a factor in decision making.

Emboldened Right

Although I have described the contemporary ratchetting of punitive rhetoric as a deepening of punitivism[71], many interviewees did point to the significance of the presidential election of extreme-right wing Jair Bolsonaro and how this has influenced judges during hearings. Here, a judge was discussing the expansion of punitive rhetoric and so I asked about whether it influences decisions.

[71] The shocking imprisonment rate under post-dictatorship left-wing governments indicates a punitive context before the extreme right gained power, and thus I refer to the recent deepening of punitivism, rather than a distinct *punitive turn*.

> Interviewer: Yes, and that kind of political discourse you mention, do you think that it affects the minds of the judges when they are making their decisions?
>
> J5: Yeah, I think it certainly is. It has a very big influence. Even an influence in the sense of- I think so, with the election of Bolsonaro, I think it was kind of on the minds of the judges who have this punitive sense, the kind of an idea of: "We won. We were right. Look, our guy was elected. The population voted for him." …I think that the conception of these colleagues is that "we were right. Look. Look at Trump blocking entry, making a wall on the border. Look at Bolsonaro. Weren't you there? He was elected by the people!"

J5 describes a sense of long awaited vindication felt by colleagues holding more punitive views, and that the extreme rhetoric of the new president allowed them to double down on their own stances. The clear feeling that the political climate had a "big influence" on decision making was shared by many of the interviewees and that Bolsonaro's election marked a significant change.

> So, we have an authoritarian political constitution and a social base which has always hampered the discourse of human rights. And that today, this discourse is the official discourse of the government… From the coup against Dilma, from the impeachment process, the Temer government, and now with the Bolsonaro government, it became quite evident that what was an informal discourse – which was often silenced, which was not explicit – has become official discourse. – S6

S6 identifies that such sentiments were always part of the societal narrative, but that while they were previously peripheral, "often silenced" or "not explicit", they have now been brought to the very heart of government policy. S3 goes even further in her relating of the situation by linking contemporary explicit racism in Rio de Janeiro to power dynamics established during the colonial period, which centred around white men.

> Things have deepened much more, the difficulties, people's own perception and how they talk about it, the narrative, the speeches, all are very reactionary, and racism is being increasingly more open… And I think this is a continuation, but now with a much more violent discursive question, which is an explicit racism, not only from the president, but here in Rio with the Governor.

> So, anyway. It is very complicated to make any analysis at that moment, other than a more historical analysis that shows a little of how it develops in Brazilian society from this power that is white, that is masculine, that comes from a Christian tradition. I think that thinking about the history of this country, helps to understand a little of this process, including the current moment, sometimes people no longer have problems with being racist, that before they were still embarrassed, now even that is no more. It's a disaster. – S3

Several interviewees spoke about contemporary racism as harking back to views held at a previous time. As in other parts of interviews, the prosecutor group distanced themselves from the possibility of being influenced by historical factors but suggested that others continue to be impacted. Pr4 focused on how the police – but not prosecutors – have been emboldened by the "current moment" and how this has always been part of their training as "a prejudiced institution, made to protect those who have more money from those who do not". After enquiry about whether political rhetoric effects the justice process, Pr4 responded:

> I think less in our performance, but a lot in the performance of the police. I think it is shaped a lot, because, also, good policemen are very disgusted with the way they are read by intellectuals, by the press. As if they are all going up the hill [favela] just to take the property away from the drug dealer and to find the bandidos and everything else. As if they all necessarily mistreated the residents of the communities and only know how to work by kicking the door down. So, I think when someone comes and says, "No, what you guys do is right" and "good bandido is a dead bandido" and everything else, I think they feel like they are being heard and legitimised to act in their own way, which I think was many years just taking hits and just being criticized. – Pr4

Pr4 described how "good policemen are very disgusted" with their portrayal as aggressive and the suggestion that they mistreat residents of favelas, yet also notes how these same police officers feel that "they are being heard and legitimated to act in their own way" as result of extreme-right rhetoric. The definition of a "good" police officer appears convoluted here and may be indicative of how some justice actors have mixed feelings about the legitimacy of intimidation and lethal violence for "combatting" presumed criminals. Pr4 describes how the overt confirmations from highest ranking elected officials that certain

people are legitimately killable has been welcomed by a group who has felt unjustly criticised for carrying out such acts.

I asked Pr4 how she felt that these sentiments linked to actions taken in the courtroom. Again, at first, she responded that opinions are mainly standardised and that any faults in the system are due to the volume of cases, rather than an impact from political forces. However, Pr4 later contradicted this point by suggesting that that the punitive "moment" has emboldened judges to act in certain ways.

> I think it is a movement that is not just here, I think it is global, this frightening rise of these conservative movements. I think that at the moment when this happens, those who work with little less of a critical sense, feel entitled to practice greater illegalities, be more truculent and be more violent. I think there is this game, but does it influence our decisions, the way we see and think? I don't think so. I think at least – I will speak for myself – when we tend to reflect a little more about our work, not to do it automatically, when we have a little more critical sense in relation to our work, I think it does not have much influence, no, honestly. But, anyway, I think it is a moment of conservatism, it may be that several operators of law feel seduced, but I think that whoever arrives, sits in the chair, and judge in a more punitive way, already had it inside them, you know? I think they just feel more at ease. I think that these extremist movements, both on one side and the other, people who thought terrible things, felt free to express this in some way. – Pr4

Part of the suggestion here is that judicial actors are influenced by whichever political leaning is in ascendency. J6 also noted this phenomenon and spoke to the tension between the need to consciously avoid political influences, while acknowledging that judges are members of the same society as everyone else and thus susceptible to political climates.

> We are in the society and all the society is affected by this. I don't think-- Even if we want to, we wouldn't be immune to this, I don't think it's possible. Everyone who is sensitive to human rights is more aware, paying more attention, I guess. People who are against human rights are more comfortable to say things in the past they maybe wouldn't say. So, I guess yes, for better or for worse I guess it affects the way we practice the law. I'm not saying that we apply the law differently, but I guess the way we who are concerned about human rights are paying a lot of attention to what is going on. Of course, if you are a serious judge, you must be a sufficient

> distance from the political discussions of the society, but we are in the society, so it's impossible to be separate. – J6

J6, as well as others, underline the point that it is impossible to be completely distanced, but efforts must be taken to avoid undue influence. As we see in this next subsection, another human trait that judges cannot escape is the experience of fear.

Fear-driven decisions

When thinking about the specific context of Rio de Janeiro and Brazil more broadly, interviewees regularly referred to society's anxiety around security and many felt that this was an important external factor that spurs judges to feel the need to actively fight crime. This subsection therefore addresses how judicial decisions in custody hearings are fear-driven responses.

The statistics visited in earlier chapters, relating to the high rates of violence and murder in Brazil (at the hands of the police as well as organised crime groups), leave little room for doubt that in Brazil there is a greater threat of violence than in many other places. However, as S6 stated, "fear of crime and crime are not an object and its reflection". Many interviewees spoke of the impact of the 24 hour news cycle and extreme coverage across all forms of media centring around drug gangs and incendiary discussion about what drastic actions should be taken. Interviewees noted that this built the genuine threat that exists in reality into something much more extreme and omnipresent. Whether the perceived threat is reflected in reality is not the focus of this study, but the belief of threat and therefore the focus on public security was repeatedly referred to as an influence on judges' decisions. Putting it bluntly, PD5 stated that judges are "contaminated by insecurity" and this facilitates their willingness to detain children and young people who have received little to no support from the state.

Decisions were thought to be taken to defend societal groups *worthy* of protection, but other interviewees spoke of fear-driven decisions from judges more closely aligned to a form of

self-preservation. Some interviewees asserted that the media's strong focus on violence leads judges to feel vulnerable to blame if they release somebody who commits a crime (or is presumed to have committed a crime). J7 explained the difficult situation experienced by judges:

> The judges, for their part, as a whole, they are highly pressured by public opinion, by media pressures. A judge who releases is frowned upon, they are seen as if they were an agent of crime, as if they were a partner in crime… Apply the law and, if you must detain, detain. If you must release, release. If you must condemn, condemn. Because that is how the law works. The law is the parameter that must lead the judge to a decision. It is not the responsibility - there is no law to guarantee public security. The police are responsible for public safety, the Public Prosecutor's Office, the repression bodies, the prison system. Not justice. Justice must be absolutely impartial. And we sin by being partial judges. – J7

J7 identifies the importance of impartiality and the need to avoid the notion that public security should feature in decisions of judges, yet also acknowledges that by following the law in this way, a judge runs the risk of being condemned publicly as "an agent of crime". J7 states that it is a sin to be anything but impartial, but also talks to a reality of having to work within an atmosphere that concentrates so closely on assigning blame that judges work "under the duress of society itself" through fear of being "stereotyped like the guy who releases a drug dealer" (J7).

Another judge, J6, expressed the belief that judges may not be explicitly acting in bad faith, but they may concede full adherence to the law to avoid risk of public shaming. We can also see further adherence to the interpretation of pre-trial detention as punishment, whereby J6 is certain that some judges fall-back on the assumption that the defendants at the very least can spent time in prison to think about what they have done.

> J6: The expectation of the behaviour of the judge sometimes is higher than a regular human being. It's an ambiguous situation. That's why I'm saying this. When you decide to send someone to jail, of course, maybe there are people who wake up in the morning, go to his or her court and say, "Now, I'm going to do bad things to people. I will send innocent people to jail" because they hate people. I don't know if there's someone like that, but in ordinary situations people don't think like that. They are

> trying to do their best, but the limits or the situations they take into consideration are different and they value things in a different way. I guess the worst nightmare of a judge is, "what if I send these people to the streets and they do harm to someone?" I guess that is the hard nightmare. That is the key. I guess that's the red line. Because everybody has that nightmare, that they open the newspaper in the morning [and find], "Who put this person on the streets?"
>
> Interviewer: The newspapers would say, "It was *this* judge?"
>
> J6: Certainly, they would say that and would blame you for whatever happens.
>
> Interviewer: Would there be any real consequences for your work, or is it more it would damage your reputation?
>
> J6: I think people, they can damage your reputation, and of course, the harm itself. This is something that is always at stake. Unfortunately, there's a lot of judges that think that "if the police took him, at least he was in the wrong place doing something wrong, let's put him in jail for a few days to think about his life". I'm sure probably there are people who think like that.

Judges fear that their reputation and career may be adversely affected if the media present their decision in the wrong light, but as J6 notes, they also genuinely worry about possible harm that may be caused by choosing to release pre-trial, explaining that "everybody has that nightmare". J6 highlighted the level of discretion available to judges and that for the more punitively leaning, "the limits or the situations they take into consideration are different and they value things in a different way". An important point here is that interviewees contended that where judges draw their limit is heavily influenced by media punitive rhetoric. J3 also spoke to this and relayed their experience with other judges:

> I heard the judges talking about compulsory intervention in the crack issue and repeating the same rhetoric of the press, calling them zombies. Even a Minister of the STF, Barroso, in his speech he called them, "crack heads", "zombies", and "bodies without souls". Everything the press says, gets reproduced. – J3

Here J3 explains that when analysing court transcripts, she discovered that judges used derogatory language found in the press. J3 felt that the impartial nature of the press and its lack of proper critique of the issues is consumed by the judges and "you see that the most

uncritical press is part of the judges' routine". These unprofessional and derogatory phrases used by judges during hearings were presented by some interviewees as illustrative of how extremely punitive views circulating in public discourse have gained primacy and are openly embraced.

J5 spoke about the "serious moment for the return of populism of the worst kind of extreme right" and he was sure that it influenced judges. Beyond the main media outlets, J5 cited the influence that other methods of communication have had in stoking fear amongst the public and how this has infiltrated judicial decisions.

> J5: Bolsonaro resulted from the combination of fake news and WhatsApp… Did you hear about the "cock bottle for babies" (*mamadeira de piroca*)?
>
> Interviewer: The…?
>
> J5: "Piroca" you know what it is, right? The male sexual organ.
>
> Interviewer: Ah, okay – a baby's bottle?
>
> J5: There was a lot of fake news saying that the PT[72], if elected, would distribute bottles to children with a cock on top - and people believed it[73]. This was circulating around. And today I was talking about this with an experienced judge, and she was literally run over by this fake news… She was overwhelmed and did not know what to do... I don't know what to do...

This example was used by J5 to demonstrate the level of penetration achieved by overt falsehoods, designed to stoke moral panic, and deepen public support for extreme responses. These are not isolated examples that can be laughed off as obscure rumours, as they were consumed by large swathes of the population. As interviewees explained, this included judges, some of the most educated people in the country. As we will see in this next section, interviewees highlight a self-aggrandising image held by many judges is in part due

[72] PT – The Workers Party.

[73] During the 2018 Presidential election campaign Bolsonaro made several extreme claims, including false accusations that PT were distributing 'gay conversion kits' and around the same time, a video (clocking millions of views) was circulated showing a baby's bottle with the teat shaped like a penis, alongside claims that PT were distributing them (Dennison 2019: 103).

to the notion that as the most educated, judges' opinions and insights are above that of others. From the evidence presented, there are clear reasons to contest these notions.

7.5 Discussion

This chapter has focused on the position of the judge as a gatekeeper and the significance of this position in terms of who is able to occupy it and consequently, whose positionalities are considered and what philosophies are employed to make decisions during custody hearings. While the first empirical chapter highlighted how colonial era hierarchies continue to come to bear on those racialised and spatialised as Other and less worthy, this chapter has illustrated the heightened status of judges and how they are able to wield the power of the law to fit their own (largely punitive) agendas and maintain colonial asymmetries of power.

Selectivity was a notable theme on two fronts. Firstly, in the sense that those gaining the gatekeeper position of the custody hearing coordinator can select "the king's friends" to ensure that a particular detention-focused philosophy is followed, which has led to a surreptitious authoritarianism. But also, in that those able to achieve judicial status tend to be from such a small and elite pool that no matter the particular political affiliation of those in position, the social and empathetic distance between the judge and the judged remains vast. The consequence, according to several interviewees was therefore that the outcomes of custody hearing relate far more to the punitive persuasion of judges than the situational context or protocols. Many interviewees felt that judges believe that they are above the law, in part due to their success in examinations and that they can overlook the rules if actions are contributing to furthering a greater cause. This is in line with the examples cited in Chapter 4 of judges choosing not to hold custody hearings or deciding guilt and sentencing a detainee during a custody hearing, because they believed their opinion to supersede constitutional regulations. It also indicates how the self-image of judges adheres to the spatial dimension in terms of imagining themselves as the enlightened minority and inheritors of *Europeanness* as natural rulers over the ruled.

Punitive assumptions were also highlighted as a point of departure for justice decisions. While such views have always been present in Brazilian justice, interviewees frequently referred to the rise of the far right as key to the facilitation of how such notions have become central and dominant. Many pointed to the election of Bolsonaro and how this exposed a reality which had been less publicly vocal and as J5 put it, "Now people are emboldened to say things they wouldn't dare before. It's now nice, beautiful to say the bad guy has to die". S6 related this thinking to legacies of dictatorial mentality which is "essentially anti-humanist". The voicing of such extreme views are not a sign of a new surge to the right but an exposition of our 'colonial presents' (Stoler, 2016: ix) and indicative of the temporal endurance of assumptions born of empire.

Fear was a significant point of reflection for interviewees, both in terms of the threat of crime in society and the fear judges experience at the danger of being judged themselves for being too soft on crime. Indeed, many interviewees depicted the mainstream view as "extreme authoritarian" or "punitive", whereby merely following guidelines on the use of pre-trial detention as a last resort would put a judge at odds with the majority. Interviewees spoke of how fear of insecurity clearly drove judges' punitive impetus, and some, especially from the prosecutor group, relayed how they believed that they could not walk in their own neighbourhoods safely. This lent an immediacy to the necessity to act in defence of society.

While we can consider the different philosophical positions, the ways of knowing that judges take into the courtroom, we cannot examine these epistemological positionalities without also acknowledging the underpinning ontological assumptions detailed in the previous empirical chapter. Judges do not recognise themselves in those racialised and spatialised as Other, yet shed tears for those who they perceive to be of their group. The demographic overrepresentation from privileged white groups leads to the centring of the interests and experiences of this group, meaning that the realities of most of the population are not factored into decisions. This demonstrates hierarchical access to justice according to racist assumptions and is illustrative of the subjective dimension of coloniality. Here we see the dual axis of the coloniality of power (Quijano, 2000) – the centring of economic interests of the powerful according to racialised social hierarchy – present in the functioning of justice.

The previous chapter outlined the differential treatment of people othered via racial and spatial dimensions in a manner that broadly fits with Souza's (2007: 26) conceptions of a subcitizens, deemed less worthy for not meeting the 'useful producer' status inherent of citizens. These subcitizens must follow the law, yet the law is not used to protect them, but rather it is used against them. However, this chapter adds another relational layer. For many, part of the identity of the judge is realised in opposition to the dangerous other. For Said (1978), by orientalising the other as premodern and barbaric, the colonisers also defined themselves in opposition as progressive and civilised. In the contemporary Brazilian context, it is the presence of villains to be vanquished that necessitates the heroic superhero judge, and importantly, vice versa. In this way the caricatures cocreate and remake each other.

It is not just that those othered are marginalised or unable to access the regime of rights to the same extent, but that crucially, they are conceptualised by the powerful as enemies to be hunted. This active pursuit is framed as a modern[74] moral crusade to rid the country of dangerous criminals. The status of racialised figure of the bandido or traficante, is thus not only of a subcitizen, but an anticitizen, in need of pacification and elimination. The colonial division between the conquerors and those to be conquered remains valid and used to legitimise punitive approaches as points of departure for dealing with the 'internal enemy'. Interviewees likened contemporary practice to that of the Iberian Inquisition due to the pursuit of the other because of who they are, more than what they have done. This is important for understanding judicial decision making in custody hearings, as depending on which side of this colonially constructed divide a defendant falls is likely to inform decisions related to their pre-trial freedom.

A distinct quirk of this positionality is that while many judges perceive fighting crime to be a state function which they implement, they also appear to believe that they are sufficiently distanced as not to be complicit in the conflict. This act of cognitive dissonance leads to the ontological dualism whereby judges can claim to be neutral actors, while also overtly

[74] I purposely use 'modern' here in reference to Mignolo and Walsh's conception of modernity as constitutive of coloniality.

operationalising a specific philosophical agenda. As PD3 presents it, a person can wear the robe of a judge or the cape of a crusader, but they cannot wear both.

This chapter has contributed by building on conceptualisations of Souza's 'subcitizen' (2007) and introducing the notion of the 'anticitizen', to meet the additional vehemence of the hunt for the internal enemy. This conception could only be forwarded in this chapter after discussion of the judicial self-image, as it is in defining the villainy of the other that the judge reflects their own heroism. This helps us to understand how pre-trial detention is weaponised against the perceived enemy in a modern moral crusade, in a context where there is leeway for a judge to step beyond their boundaries and action their philosophies contrary to the constitution. Testimony from interviewees falls in-line with the twin axis of coloniality of power, whereby a racialised social hierarchy and the economic interests of elites are centred over the lives of those deemed expendable.

So, how can this be changed? Currently, Human Rights discourse is the most common language used to address such injustice and advocate for change. The next chapter explicitly explores interviewees' perspectives on such an approach to consider whether this does in fact inform judicial decisions.

Chapter 8 | Utility of Human Rights

8.1 Introduction

The impetus for this study is to understand what informs judicial decision making during custody hearings, with a longer-term goal beyond the scope of the project to contribute to understanding how to reduce the number of people held in pre-trial detention. Human rights arguments are among the foremost instruments for attempting to facilitate change for those concerned with the criminal justice processes, the selection and treatment of detainees, and the conditions that they are held in. It was therefore important to investigate to what extent this discourse does inform judges' decision making processes.

The two previous empirical chapters examined the bounded nature of citizenship and judicial philosophies of justice. They established the targeted oppression of people of specific subjectivities and geographies, and identified how in an authoritarian style, judges go beyond their mandate to enact the punitive philosophies to actively *fight crime* and attempt to remove the anticitizen. With this context in-mind, I now explore the usefulness of human rights as a concept and a as language of reform for engaging with judges and custody hearing decisions.

This chapter will first explore how interviewees grappled with various interpretations and operationalisation of human rights. In contrast to normative discussions relating to universal applicability, notions of rights as an obstacle are highlighted, as well as the conditional application of many rights, deemed finite and in need of rationing. The second section reflects on how judges deal with specific human rights violations relating to presumption of innocence and prevention of torture as key areas of consideration during custody hearings. Interviewees' reflections on the utility of national and international human rights protocols are also examined. The chapter concludes by connecting colonial era social hierarchies and assumptions to contemporary attitudes towards human rights discourse, and thus its limited impact on judicial decisions during custody hearings.

8.2 Human Rights a concept

Polarised Operationalisation

Many interviewees spoke about judges aligning themselves according to a binary division in approach to human rights. Those, especially from the prosecutor group, talked about the increased polarisation in views over recent years. The division was generally illustrated with conservatives and their punitive natures on one side and liberal judges with their 'guaranteeist' views on the other. The two sides were presented as relational philosophies and proponents of each presented the other as problematic.

'Guaranteeist' was the phrase used by many to refer to those emphasising the rights and guarantees of the constitution and holding these aspects of the constitution above all others. For those supportive of this philosophy, the normative, universal interpretation of human rights is complementary to constitution aims. In relation to custody hearings, this means ensuring the presumption of innocence, prevention of torture, fair trial, and maintenance of dignity amongst others. For those on the other end of this spectrum, 'guaranteeist' is thus used as a slur and interviewees recalled having the word levelled against them in a derogatory way when advocating for human rights. S7 noted that that talk of rights has drawn comments such as "comunista" (communist) used as a clear pejorative term and used with venom akin to accusing someone of treason. S7 reported that attempting to do rights-based work with judges led to insinuations that she works at the behest of bandidos and has received varied scornful comments about the political Left from the justice actors considered to hold mainstream views. Those holding such views argue that overt attention to individual rights is a threat to wider societal protections, and rather, public security aims and risk averse strategies should be centred. This vision is represented here by Pr1:

> We also must weigh our role in defending society as a whole. So, you have an individual's right, that individual's freedom and the public security of the whole society. The member of the Public Ministry in the defence of society's rights, weighing these assets, obviously ends up tipping the balance as it will present more results for society. So, if that individual is posing a problem for that society, some measure has to be taken. – Pr1

Many of those operating under this latter philosophy, centring the defence of "society as a whole", also saw punitive responses as a logical next step, as described in the previous chapter. For custody hearings, this means uncritical readings of police testimony, high levels of physical security in court (including handcuffs during hearings), and pre-trial detention as standard and a naturalised inclination to reduce risk for the worthy.

Most explained that those deemed guaranteeist were certainly in the minority and no interviewee suggested that judges were evenly divided between these two approaches. Others, such as Pr4 suggested that rather than a complete dichotomy, a spectrum exists, with many taking-up more central ground:

> I think there are a minority that are extremely guarantor, but it is the minority. I think there is a considerable group that is more punitivist and another considerable part that is this middle path. – Pr4

In my conversation with prosecutors 1 and 2, they acknowledged that it is the duty of all criminal justice actors to guarantee the constitution, but that they believe that a problem arises where judges centre human rights at the expense of society.

> Interviewer: When you were talking about the way the problem is bigger than custody hearings, I was thinking about how some reform talks about human rights, but I know there is other argument saying that this discourse doesn't help the process, but the opposite. I was wondering that you think about human rights and reform?
>
> Pr1: I think so-
>
> Pr2: There is a confusion of concepts.
>
> Pr1: Yes, a confusion of concepts. First, there is a tendency in Brazil among us to say, "Ah, he is very guarantor, the judge is very guarantor", when the judge has a profile of releasing what, eventually, we consider exaggerated. We are all guarantors. That guarantee is to guarantee the Constitution. Even in Italy, it is to guarantee the Constitution. That is what we all have to be: the prosecutor, the judge, and the defender.
>
> What we do not want are libertarian people, who always grant freedom, thinking only of individual rights, disregarding society.

While acknowledging that the constitution allows for the release of some detainees pre-trial, prosecutors suggest that guarantor judges release far beyond what should be deemed reasonable and that such judges exaggerate those protections. Interestingly, Pr1 reaches for Italy in the quote above to show her alignment with a European country, representing what is reasonable and respectable. However, this *reasonableness* is then contrasted with the notion of "libertarian people", who disregard broader societal needs by concentrating on individual rights.

The views expressed by these prosecutors are also emblematic of how many other interviewees relayed the approaches of many judges, with some emphasising that most judges hold similar views. Within such a framework, human rights and those advocating for them were clearly expressed as an obstacle to attaining security.

Rights as awardable objects

As discussed in Chapter 2, normative interpretations of human rights unequivocally locate fundamental rights as the inalienable birth-right of every human. However, through interviewees statements, it was clear that alternative interpretations are not only present in Brazil but are arguably more potent than those presented internationally as normative and universal.

One of the divergences from normative discourse was the way that some interviewees described discussions of rights *arriving* in particular spaces or for specific groups, rather than rights as naturally imbued concepts.

> I think that in common sense, in general, people see human rights as an entity, something as if it were something concrete, something or something diffuse. We're here in a situation of violation. "Ah, human rights arrived, in the prison itself, human rights arrived". People do not have a notion of what these rights are.
>
> …People do not understand, for example, education as a human right, communication, health. They understand that they have a right to health, education, and basic sanitation, but they do not understand it as part of human rights. – S3

The notion of rights *arriving* is indicative of the sentiment that those within that space exist in a context absent of rights, "in a situation of violation". S3 also suggests that rights such as those to health are not interpreted as human rights and thus, those who feel that they are living in violation, do no claim the concept of human rights as their own. Rather, as Pr4 explained, the penal context is deemed to be "too mild" if a detainee is *given* rights by the state and describes this as "the dominant popular discourse".

> So, it's a bit hollow when you talk about human rights in relation to people who are in the custody of the state. I'm talking about human rights in a universal way. But it's as if the consequence for the subject are too mild if he were to be entitled to anything, this is the dominant popular discourse. When, in fact, everyone, both citizens, has an absolute right to their security, the maintenance of their peace, of his physical and mental integrity. – Pr4

Some interviewees talked about human rights as if they were a finite resource. While there are tangible resources such as medicine or beds which could conceivably run out at pre-trial detention facilities, this representation does not fit with human rights related to the protection of dignity or from torture. Nevertheless, the limited nature of public resources was a theme that some interviewees spoke of when recounting the actions of judges in relation to human rights.

> Because it is interesting, the Brazilian Constitution, as it is analytical, guarantees a series of rights to people. It is common for court decisions saying that, "No, the Constitution does guarantee the right to full education, and that your child has the right to day care, to study from the age of four months. But the state does not have the resources to do so". So, there is a reservation of what is possible. "And, given this reserve of what is possible, I know that you have a right, but I, the judge, do not send the state to recognize your right, because it does not have the resources to do so".
>
> …In the criminal environment, our prisons are already overcrowded, they never have room, but it is always possible for them to receive another body. They can always fit one more, because normally that body is black, from a favela, peripheral. So, the judiciary, at times, they are so cruel, that the judges do not think they have any responsibility for the prison issue. They say, this is very common to be said in decisions, including in custody hearing, that this is a problem for the Executive Branch, the Penitentiary Administration Secretariat, it is not his. But it is he who is restricting that figure's bodily freedom. But then, hey, if there's no medicine there, "it's not my problem". – PD4

Here PD4 relates an experience which reveals the conditional nature of constitutionally mandated rights. Interestingly, in the above quote, the public defender identifies an occasion in which a person should receive something from the state, in this case childcare and education, but the judge does not order it to happen, citing an understanding of the lack of resources. However, in the second example, where a person is to be detained in overcrowded conditions, the judge's knowledge of lack of resources is disregarded and states that "it's not my problem". This sentiment rings true with those detailed in Chapters 6 and 7 considering judge's opinions on their role as protectors of society, and that when dealing with anticitizens – conceptualised not only as unworthy of protection but to be actively pursued and eliminated – there is no need to have concern for the viability of rights. A quote from another public defender develops this further, emphasising the enemy status of detainees:

> "It is something that cannot be applied here, we are at war." We often hear the judge say that. I heard from a prosecutor in custody… a case that I talked about – violation of domicile – they broke down the door of a person's house, a family. And she said, "No, that there is no such thing in the favela. That the police can enter anywhere, because everyone traffics in the favela, so the prudent security officer can enter". I said, "Doctor, I am not aware of this definition that you are giving. For me, the house in the favela is also a house. It is not my understanding, therefore, that only houses in the South zone are houses." That's right, and the judge did not recognize a violation… Two Brazils. That's it. Have no doubt. – PD5

In this case, rights are conditional partly because citizenship is conditional. Those peripheralized and deemed anti-citizens can be violated via the application of a logic which says only those in privileged spaces have their homes recognised as official places of domicile. In such cases, constitutional rights are protected for certain groups as privileges, which the next section will expand on.

Rights as Privileges

Several interviewees across all groups spoke about the legacies of the introduction of human rights as a discourse for contemporary interpretations. Interviewees pointed to the use of human rights language introduced to advocate for white, middle class youth movements who were suffering oppression and torture under the dictatorship of 1964-1985. Here explained by PD1:

> If you took the Brazilian historical process, the subject of human rights, it only had relevance at a time, that was in the dictatorship, because the middle class children were subjected to the forces of repression. It was only this moment. Today the great victims of the repressive power are those from the favela, the poor, and the middle class does not care about this group. – PD1

Interviewees explained that such arguments had not been made to prevent or address torture and oppression of black and Indigenous people of Brazil before this point and once the dictatorship was over it was still not extended to these groups in the same way. In this sense human rights were introduced in Brazil for the privileged and they remain privileges reserved or bestowed on those deemed worthy.

When asking interviewees about the extent to which they believed that judges consider human rights in custody hearings, many responded with examples linked to the right to health. I therefore briefly focus here on the right to health as example of a specific human right debated in relation to detainees.

> From my experience, the few from AJD[75] will think about it. The vast majority do not. They think that good bandido is a dead bandido. They should be imprisoned, and that if there is no doctor there for people who have not committed crimes, you do not have to guarantee the health of the convict. – J3

[75] Associação Juízes para a Democracia (the Judges for Democracy Association)

Where rights are conceptualised as privileges, rather than inherent necessitates, the channelling of limited resources towards ensuring rights for those for whom the system is created to eliminate seems incongruous to logic. J3 continued to explain this viewpoint, where there a clear social hierarchy is in place to determine the levels of treatment:

> The vast majority of judges think that prisoners do not have to have them [rights] - you have to first guarantee those of the good people and then you think about the people who are in prison. – J3

J7 felt that for some judges these sentiments ran deeper than jealously protecting resources and state interests to also guarding the boundary for dignity. The below extract is J7's response to my mentioning of the existence of arguments presenting human rights as more of a hindrance than a help.

> No, I understood what you meant, but that is the angry argument of people who do not want law enforcement taking into account the dignity of the human person, because not every human person has dignity. If you assume that only mine have dignity, strangers have no dignity, then why human rights? Human rights are mine, I say. For me and mine, yes. This happens sometimes when an angry person falls under the bars of the law. – J7

The assertion here is that if your point of departure is that strangers (or the Other/anti-citizen) have no dignity, then applying human rights discourse to them makes no sense. The judges adhering to this view do not want the dignity of detainees to be a consideration, as that is viewed as a privilege for those deemed worthy. We can recall the phrase "for my friends everything, for my enemies, the law" to illustrate how those in power jealously guard privileges, away from state-related decision making, while using the law to disempower and oppress their enemies, the anti-citizens. Under such philosophical premises, the question of rights for the disposable anti-citizen makes no sense, as J7 explained:

> When it's the rights of those unworthy people, in his point of view, it is all about killing. Why arrest? Kill them quickly. Why pay for the prison system? Kill at once. Why judge? Condemn right away. – J7

Rights as an Obstacle

Alongside interpretations of human rights as tangible objects that can arrive in a location or privileges to reserve for those deemed deserving, a further conceptualisation was put forward whereby rights are represented as obstacles to security. Some interviewees discussed this as an overtly anti-human rights agenda, and many linked the increased voicing of this view to the election of Bolsonaro. Several made the point that, importantly, the election transitioned the views from peripheral notions to state positions. Others described the election of Bolsonaro and departure of Moro to the Ministry of Justice as "crowning a thought", whereby detainees should not have human rights and instead "the process is a way to punish someone, at all costs" (PD1). Here we see the view that the reality of the justice process is less about assessing evidence, but more about using the law to remove the dangerous Other, to punish "at all costs", even at this early stage of custody hearings.

This rhetoric is linked to the idea of human rights *arriving* in the prisons and that any discussion of human rights was a way of supporting, aiding or protecting criminals. Many spoke of a spike in phrases such as *human rights are just for bandidos*, and *the only good bandido is a dead bandido*. PD5 relayed her experience of the notable increase in the use of such extreme right discourse, even from unexpected corners.

> At election time, for example, it was very evident on social networks, …they complain "Ah, you are defenders of the bad guys." "Only bandidos are given human rights". …They think that whoever is defending them, is defending a bandido should have the same punishment, and it's a very crazy thing.
>
> People were detonating things without any reasoning, being carried away, being carried away by the mass, being carried away by an idea. It was hovering. I swear to you, an idea that- even people who had a certain education took hold of that idea, which hovered in the air and defended it. – PD5

The frustration from PD5 was palpable as she relayed the experience of trying to reason with people, but finding that this punitive rhetoric had gained such traction. PD5 described it as "hovering" in the air and people getting "carried away". Relating this directly to custody

hearings, J6 explained how judges consumed such rhetoric and how it leads to an approach which is the inverse of their responsibility.

> J6: What makes me very sad is that we don't have-- because it's very sad when you see a judge saying that human rights are for criminals because it's our most basic constitutional right. The guarantees in constitutional are fundamental rights in the law. That's it. We are paid to guarantee human rights. That's what you're paid for so when people say that human rights are an obstacle for what they want to do, it's completely nonsense.

As well as human rights being presented as an obstacle to justice, those defending human rights have come under great threat. Several public defenders spoke of how the rhetoric also includes assertions that those defending the human rights of criminals should receive the same punishment as the criminals themselves.

> When they killed Marielle Franco[76], colleagues working in the human rights group were very afraid of dying and remain afraid of dying. I have had everyday situations in my life where people say, "You are going to be murdered. You are going to die if you don't stop it." That I hear-- So, working on the human rights issue in Rio de Janeiro is kind of putting your head in the guillotine.
>
> And this will manifest itself obviously within prisons in Brazil. Brazilian prisons, they are the most harmful and disrespectful to any rights. Why talk about all this broth? Because this whole broth will influence the judiciary, it will influence the Public Ministry, it will influence all institutions, it influences the whole society. The judge is not separate from society. – PD4

As well as expressing fear in completing his everyday work, the above statement from PD4 illustrates how multiple interpretations of human rights existing in public discussion does impact on decision making in court, despite constitutionally mandated guarantees. In a climate in which some citizens are deemed disposable and human rights advocates are assassinated, the sentiments circulate as part of the cultural "broth" that "influences the

[76] Marielle Franco was a human rights activist, politician, and vocal critic of police brutality in Rio de Janeiro. She was assassinated alongside her driver Anderson Pedro Gomes in 2018, and two former military police officers have been charged with their murders.

whole society". PD4 spoke in a resigned tone when concluding that sometimes when defending a client, judges react as if "talking about human rights is something ethereal, it is something imaginary, by a lunatic".

8.3 The Relevance of Rights

The initial section of this chapter considered multiple interpretations of human rights as a concept and how they are utilised in custody hearing contexts. This second section examines specific rights related to the pre-trial context and considers the usefulness of national and international human rights protocols for judges when making custody hearing decisions.

Consideration of Human Rights Violations

While it was interesting to hear about interviewees thoughts on human rights as an abstract concept, I found that some justice actors preferred to speak about specific violations of human rights so as to explain their positions. This subsection will focus on prison conditions and overcrowding, prevention of torture, and presumption of innocence as rights which interviewees highlighted when considering the utility of human rights for judicial decision making in custody hearings.

Prison Conditions

Once arrested, prisoners are detained in holding cells on the court complex to wait for administrative processing and medical examination before custody hearings. When talking about prison conditions, interviewees moved between discussing this space and the prison cells in which detainees are transferred to if judges chose to hold them pre-trial. I start here with my own reflections upon viewing the initial holding cells.

Field notes Wednesday 5th June 2019

> Before I observed any hearings, I was briefly shown the holding cells. The officers at the first gate greeted Fulana[77] happily and made a joke about her showing me around. One said something like, '*if it is X university, then we can leave him in there*'. I think that more than anything, the jovial nature of the conversation sticks in my mind because of what I saw next. Actually, the smell came first. I had smelt it before, in London, Kenya, Uganda, Tanzania, Zimbabwe, Malawi… Of course, it is not exactly the same, but recognizable, nonetheless. A sickly smell that hangs heavy in the air that I have only come to experience in prisons. It is not just the body odour of many men in one place without adequate ventilation or access to hygiene; there is a palpable weight and thickness to the air that immediately sticks to the back of your throat, that makes you tighten your breath and hope that you don't get sick, while you know that by now you have already increased your chances. It is a smell that I have come to associate with pain, frustration and despair, and a lack of hope.
>
> Entering the building, I had forgotten to mentally prepare myself. In fact, I realise that I hadn't been sure about what to expect. I have read about the terrible inhumane conditions in Brazil and years ago I had visited some prisons in Sao Paulo. And I've visited many prisons throughout East Africa, which meant that I was surprised when noticing my own shock at the conditions. Through the corridors, men, mainly young black or mixed heritage men stood, more stooped than really standing, handcuffed in pairs, with heads bowed, literally centimetres from the wall. The men emanated fear. I don't think I caught any actual eye-contact with anyone to read it on their face, but the rooms just spoke of it. The feeling vibrated between the close walls of the corridor and as I walked past them and the holding room, I felt out of place. I felt my privilege, and I felt like I had walked into the darkest hours of the nineteenth century. The lines of people awaiting their fate, packed closely against old, tired, and chipped walls instantly rendered me despairing at the situation, unable to help and the frank conviction that this was all wrong; at a deep guttural level it was wrong. I had (and have) an angry pang that say that this can never be justice.
>
> The holding cells had a front-facing surface that was more grating than bars. I purposely did not look for long as it felt unfair and inappropriate to do so. What I did see was a space that appeared to be similar to the holding rooms in London prisons, but with many, many people packed in together. Just as in many photos available on the internet, arms motioned out of the main hatch in the grate, appearing disembodied, some still, some in constant flux. It was dark and dank and the mixed, muffled sounds contrasted heavily with the lines of hunched and handcuffed men, all apparently arrested with the last 24 hours. I believe there was one women's cell to the men's three, but I wasn't purposely checking for the details as I felt as if I was intruding. There was a separate room where people could be interviewed, although Fulana said that she avoids it wherever possible and interviews them in the other building and given the atmosphere, I can completely understand why.

[77] A social worker (not real name)

Interviewees mentioned prison conditions in this part of our discussions to demonstrate the lack of concern for detainee wellbeing embodied within the structure of justice mechanisms in Brazil. If these are the conditions in which people are held as part of the functioning of justice, then, as many pointed out, it is clear that justice and human rights do not coexist in practice. J7 was particularly vocal about this aspect and reflected on his role in the functioning of the system.

> This is what we are experiencing, my friend. These are our concentration camps. These are our modern slave quarters; this is what we have. I am in a place of collusion with this because I am one of the enforcers of the law. With all the resistance, I also have my responsibility for that. – J7

J7 explained that he has been outspoken about improving conditions and providing resistance to the status quo, but that he works against an entire system set up to overlook these problems. I asked interviewees whether they believed that prison conditions informed judges' decisions about pre-trial detention and whether judges visited prison cells.

> There are very few. You can count on your fingers the judges who will visit a prison, who will know the reality of a prison. They don't want to know where these people are being sent. "Ah, they deserved it. They did it in that place, so they deserved it. If they're there, it's because they committed crimes". The trials have been like that. – J7

This disregarding of the realities of pre-trial detention relates to the previous chapter, where J2 felt it important to consider external factors such as the security climate when making decisions about custody, but he distanced the importance of external factors such as prison conditions and overcrowding. Several interviewees made the point that any concern about inhumane detention conditions that judges may have, is often overridden by concerns about the assumed threat that the detainee may cause. This assumed threat enmeshed with assumed guilt was another rights violation broached by interviewees.

Presumption of innocence

Many interviewees spoke of the accepted minimisation of discussion around rights, where assertion of assumed guilt removed any necessity to consider rights. Interviewees repeated variations on the sentiment, "oh he must have done something" (J3), leading to a naturalised

assumptions that any *given* rights or privileges can and should be removed. The sense was that judges may agree in principle to the abstract concept of human rights, but it is in the discussion of specifics that the fissures are revealed. S1 explained that when highlighting the right to presumption of innocence, judges have responded by saying, "does that mean that you don't trust the judge's judgement?" and imply impertinence in the question. The intimation here is that while the law does assert a presumption of innocence, the judges' superior judgement (as discussed in Chapter 7) should be considered to supersede even the constitution.

Custody hearings are related to *flagrante delicto* (caught in the act) cases, so justice actors do often enter this situation presuming guilt. However, the custody hearing is not meant to make a judgement on this but purely assess the risk of release pre-trial and to provide an opportunity for the detainee to disclose torture. Here, Pr1 asserts her position contrary to this:

> Pr1: Now, the fact that human rights must be preserved does not mean that the fact that the person has practiced crime should be disregarded in order to analyse whether he should be detained or not.

The emphasis here is not on risk at all but focuses on the assumed guilt (treated as fact) and determination to detain. This further represents the view that the court actors aim to remove those deemed dangerous, rather than assessing the facts according to the law. PD1 speaks to the feeling amongst many of those interviewed that the slightest indication of possible guilt is enough to detain, rather than considering detention as a last resort.

> It only needs a red flag and it's over. So, this is a complicated scenario. You do not have that human rights mentality, that you're here to protect others' rights, no. The concern is with the victim. And if I'm defending the guy, I'm almost as bad as him. So, it's complicated. – PD1

As so many people presented in custody hearings fit the constructed figure or the bandido or traficante (the anticitizen), the urge to remove them from society overrides any considerations of possible innocence. As the next subsection explains, this impetus to expunge also supersedes concerns of violence employed to secure this eventuality.

Protection from Torture

J3 noted that at the inception of custody hearings there was "internal resistance" within judiciary from some quarters. J3 explained that judges eventually agreed to the introduction for increased pay, but were still against it. J3 spoke of a certain kind of judge who called the process "bullshit" or said "I'm not a doctor to check for wounds" relating to the requirement to ask about torture during arrest.

> He did not agree with the custody hearing. He thought it was bullshit. That he was "not a doctor to check for wounds". You hear barbarities. That now "the judge has become a nanny". So, it got worse. And in return for a fee, they were happy to do it, but in quotes. He still had an internal resistance to doing that. – J3

To again link to the previous chapter, many judges do not consider their role to include consideration of the rights of the individual (presumed guilty) detainee. According to several court actors interviewed, this lack of concern has translated to a slack process in reality, whereby if a judge does ask the detainee about torture (this was not always the case from my observations), then this was noted as a point of administration and usually nothing further was done about it.

J1 chose to speak about torture when asked about the usefulness of human rights for custody hearings. J1 noted that his official role is to report any possible incidents, however, he maintained that there is a difficulty in knowing if the allegations are true and whether any injury happened when it was claimed to. Several public defenders stated that they did not believe that judges took detainees' accounts seriously and would question their statements, essentially gaslighting those reporting torture. J1's statement is suggestive of such attitudes.

> It's a complicated situation in relation to reports of aggression, mainly. Sometimes we don't have a lot of clues here. You've probably seen some hearings, and the person sometimes claims he's suffered thousands of assaults, and sometimes he doesn't have a scratch on his body.
>
> And it's obvious that we know about police violence, but we also know that the defendant has the right to lie, it's part of it. So, without a medical report, without a very detailed examination, without listening to both parties, it is difficult to know whether there was an assault or not. So, generally we send it to be investigated, the police audit will find out, and that will be further down the road. But as a rule, it is very difficult for you to find cases where the aggression is prior to the practice of torture for you to obtain a confession. – J1

Police violence and torture is well documented, (as detailed in earlier chapters), yet J1 peripheralizes this possibility. Interviewees who spoke of this dismissal or questioning also noted that such interrogation only took place for those racialised and spatialised as anti-citizens, and never with the few middle-class white defendants they had come across.

Such hierarchical treatment also combines with other structural problems within the justice system. Interviewees spoke of the desensitisation of those in the system to the witnessing of black people's pain. Such normalised and targeted violence has clear resonance with institutionalised violence against enslaved peoples. J3 spoke with dismay as she recounted two "extreme occasions" where detainees were so clearly in pain that she personally called ambulances because the court staff refused to, and that "I had to force them to take him to hospital". Several interviewees related the routine violence against demonised groups to that of Inquisitional processes, whereby pain was legitimised as a method of justice practice.

PD4 argued that torture is institutionalised through the justice system and that historically it has always been institutionalised. PD6 talked about the cyclical process of the negation of "the most elementary social rights" and structural discrimination. PD6 expressed further frustration with the governance of public defenders, which they described as being institutionally focused on internal privileges and status, rather than about the actual needs of those in need of help. PD6 referred to this framing as a how the institution has been "forged in a colonial way" and thus, upholding historical asymmetries of power, rather than appropriately championing the human rights of detainees.

Utility of International Protocols

I asked judges and other court actors about whether international protocols[78] helped them during custody hearing decision making. J2 explained that while he was aware of regional protocols relating to custody hearings and human rights, he did not know the details and that they were not a feature of his daily thinking. J2 explained that he has felt some resistance to international protocols in the past and that this is partly as "there is no culture to promote or debate" these ideas.

> Perhaps you have some resistance because it's not clear where it fits - you do not open it in the Constitution and find it right there. You must do some research. Often, you don't know what international protocols were included in the Brazilian legal system, through the conventions.
>
> …Just to give an example. Sometimes relevant laws in Brazil are reported and such. There are debates in the academy and even in courts as well. When an international treaty is passed, it does not have as much focus. Then there will be no debates, either after passing the debate or during the legislative process… Maybe we don't have that culture yet. – J2

J2 explained that to include thinking about international protocols would involve extra work that was not a feature of his training and which he did not feel was necessary. J7 discussed how he does use international standards relating to children to justify treatment of teenagers in court as victims of exploitation rather than criminals, but felt that he is "unique" in making such an application.

> "In my thesis, I absolve all teenagers who are arrested as traffickers because, before they are traffickers, they are victims of child labour. But my vote is unique". – J7

This proactive use of international standards in a context where many others would consider it unnecessary or extra work illustrates the space within the justice system for judicial discretion, and that while it is possible to apply such protocols, many choose not to.

[78] Such as UN Nelson Mandela Rules, UN Bangkok Rules, and regional protocols such as the American Convention on Human Rights (Pact of San Jose, Costa Rica)

Interviews with public defenders support the notion that judges often are either unaware of international human rights protocols or are unwilling to do the work (portrayed as superfluous). I asked interviewees whether they believed that judges consider such protocols and these quotes from PD4 and PD2 are emblematic of many responses:

> We have been trying to apply the decisions of the Inter-American Court of Human Rights in the proceedings here in Brazil. But when you invoke such a decision in the process, the judge is amazed. It is a process under construction. It is a construction that will take a long time. – PD4
>
> I think that the professionals who apply the law here at the custody hearing, they don't have that concern. The Constitution itself carries in its body, in the text, the presumption of innocence. …Handcuffed. Is this treatment of the innocent?... Then, the Constitution is violated, and the treaties are violated beforehand, without the slightest concern. There is no such concern, no. – PD2

Public defenders were clear that little to no concern was given to international protocols to the extent that judges were "amazed" that they were mentioned. Pr1 also mentioned what was considered the unnecessary use of handcuffs when explaining the lack of adherence to international standards of treatment. The below is an extract from the interview with PD1 after I observed the custody hearings with them earlier in the day.

> Interviewer: I noticed you mentioned Mandela's rules, that sort of thing, international protocols.
>
> PD1: Yes.
>
> Interviewer: Do judges give importance to this, in your opinion?
>
> PD1: No, not one.
>
> Interviewer: So why do you keep using it?
>
> PD1: You know, last week I joined a collective against handcuffing in the courtroom. You know, it's curious and even good that you're English. In the nineteenth century, Brazil had a series of treaties with England to end the slave trade. Except that Brazil did not comply, and the expression "for English to see" was created.
>
> …And that's what I- when I mention these protocols, they look at me like I'm crazy! They are made available on a website of a public judicial oversight body, which is the National Justice Council, and no one observes them. So,

> I say, damn it, that logic of *for the English to see* has not passed yet. Our past is not so far away. We keep repeating the same things. So, literally, Mandela Rules are not observed, Bangkok Rules for the issue of the imprisoned woman is not observed. It even seems exotic when you mention this, so no.

PD1 explained that while the protocols are available to use, judges treat them as "exotic" and appearing perplexed, added that "when I mentioned the protocols, they look at me like I'm crazy!" PD1 also called on the expression "for the English to see" (*para inglês ver*), to express how government may sign international treaties to appease an international audience, yet the actions show no commitment to putting the rules into practice.

Other interviewees also questioned the usefulness of protocols in practice. Pr4 felt that international protocols are valuable for monitoring extreme abuses but that the expectations are distanced from the realities of many countries.

> Interviewer: Do you think that the Costa Rica Pact or the Mandela Rules are viewed as important here or are they not so relevant?
>
> Pr4: Yes, there is a little bit of that. I feel it a little. …It is clear that striking cases of injustice deserve this international attention and international protocols are there for that, so that there is constant vigilance, but, also, I understand those who criticizes this a little, because they are decisions, sometimes, made by people who they are totally divorced from the reality of that country: their methods and the reality of lack of resources, of misery. We have an endemic corruption in Brazil that has always existed, so you have a weakened society, weakened control bodies, and broken police.
>
> So, we cannot have a Ugandan reality and want to have a Swiss result. So, I understand critics, "Oh, that's not part of our reality." In part, yes, but it is important that we respect this north, because if we don't even have that, we go back to barbarism. We don't have any brakes. And these more conservative movements, with these more nationalist biases, preach that a lot, "Oh, what is the point of the UN?" It's very weird that, it's very crazy, because all my life I've had the UN in super- and I still do, in excellent account.
>
> It is a very important body to guarantee basic respect for human rights, nations, and everything else and, nowadays, in Brazil, you see this discourse very trivialized, that it is useless, that rights are not even there for them.

The emphasis on external vigilance and high profile cases from Pr4, illustrated how she believed protocols to be important for being held to account on the international stage, rather than asserting collective agreement of UN universal rights and ensuring at least the minimum standards of treatment for prisoners. Pr4 also notes that she can appreciate the criticisms of how UN policy decisions are "divorced from the reality" of Brazil. Pr4 highlights her frustration with the inherent expectations of protocols that every country can or should achieve the same outcomes when stating "we cannot have a Ugandan reality and want to have a Swiss result". At first this appears to be an argument questioning Western values or pointers of achievement for contexts of the global South, but Pr4 does also gesture towards ontological assumption of a natural linear trajectory of development in-line with global North capitalist parameters by suggesting that without such guidance "we go back to barbarism". The evocative term 'barbarism' holds connotations related to discriminatory and derogatory stereotypes about African and Indigenous peoples, especially pre-invasion and enslavement – rather than barbarous practices of European empires – and thus also suggestive of a Eurocentric bias. Pr4 also identifies the trivialisation of human rights discourse and how conservative movements proactively question the function of the UN and its policies. The relevance of universal conceptualisations which underpin international protocols was called into question by several interviewees

(Ir)Relevance of the Universal

The first section of the chapter highlighted how there are multiple interpretations or ways that human rights are operationalised in Brazil, and over the course of the interviews the relativity of other important concepts was also questioned.

> Of course, being a judge in Switzerland is not being a judge in Brazil. Impartiality in Brazil, impartiality in Switzerland, impartiality in the United States, impartiality, are not the same. I think it's something we should think about: what is impartiality in specific contexts? Our job is to read and apply the law, but we interpret the law, so, of course, there's a lot of *us* in the outcomes. …A motive that should be considered in some way here is completely different in Switzerland for someone who was raised in Switzerland or will have a wonderful life in the United States or live in Canada or live in London. – J6

J6 argues that concepts such as "impartiality" and "motive" as defined in the global North, do not mean the same thing in Brazil. The point here is the challenging of the uncritical consumption of Northern/Western logics of linear development, philosophies of justice and methods for reform.

When considering the philosophical or a policy relevance of human rights for Brazil, interviewees often couched their discussions in relation to the treatment of other movements or policies. Interviewees spoke of the tendency in Brazil to uncritically import ideas related to the dominant conservative interests, while providing resistance to philosophies that aimed to reduce the inequalities ingrained in the socio-economic hierarchies. J3 in particular criticised uncritical importation of discourse from European contexts, naming it "a colony syndrome", to presume European intellectual supremacy.

> It's a colony syndrome, of importing discourses from different realities and thinking that you're just going to get it. And many of the court-- The greatest example of this is Barroso, who is the STF minister, professor of Constitutional Law at UERJ. He was a state attorney, so he has a very strong economic law bias. Not so concerned with the realization of rights, but with the cost that this generates, and he imports all these theories of Economic Law to Brazil without considering the social reality. Germany is the favourite country to import things from. I don't know if it's because it's a difficult language, we think it must be smart what they say, I don't know. But Germany, they love it - Barroso loves to import theory from Germany. …You cannot use the socioeconomic reality of Germany in Brazil. – J3

J3 makes the case that when a popular conservative figure imports policy from a European or North American nation, they gain widespread support, partly because it affirms a colonial era supposition that the Europeans know better. As well an uncritical importation of policies from specific jurisdictions, interviewees reported the active blocking of ideas if they did not come from this legitimised knowledge production base of Europe or North America. For example, J6 mentioned the introduction of a new Brazilian initiative relating to pregnant women, to illustrate how many judges provided resistance to human rights for detainees. J6 recounted that in a workshop on the topic, judges argued that if the USA and Europe do not have such policies, then Brazil also did not need to implement them. J6 referred to this as "a very colonial mindset".

Some interviewees also noted how the more punitive justice actors did also find reason to question uncritical importation of policies where they conflicted with their underlying ontological positions, such as distancing the anti-citizen from the privileges of rights. For example, PD1 shared an occasion in which a judge reacted negatively to the prospect of human rights training by complaining that him "ah you're coming here with you Tordesilles Treaty[79]", intimating nonlegitimate intervention from abroad. J3 also recounted how she had explained some interesting projects on mental health in Finland to colleagues and the other judges responded by saying "ah but Finland is Santa Land and the same will not work here."

The critiquing of external policies (often promoted as having universal application) appear at first to be a point of conversion for both the conservative and liberal camps. However, the assumed consequences of questioning importation are clear points of diversion. These divergences play out in the response to human rights training for judges, as while more punitive judges dismiss human rights discourse as irrelevant for their context, the smaller group of liberal judges search for more nuanced and context-specific applications.

I asked interviewees about their experiences of judges' responses to human rights training. I asked this to better understand the value that is given to the discourse and thus how relevant it is for decisions in hearings. The feeling was that, almost exclusively, judges are not open to hearing about human rights. S1 explained that they will go to the training if they must but the information "goes in one ear and out the other", because they believe they know better. Sentiments were related to those discussed in the previous chapter whereby judges believe their judgement is superior to any piece of legislation. S1 noted that even where there is some opposition, "the most punitive shout the loudest". Likewise, J3 explained ulterior motives for attending human rights training.

> J3: I do not think they give much importance to them, no. You may be able to sensitise one or two with these courses… Now the CNJ has determined that that for you be promoted due to merit, you must complete 40 hours

[79] The 1494 Treaty if Tordesillas, signed by Spain and Portugal divided what they considered newly discovered land across the South of the Americas between the two empires.

> of courses per year and always within the last two years. So, you must be always improving, in quotes.
>
> …I recently did a restorative justice course, which had an extremely conservative criminal court judge, and he was not sensitised by the possibility of you solving crimes by a method other than formal courts, because here comes the question, "Ah, but the victim?" He doesn't hear the rest, understand? Because he's accustomed the idea that, "I'm a judge, and you have to have a custody hearing because the Code says so". …But he made it clear that he was there for the hours. – J3

J3 describes how judges ally themselves with the victim's positionality and in opposition to the detainee, meaning that human rights sensitisation in received as if aiding the enemy. Once the judge has made this assessment "he doesn't hear the rest", as it is counter to his way of being in the world, his dichotomous ontology. In J3's eyes, many judges merely attend training related to human rights to accrue the necessary hours to gain promotion, and thus, their actions are purely performative. J3 is also critical of external conceptual imposition, but unlike those who conclude rights discourse is therefore irrelevant, J3 contends that those rights persist, but need to be considered in relation to the specific context.

> I am very critical of this imposition - a Western conception of a general human rights. I think you always have to consider the social reality, obviously, because you have rights that ultimately-right to health, right to education, right to housing. But you always must weigh with the social question of the country. – J3

J3 suggests that the social reality – indicating the combined issues of access to fundamental rights such as healthcare, education, and housing, as well as state violations of rights through violence and torture – means that the impetus behind human rights "needs to have a greater effectiveness of human rights in Brazil than Europe". J3 added that "human rights are very beautiful in Switzerland and Denmark. Here in Brazil, it is another reality – of social inequality". Some decision makers therefore felt that given the social context of regular violations in Brazil, human rights are arguably even more important than in other places. The lack of universal agreement over conceptualisation or application is thus not a reason to disengage for J3, but rather an indication that an interpretivist approach is needed to replace the occidentalist pitfalls of positivist approaches to rights.

8.4 Discussion

This chapter contributes to the understanding of how normative discourse of human rights relates to the real-world practice of justice in custody hearings in Brazil. The complicating of universalised notions of human rights provides a more nuanced understanding of a plurality of conceptualisations of human rights. The normative conceptualisation of rights naturally imbued for all people does exist in law and in rhetoric, but it competes for conceptual dominance with other characterisations such as entities that can *arrive* in a location, objects that are awardable or interpreted as privileges, as well as being seen as problematic and obstructive to justice. Acknowledging that anti-human rights rhetoric is widespread, human rights as a concept has been delegitimised in the eyes of those who are most violated, and this has diluted the power of rights as a language to hold the decision makers to account.

Much of the information presented demonstrates the presence of coloniality in contemporary justice practices, which is another important contribution of this chapter and relates to Aliverti et al's (2021) temporal dimension of decolonising the criminal question. While law exists to prevent the rights violations described above, arguments were provided to suggest that such rules have only ever been in place as tools for the powerful to use against the disposable masses, rather than moral standards to which they hold themselves, illustrated in the phrase, *for my friends anything, for my enemies, the law*. Colonial logics related to Inquisition and just war are clear in the willingness of judges to not only overlook the violence of state actors and institutions and the foregoing of the presumption of innocence, but also in the couching of this treatment within a moral framework claiming to be working for the protection of society.

Interviewees referred to specific violations of rights related to custody hearings as vehicles to illustrate that if current detention conditions, presumptions of guilt and institutionalisation of violence and torture are part of the functioning of justice, then justice and human rights do not coexist in practice. Interview testimony adds to existing critiques of policy transfer and has identified how applying traditional human rights training with judges does not lead to intended changes in actions or philosophy. This reflection on the current state of human rights

training specifically and human rights as language of reform more broadly is another important contribution and is indicative of the spatial dimension of coloniality. In the current form, interviewees contended that most judges are not positively disposed to human rights training and merely attend them to gain promotion. Using international protocols can seem like and "exotic" idea (PD1) and it was reported that judges are largely unaware of them or unwilling to do what was deemed *extra* work to use. In this sense, international protocols are no different from the *leis para inglês ver* during empire and can be considered *laws for the United Nations to see*.

It was also interesting to see how interviewees connected human rights related to custody hearings with European and North American philosophical dominance. Some interviewees invoked European and countries to demonstrate intellectual alignment with what is deemed reasonable and respectable. Others referenced how importation of European and North American policies are uncritically welcomed partly because it affirms a colonial era supposition that the Europeans know better. However, whether a policy was born of Brazil or elsewhere, if it contradicted the underlying ontology of the punitively-minded elite, then arguments could always be found not to implement them.

This brings the discussion to the subjective element of identifying colonial era assumptions. Interviewees remarked on the normalisation of extreme pain of black Brazilians and one judge recalled having to demand ambulances, where others were inclined to do nothing. As earlier empirical chapters noted, judges are accustomed to black pain and suffering, and socially distanced to the extent that they do not extend empathy to many that they judge. It is clear that these measures are wrought against a specific group, those racialised and spatialised as dangerous Others. Therefore, considering the human rights and wellbeing of the anticitizen is nonsensical for judges focused on the war on crime. The thought of the enemy detained in insalubrious conditions does little to prick their conscience of those judges concerned with fighting crime and thus concern for their human rights appear as illogical as colonial elites would have felt showing concern for the treatment of enslaved people, they deemed less than human, or the worrying for the wellbeing of enemy combatants during an ongoing war.

This chapter has considered the value of normative human rights discourse for judicial decisions about pre-trial detention in a context where the law is used as a method of oppression against targeted groups. The final empirical applies the concepts and theorising built over the last three chapters to observations of custody hearings and examines how power dynamics in and around court inform pre-trial detention decisions.

Chapter 9 | Courtroom Dynamics

9.1 Introduction

The first empirical chapter (Chapter 6) considered the underpinning ontological points of departure for judges in Brazilian society, the racialised and spatialised boundaries of citizenship and the consequences for justice, and the importance of dichotomous characterisations of those worthy of protection and security in opposition to those deemed anti-citizens. Chapter 7 considered the philosophies of justice employed by judges in custody hearings and how the strategically selective nature of recruitment and training of judges leads to a perpetuation of traditional power dynamics. This chapter also introduced the conceptualisation of the 'anticitizen', a cocreation alongside the crime fighting judiciary on a modern moral crusade. Chapter 8 then considered how human rights discourse is used in practice and the utility of human rights as a language for advocating change. This final empirical chapter keeps all of these philosophical considerations in mind whilst holding a lens to the behaviours in and around the court to examine how interactions and physical surroundings affect decisions.

The chapter is divided into two broad sections. The first reflects on the environment and procedures that are standard to the custody hearing process. This includes consideration of how the physical architecture of the courtroom and the administrative processes within them contribute towards judicial decision making. The second half of the chapter considers the interpersonal dynamics and to what extent the presentations given by prosecution and defence influence the decision to release or detain pre-trial. This chapter combines interviewee statements with my own observations in and around custody hearings.

9.2 Procedural Dynamics

Scenic Distribution

I start here with a reflection from my field notes:

> Fulana[80] kindly showed me around the five courtrooms, which were really fairly small office type rooms. Each has a raised platform, with space for a judge, an assistant and a prosecutor, and a lower space for a detainee and defence. Each space has a microphone for each person, although it seems this is purely for recording purposes rather than any sound amplification. Only four of five courtrooms were in use that day. I was told that there were more than 80 cases to deal with that afternoon. – Field notes 5/6/19

The physical architecture of the courtrooms elevates the judge and prosecutor above all others involved in the hearings. This physical elevation reflects the status hierarchy that interviewees related to me in interviews. PD1 identified this power differential as important for influencing judges' decisions:

> There will be the judge and, on their side, will be the prosecutor. And the defender will be far away with the defendant. So, even for a layman, he should question, "Gee, why is that guy there so close, and the other one who is defending so distant?" This scenic distribution has a kind of power there too, you know? … Here in Rio, they must be right on top. The whole problem is this. If you take, for example, Lula's judgment by Moro, it's the same logic. The prosecutor is on the judge's side. You do not have to have this—Symbolically, it happens as if it's a partnership. It is not meant to be a partnership; each has their own job. – PD1

PD1 highlights the power of this "scenic distribution" and explains how this is a physical manifestation of the symbolic partnership between judge and prosecutor, as played out publicly in judge Moro's coaching of the prosecution in former president Luiz Inácio Lula da Silva's trial. PD6 also used the term "scenic distribution" to explain how the design of the hearings favours the prosecution, "as if they were a team, partners in a team". A third public defender also laments the interconnectedness of the judges and the prosecution:

[80] A social worker (not real name)

> And here in Brazil there is also an issue that is very evident. The Public Ministry and the Judiciary are very interconnected. It has that disposition- I don't know if you have been to a hearing here. The scenic layout of the courtroom is the judge on the prosecutor's side, and the lawyer is down here. So, you have a bad symbiosis for the process between the Judiciary and the Public Ministry. This is also an element, whether you like it or not, that favours a trend of pro-accusatory thinking. – PD8

PD8 names the interconnectedness "a bad symbiosis", recalling the similarity between contemporary justice practices and inquisition style hearings, where the prosecution and judge combined to favour "pro-accusatory thinking". I will return to the theme of inquisition when discussing the interactions and partnership between judge and prosecutor in the second half of this chapter, but this short section was necessary to explain the systemic imbalance created by the hearing set-up. The next subsection now continues with the procedural theme and addresses the entrance of the detainee to the court and initial points of administration.

Detainee Processing

While the treatment of detainees certainly has an important relational quality – the interaction between humans – I have included the way the detainees are processed by the court as part of procedural considerations due to the consistent way detainees experience the institutional machine of the court. In the previous chapter, I included an excerpt from my field notes describing the conditions of the holding cells for detainees awaiting custody hearings and recalled that, "[t]hrough the corridors, men, mainly young black or mixed heritage men stood, more stooped than really standing, handcuffed in pairs, with heads bowed, literally centimetres from the wall". I return to these reflections here because judges also witness this treatment of detainees as they walk through the complex. Observing such treatment – treatment that judges would never expect or tolerate for someone from their own social group – normalises the lower standing of the detainees, thus asserting their anti-citizen status before the hearing begins. The importance of non-verbal indicators of worthiness was noted by several interviewees, with some highlighting the distinct link to historical practices.

> PD3: And here, I don't know if you noticed prisoners walking barefoot? This, at the time of slavery, if the person walked barefoot or not

> was what showed whether he was a free man or a slave. So here I think we have a slave ship a-day. I think that the fact that they are barefoot has a symbolic effect that we do not notice. But there is still a lot of the slave ship here inside the prison unit.
>
> Interviewer: Yes, I saw many people without shoes, with clothes that don't fit.
>
> PD3: I was in Zanzibar, a photo reminded me of that time. I will show you. … [shows a photo on her phone] This was a monument they made there where the former slave port was. And then when I saw this, I immediately remembered here, because it is exactly this scene. Okay, the chain is not around the neck, but it is around the hands. And for me, this is reproduction of the same.

I include here (Figure 5) a reproduction of the photo PD3 showed me to indicate the similarity between the treatment of enslaved people during empire and contemporary treatment of legal citizens accused of crimes.

Figure 5: Memorial to those sold at the Enslavers' Market, Zanzibar, Tanzania

PD3 refers to "a slave ship a-day" to equate the cohort of detainees that the court receives. The public defender directly equates the inhumane treatment of enslaved people with the contemporary treatment of detainees through the daily practice of law.

I return here to my field notes to reflect on the entrance of detainees to the courtroom from the hallway where they had previously been standing in handcuffs against the wall.

> All detainees were dressed in a white t-shirt with the words 'audiencias de custodia' (custody hearings) in black. The majority had blue shorts and flip flops. This reminds me of the school uniforms I see primary school aged children wearing, although they don't usually wear flip-flops. In fact, several detainees had no shoes at all. One large detainee was wearing clothes that did not come close to fitting him. I felt incredibly uncomfortable as it seemed very demeaning, although he made no complaints. His shorts did not do up and the t-shirt barely covered is chest, leaving his stomach completely exposed. – Field Notes 5/6/19

The detainees were not permitted to wear their own clothes, which gave the impression that they were already considered condemned prisoners, even though they had not had a trial. I also noted the similarity of the clothes to infant and primary school uniform, which also may lead to an infantilising effect. This recalls connotations of racialised notions of (under)development asserted by early colonising powers and later by social Darwinism and eugenics.

Some interviewees reflected on how this treatment is only tolerated for poor and racialised groups who are particularly targeted by the *em flagrante* or 'caught in the act' arrests. Here a prosecutor identifies how, from start to finish, those lacking in social capital are treated worse by the system.

> Pr4: 'Arrest in the act' only catches the poor. Have you ever seen a little white man being arrested in the act? It doesn't happen… Can you imagine a corrupt white-collar prisoner arriving barefoot and handcuffed at the Custody Hearing?
>
> Interviewer: It is hard to imagine-
>
> Pr4: -It's not possible to imagine.

The point here is that the judges expect only a certain demographic to be brought to court as a result of *em flagrante* arrests: those deemed anti-citizens. The absurdity with which the prosecutor views the idea of a privileged white man entering court with no shoes is illustrative of how this treatment is not an inescapable or fundamental element of the process, but a choice tolerated for those deemed unworthy of dignified, humane treatment.

I was taken aback by the stark juxtaposition between the suited judge and prosecutor, and some detainees who were forced to sit in the formal setting of the court, barefoot and with their bodies mostly exposed. In previous chapters I have recounted how interviewees believed that hearings take place with an assumption of guilt rather than innocence and it was my sense that the processing and treatment of detainees in this environment only served to facilitate the assumption that these people were somehow *lesser* and *underserving* of fundamental rights, thus facilitating judicial inclination to detain. My notes at the time underscore this sentiment.

> My overriding feeling was that these were people already in the midst of punishment. Physically restricted, stripped of identity, held in squalid conditions, bound to strangers, and oppressed. They were not brought before the judge as people who may be innocent or victims of circumstance. They looked labelled as criminal and undeserving. Bereft of basic dignities such as shoes to walk in or clothes that fit. Moved like cattle and held like prisoners of war. – Field notes 5/7/2019

Administrative Procedure

> J1 didn't seem to mind me observing his hearings. He maintained a stern but neutral look throughout the entire afternoon. To his left sat a man who ran the admin side of the hearings. He noted who was up next and asked the detainee their name, age, address, contact names and numbers, CPFs[81], number of children and any disabilities etc., although sometimes the judged asked these questions. Many detainees didn't know their CPFs by heart. On those occasions someone else in the room seemed to have it and would dictate it to the judge or assistant.
>
> Sometimes, two detainees were received together where they had been arrested for the same alleged offence. In these cases, each had their own set of handcuffs, but they would also be forcibly linked whereby one had thier arm though the arms of the other, the way a romantic couple links arms. So, for either of them to be able to sign the paper on the desk, the other would have to adjust their body and contort themselves in an awkward way so that their head was almost on the table. It felt demeaning, but nobody seemed to blink an eye.

[81] Cadastro de Pessoas Físicas (Natural Persons Register)

> On one occasion there were not enough chairs for both detainees to sit down because there were two public defenders. There was one chair free, so I gestured to the officer that they could use my chair, plus the free one. But he looked at me with a smile that suggested the idea was ridiculous. With the detainees bound to each other and standing throughout the hearing, the form signing on this occasion called for even further gymnastics.
>
> The desks were full of papers overflowing in some places. It looked as if a vital piece of paper could easily be overlooked, missed, dropped, or passed to the wrong person. While discussions were ongoing, the Admin would print out a form for the detainee to sign. This would usually happen just as the judge had finished his rapid explanation of the formalities of a custody hearing and why the detainee was there. I'm sure he recounts it in his sleep considering he said it 16 times that afternoon alone. But it was so fast! I found it incredibly hard to understand. I have to assume that for many detainees, unaware of formal law processes, such a sprint of an explanation must be confusing. Some appeared be injured or dazed, but there were no reasonable adjustments made to ensure the information was accessible. – Field Notes 5/6/19

I begin with my observations of the initial phase of custody hearings to underscore two points. Firstly, that little concern was given to the dignity of the detainee. In addition to the descriptions of uniforms (or lack thereof) in the previous section, the physical contortion expected of detainees in order to sit and listen or sign their name was illustrative of the normalised and institutionalised nature of a lower standard of treatment and rights for certain people.

Secondly, during my observations I noted that there appeared to be little regard given to whether the detainee understood what was happening. The technical language, the speed and the interruptions all coagulated to create, in what appeared to me, to be a stressful and unclear experience for the detainee. I record these points to illustrate that it appeared that fundamental rights were not a factor of detainee treatment in hearings, and that decisions about detention were consistent with this in the sense that basic rights were not an informative factor either.

As established in the previous chapter, many Brazilians connect the introduction of human rights to the prevention from torture, and therefore, the fact that a key part of the custody hearing is designed to provide an opportunity for detainees to disclose any torture or ill treatment, means that there is an acute moment in the process to consider human rights. I refer to my observations of this moment:

> The judge did ask all detainees if they had been physically hurt by arresting officers. Approximately one third said yes. In such a case, the next question was "do you know their name", or if they didn't know (the case in all but one example), "was it a military police officer?" They were then asked to give a description of the officer. The descriptions didn't go beyond, "tall", "strong", "dark", "short hair/bald". It wasn't clear what would happen with that information. Some were asked if they had been examined or photos had been taken – some said yes, but not all. I remember [during a previous visit to Brazil] being in JX's court and watching her get down from her platform and take pictures herself, with her own phone of the injuries that a defendant reported were caused by police.
>
> It seemed to me that the officer guarding the detainee hovered very close, almost looming over the detainee while they were asked about his topic. While I understand that people are particularly concerned with security, I can't help but assume that such an intimidating physical presence in uniform must have some kind of effect. Having said that – several did claim abuse, although the complaint always related to something that occurred during arrest, not while in custody. This of course may have been the case, but I know that from reading reports from Human Rights Watch and others that beatings and torture are not uncommon in police custody.
>
> Detainees' hands were always required to be under the table. Many automatically lowered their heads and the officers told them, "No, here you look up". It seemed apparent to me that in most other areas they are instructed to look down at the floor. – Field Notes 5/6/19

While the focus of this study is not about the investigation of torture, the way that this part of the process is carried out does tell us something about how the detainees are viewed by the judge and how this assessment may impact on their decisions. PD1 pointed to the lack of interest from judges in thoroughly investigating the possibility of maltreatment:

> You were with the judge today. He is a quiet person and everything, but, for example, in the matter of torture - I know that this is not the object of research, but, for example, he said, "Oh, you want to talk or do not want to talk?". But look, one of the objectives of custody is the question of

> torture. There is no room for that. …So, I think it's a bit of a misunderstanding of the matter. You know? In Brazil, it has been imprinted that human rights are for bums, to help bandidos, you know? – PD1

My observations echoed those of PD1 in that the questioning about torture did appear to be more of a paper-based exercise than one designed to prevent and investigate human rights abuses. Questioning was minimal and it was no suggestion during the discussion that any further action would be taken. The lack of follow-though meant that, again, the phrase *leis para inglês ver*, seemed extremely relevant. I contrast this in my notes to an example of a judge in another court setting, who I observed taking great care to ensure injuries were documented, indicating to me that it is possible within the court setting to follow the ethos of the questioning around torture.

PD1 links this lack of concern with the discourse that rights help criminals (previously identified in Chapter 8), and this was supported by other public defenders who stated that prosecutors are often irritated when torture is pointed out, which also did seem to be the case in my observations. However, in addition to what I observed, public defenders explained that prosecutors would often work to actively undermine the detainee's testimony. In this quote, PD5 describes how a prosecutor attempted to prevent medical examination of a detainee:

> I also had an emblematic case, which I am remembering now, that the boy sat down all marked, …I asked that he go for a medical examination, because it hadn't happened. Then the prosecutor said, "No, it doesn't seem that there are marks or there are signs of aggression." Then I said, "Sir, I don't know, I didn't go to medical school, I don't know if you have legal medical knowledge, because for me, he has clear marks. Now, to me it seems that the cause could have been generated by the reported aggression, but I am not the one who can determine this, that's why I'm requesting that he go to a person with expertise in this area". – PD5

The question around ill treatment is meant to be delivered by the judge to ensure the protection and rights of the detainee and is not intended to be an issue of debate between the prosecutor and defence. However, public defenders argued that many judges are so aligned with prosecutors in their thinking, and are dismissive of the welfare of detainees, that

they see no issue in allowing a cross examination to take place. When I asked J1 about this point in the process, he responded by stating, "We start from the premise that the people involved, the military police, are not there to harm people they do not know". This premise, which appears to be one respecting the professionalism of the military police, is not a neutral starting point, considering the known levels of violence committed by military police in Rio de Janeiro, to the point of regular lethal violence.

As with a colonial inquisitorial system, the onus in on the defendant to prove their claims, rather than enjoy the right to presumption of innocence. PD4 also provided an example of where a prosecutor felt comfortable to accuse the defence of instructing a detainee to lie about torture:

> They say the citizen is lying, etc. There is a case of a prosecutor who said the defence instructed him to lie against the police. …Even when they recognise torture, they do not consider this evidence as relevant for analysis of whether detention is legal. Why? Because they are instruments of public security. The logic is this: They can't stand the pressure of opposing the police. – PD4

Here, PD4 notes that even when torture is evident, prosecutors do not consider that the arrest may be unlawful, despite widespread knowledge of police brutality. PD4 suggests that this is in-part due to the conceptualisation of court proceedings as instruments of public security, as identified in Chapter 7, and the importance given to taking actions to prevent assumed future threats.

The opportunity to disclose torture is an acute moment of consideration of human rights during custody hearings and the customary disregard with which it is treated is indicative of the lack of importance given to rights in the decisions of judges. The lack of consideration of security of the detainees contrasted sharply with the security measures employed around the detainee, which I reflect on here:

> The two men were handcuffed together, and it was very difficult for them to both fit behind the desk. Several different officers escorted detainees over the course of the sixteen hearings – I think there were four different men – and most insisted on pushing the seats in as close as possible to the

> desk so that they were as wedged in as possible. I could see people's flesh uncomfortably pressed back into them in order to achieve this closeness to the table. – Field notes 5/7/2019

Public defenders often complained about the use of handcuffs in hearings, explaining that their use was unnecessary and an overstepping of security boundaries which went against guidelines. J3 said that she is aware of issues around human rights and handcuffs, so unlike most judges, asks for them to be removed from almost all detainees. J3 added that her choice to follow guidelines and remove handcuffs has caused great unease in the courtroom, but that the presence of armed officers throughout the complex means that "there's no chance they would escape, they'd be shot first!". The use of handcuffs serves here as an example where judges oversee the operationalisation of law procedures according to their own discerning of what is appropriate, rather than following set rules.

Some public defenders contended that the use of handcuffs in court was not a factor overlooked by judges, but something intentional on the part of those who wished to create a hostile environment for detainees as part of the process.

> PD1: Last week I had a guy who only had one hand and still got handcuffed!
>
> Interviewer: Really? Why do you think they did that?
>
> PD1: I think it was purely to create embarrassment in him.

The sense that I got from many interviewees was that they believed that judges considered treatment in the custody hearing to be part of the detainee's punishment for the crime they were assumed to have committed and therefore can warrant handcuffing a man with one hand. This point can be extended to include violence from police as an initial and deserved part of punishment. This is important for understanding how the judge approaches the detainee during the hearings and for the eventual decisions that they make. I asked interviewees if they felt that detainees' behaviour had an impact on the decision whether to detain pre-trial. PD7 was clear about on her stance:

> I think that initially, I have to say that most of our clients, the people who pass here, are people who already come, in a certain way, pre-judged by the judges and prosecutors, by the prison officers themselves because they are the people, the poorest of the population. Most of them are people of black descent and from poor communities and favelas. So, when these people arrive, they already arrive with a different reception. When they are not from that background, they are also people in difficult circumstances, people involved with drugs. Many crack addicts, most are addicted to crack and cocaine, so they already receive that prejudiced view on the part of judges and prosecutors. – PD7

PD7 suggests that little of what the detainee may do in the custody hearing counts towards the decision, as judges have largely already made up their mind. The division described echoes that outlined in earlier chapters about assumptions and stereotypes attached to the anti-citizen. J4 also stated that judges make assumptions based on appearance and provided the example of where a detainee has long nails, it is assumed that they use them for their drug habits.

This section of the chapter has examined the physical environment of the courtroom, the procedures employed within them, and how these influence judges' pre-trial decisions. The operationalisation of the custody hearing can be largely characterised as having an open disregard for the detainee. This disregard relates to the physical treatment of detainees with handcuffs and other physical restrictions; disregard as to whether the detainee understands what is happening; and disregard of a genuine investigation of allegations of torture. Interviewee accounts and my observations suggest that greater importance is given to judges prejudicial assumptions about anti-citizens and the easing of their own discomforts, than the dignity and rights of detainees. This prioritising of the security of those deemed worthy, *good citizens* is entirely in keeping with philosophies of justice which condone the disregard of the anti-citizen to protect the privileged. The next section now considers the interactions that take place within this environment of the custody hearing.

9.3 Relational Dynamics

Prosecution and Defence Statements

Once the administrative questions and introductions are complete, the microphone is handed from the judge to the prosecutor to provide a statement, followed by a presentation from the defence. In exploring what factors influence judges' decisions in court hearings, I asked interviewees whether they believed that judges consider these presentations before making a decision. All those from the prosecutor group felt confident that judges do listen to their arguments, but the public defenders largely felt that their presentations were not considered in decision making by judges. The selection of quotations below illustrates the sentiments from many interviewees who overtly contrasted the level of attention given by judges to prosecutors and the defence:

> Pr3: I would say, in general, it would be 55%, if not a little bit more. The Public Ministry has a greater weight, a greater *influence* is the best description, a greater influence on judges' decisions than the defence side.
>
> *
>
> Interviewer: Do you think they listen to what prosecutors say or not?
>
> PD7: Yes, yes, the majority, the majority. I would tell you that, in my opinion, more than 90% of the time …if the prosecutor asks for detention, he detains. It is very rare for him to release with the prosecutor asking [for detention]. And some, when the prosecutor asks to release, release, but only based on what the prosecutor is asking for.
>
> *
>
> PD2: It ends up with a 95% chance of the result being exactly what a prosecutor told the judge. The defender may stay there thrashing and everything, but as a rule it doesn't affect the result, which is already according to what came from the police station without paying much attention to what is going to be produced here. At least that's my impression.
>
> Interviewer: And why does the judge agree with the prosecutor so much in your opinion?
>
> PD2: They think the same. I think they think the same. This detachment from the provision of the law, this prevalence of incarceration thinking, because that is what will improve society.

It was clear that most interviewees felt that prosecutors' statements were considered by judges to a higher degree than those from the defence and this is born out in the high rates of pre-trial detention. Pr4 stated "Yes, I think they listen to what the prosecutors have to say, yes, but they have more or less consolidated positions". Pr1 felt assured in being heard by judges because they "basically observe the same criteria" as prosecutors when considering the need for detention. While prosecutors presented this close alliance as a logical result due to close adherence to the technical aspects of the law, public defenders suggested the fact that decisions are generally predicable and align with what prosecutors argue is suggestive of close philosophical alignment between the two groups that leans heavily towards the punitive. PD2 above identifies the "prevalence of incarceration thinking", the genuine belief in punitive responses identified in Chapter 7.

Whether the advantage equates to a 55% or a 95% benefit, the power relations enacted within the courtroom mirrored those established by the scenic distribution. The prosecutor and judge were described by many interviewees to act as though they were on the same team, in an inquisitorial style of justice, rather than adversarial.

> Interviewer: And within the process, what do you think about people's relationships? For example, between the prosecutor and the judge?
>
> PD3: Ah, this is promiscuous. I guess. It's a strong word, right? Anyway. This is wrong, it cannot [be like this]. This is not a fair game. Not a game of [equal] parts. The architecture of the courtroom itself, in short, denounces that there is no equality between the defence and the prosecution, the proximity of the judge to the prosecution, I have severe criticisms. I think that in Brazil we don't live an accusatory system, we live an inquisitorial system. It is not a process of defending and prosecuting parties, there is no fair play, I don't think.

Promiscuity was a term used by several interviewees to indicate the level of involvement that the groups have beyond the courtroom. PD6 describes this synergy between the two groups as "automatic" as they come from the same small pool of privileged elites.

> It is curious that there is a very close proximity that is of class and race. They are people who studied at the same schools, at the same universities, live in the same neighbourhoods. So, this identification is automatic. …And

> then there is an inquisitive mindset - an inquisitorial culture in the practice of Brazilian judges. They do not disguise this promiscuity between jurisdiction and prosecution. There is no shame about it. Pass a note, a WhatsApp during the hearing, it's normal. – PD6

PD6 notes that "promiscuity" between the groups is so open and overt that there is no shame in having personal conversations during the hearings. Indeed, I did witness prosecutors scrolling through their phones while the defence was speaking, and in between cases some showed pictures of children and holiday photos to the judge. This promiscuity allows for such familiarity in the courtroom, but it can also lead to discomfort. Interviewees from both the prosecutor and judge groups noted that judges "don't like to have to review the decisions of their friends" (Pr3) and J6 referred to this as making judges "uncomfortable". Interviewees suggested that judges will be inclined to grant the requests of their prosecutor friends, rather than create an awkwardness that would arise from ruling against them.

I also witnessed how the physical proximity of the prosecutor provided a greater advantage during the defence's arguments:

> I noticed that the prosecutor often spoke to the judge while the public defender was presenting his case. It wasn't so blatant as to be overtly or purposely stopping the flow of the opposing argument, but this was the result of her speech. On occasions it was in direct response to something the public defender said. She leaned over to the judge and said, "oh yes, but…" or "did you see this part", motioning to a particular part of a form. As well as the obvious physical manifestation of the superiority of her position verses the public defender, the proximity of the prosecutor to the judge allowed for huge advantages in gaining his attention – if he did indeed pay it any attention…
>
> On occasions, the public defender stopped while a short discussion happened between prosecutor and judge or several others that walked in and out of the courtroom. I was surprised at how often different people came in to deliver information to any of those involved. There was never an apology or an acknowledgement that some important information may have been missed and it further degraded the value of the defence. The public defender did seem frustrated by this but was not obvious about it. He had a resigned response to the interruptions that expressed to me that this was probably the normal state of affairs. – Field notes 5/7/2019

When I asked public defenders about interactions in the courtroom and how they felt this influences judges' decisions, PD1 was visibly frustrated:

> It's a power thing too. You see, for example-- It's just that you were not in that hearing. There's a prosecutor here… Sometimes you're talking, she's whispering to the judge. Like, I wanted to fight back against whatever she was saying. So even to this proximity of judge and prosecutor, I think there is something of our own authoritarianism, of misunderstanding what is the function of each one, you understand? – PD1

PD1 speaks to the legacy of authoritarianism, which has followed from centuries of empire to more recent periods of dictatorship. In these instances, the bias shown to the prosecution, or the advantage taken by them is not surreptitious, but so naturalised that it is expressed openly. In a discussion about how the judge is meant to act neutrally, PD4 responded:

> That's not the logic. He is not neutral. He's an agent--He has the bias of a law enforcement officer-- Let me tell you something. I had a case, in which the judge finished listening to the prosecution's arguments, then she left the room. I started to make my arguments and she just came back into the room with the decision ready, without—[sigh]. And then at the subsequent hearing she did the same thing. When she left the room I began my argument slowly, making a report of the case. And I had already been talking there for 15, 20 minutes when she opened her office door and said, "Doctor, isn't your time over?" I said, "No, Excellency. I didn't complete it; did you hear it? You are not here; you have not heard it. So, let's arrange 20 minutes from now, where I will use all my time. Are you going to listen to me here for 20 minutes or are you going to stay inside?". It obviously left her confused, et cetera and such, but from time to time there must be this wear and tear. In other words, there is not even the respect of listening to the defence in this environment. Pretend you're there with a mobile phone - at least pretend! But there's no such thing… – PD4

PD1 speaks of a complete lack of respect for the defence's position, to the point where some judges will leave the room while the defence is speaking. This is demonstrative of the description from many interviewees of the superior self-image of judges who believe themselves to be above reproach and able to circumvent the procedure if they believe they are right to. This section has provided evidence for this position throughout, where the judges and prosecutors are physically and symbolically raised above the detainee and defence. Despite the formal procedures and official adversarial structure, the judges and prosecutors

look down at the defence in the style of inquisition. As the next subsection will show, the defence has also had to rely on jeitinho[82] to try and influence judges' decisions.

Extra-hearing practice

In responding to the question of what influences judges' decisions in court, several interviewees, mainly from the public defender group, explained that while they believed that judges took very little of what they said in court into consideration, there were other methods they employed to attempt to advocate for their clients.

Several public defenders explained that during the 15-minute interview they have with each detainee before the hearing, they can usually predict how the prosecutor will argue and that then accordingly, how the judge will rule. They explained that they knew that the judge and prosecutor often spoke before the hearings and so occasionally they also try to speak to the judge to ensure a particular case stands out. PD4 explained that he knows the judges' punitive biases and so may approach a judge casually and say "hey, today we have this really peculiar case", so that it is not ignored during the time-pressured hearings. PD5 explained that unlike some colleagues who do not like speaking to the punitive judges outside of the court, she uses this as an opportunity to highlight extreme cases or talk generally about the realities of living in a favela.

> I talk to them out there, because- my colleagues say, "How can you befriend them?" I say, "I separate things." And I often manage to convince them, talking in a generic way, that "Wow, there is a case that it is not right." …I go to talk outside with some of them in a generic way, "Look, the person sometimes has no other option, it's not necessarily that someone in the favela has done something criminal. – PD5

[82] The word '*jeitinho*', describes the Brazilian notion of being able to find a way via formal or informal connections to achieve one's aim.

Another public defender gave a specific example of this extra-court practice. PD7 explained that she knew that the judge and prosecutor would only look at the record of the individual and not judge the context of the situation and so she went to extra efforts before the hearing:

> I always maintain that for the most part, they decide based on their own conviction and judgment of appearance, or they do not analyse the facts or the background. Because just yesterday, for example, I took a case of a 56 year old lady, illiterate, black, poor and she came accused of theft of an ointment, a vaginal cream in a pharmacy. I was very worried because she already had 14 previous tickets, all very old, the last one maybe three years ago, but all related to this type of theft without violence. I got the release because I was lucky to have the hearing with PrX, who is the most reasonable prosecutor here, by far. So, I went to talk to him because the judge- I had no hope of getting it from the judge unless the prosecutor agreed. And I went to talk to him, I said "Look, it's a theft by a 56-year-old lady who reported that she had a breast tumour and a vaginal inflammation. That she confessed to stealing an ointment of R$13"[83]. And then, PrX said he was going to advocate for release, and then JX released!
>
> But if the prosecutor had asked for detention, I have deep doubts whether he would have accepted my request. Precisely because of what I am telling you, because the prosecutor often looks and is not interested in seeing if it is a person who is being accused of stealing an ointment worth R$13. She doesn't analyse that situation, she looks at the criminal record sheet, "Ah, no, so you have 14 tickets? No, so I ask for detention". – PD7

PD7 also explained that she has attempted to speak directly to judges but has been told on several occasions by them to speak with the prosecutor, suggesting that unless the prosecutor advocates for release, then the outcome will be detention. PD7 gave other examples of non-violent theft for necessities such as food and water and said that even in these cases it is a "bola divida" (football reference to a 50:50 challenge).

It was also interesting to hear from a prosecutor who had been the recipient of this extra-court advocation. Revealing her punitive leanings, Pr3 spoke positively about public defenders who rarely request release:

[83] R$13 = approximately £2.78 (on date of interview 17/07/2019)
https://www1.oanda.com/currency/converter/

> So, when it comes to the middle ground - I've been lucky enough to work with excellent defenders, that if the defendant must be detained, he doesn't even ask for freedom, because it's no use asking. On the other hand, when there is something unfair, such as, sometimes it happens, at least in the last two years it has happened about four times, for example because he used his brother's identity card, the innocent brother is arrested in the place of the brother who committed the crime. They come one day, two days, three days, "No, this case is very unfair because the person- ", and then you pay attention because you see that it is something that is outside the standard. So, I really like the middle path, I think it exists, I have hope, I have optimism. – Pr3

Pr3 suggests that in extreme cases, it makes sense to have such discussions and considerations for release "outside the standard" practice. She notes that this has happened four times over two years. This is described as "the middle path" as opposed to punitivist or guaranteeist extremes, yet considering there were between 12-15 hearings per day while I observed, four cases in two years does not characterise a happy medium and illustrates the detention-as standard approach.

This subsection has helped to consider some of the alternative strategies applied to influence judicial decision making given the patrimonial nature of court relationships. Although not described as regular, as with discussions between judges and prosecutors (brought to popular attention by the case of judge Moro and Lava Jato), public defenders highlighted the importance of extra-court practice for influencing judges' decisions. This was not described as intending to bias opinion, but rather characterised as additional efforts to achieve the level of consideration mandated for detainees in law. The accounts from this section help to illustrate that the defence's arguments are not commonly factored into decisions, other than on specific occasions, and often dependent on support from the prosecution.

No Relation

While the previous subsection considered the various ways in which the prosecution and defence attempted to influence the decision around pre-trial detention, this subsection reflects the accounts from interviewees who suggested that judicial decision making bore no relation to the evidence presented in court. J2 explained that "Prosecutors and Public defenders sometimes do bring up points I hadn't considered or provide some clarification", but his intimation was that this was not often the case. A kind interpretation of this would be that his high level of consideration means that the other parties did not offer any new information. Yet those from the public defender group contended that for some judges, the in-court presentations were purely performative. I include here some examples of their accounts:

> I usually notice that those people come there with preconceived ideas of how they're going to decide that case and-- So much so that it's not uncommon for you to observe a court decision that doesn't rely on either the prosecution's or the defence's arguments. They are innate arguments, coming from the magistrate's head. – PD4

*

> Interviewer: Well, I'm just wondering about what you think the judge uses to make decisions. Do you think he gives importance to what you say?
>
> PD1: The judge? Rare. That varies a lot from judge to judge, but most do not listen. They do not listen. I jest that my role here is to serve as a stamp. It uses my name as if it were something that legitimates it, that is to say, "The guy had a defence. He's here, he cannot complain." So, so it's frustrating for me.

*

> Interviewer: I'm interested in what do you think about the way the judges make their decisions. Because on paper they must listen to the prosecutor, you and then make their own decision. In reality, does this happen or not?
>
> PD5: No.
>
> Interviewer: So, oka-
>
> PD5: -In reality, they already arrive with a decision almost ready. It is evident when there is a white defendant with more economic conditions, he is treated differently from a poor black person, it is evident. There is no

> doubt, the poor black man, he is a bandido in profile, it doesn't matter, and the other white is not a bandido, but he is there, what a pity.

*

PD1 above talked of feeling like his role served to provide the guise of legitimacy to a process where the judge had already decided the outcome of the hearing. The other two public defenders included here also argue that decisions are based on "innate arguments, coming from the magistrate's head" (PD4) and speak to the prejudices within these innate points of departure. PD5 highlights that those who are "bandido in profile", i.e., those who are identified as anti-citizens, with all the racialised and spatialised stereotypes, are treated worse than white detainees with more resources, clearly identifying white supremacist logics.

During my observations, I witnessed only a few white detainees, and the treatment was in line with the differentiated experience described by public defenders. All were from low socio-economic backgrounds and accused of drug related crimes, yet none of them entered the courtroom barefoot and all were released pre-trial. On one occasion a joint hearing for two detainees accused of drug trafficking (with no discernible differences in circumstances), resulted in the white detainee being released, while the black detainee was detained pre-trial. My observations were echoed by others' accounts:

> I've seen cases here of a white man, blue eyes, with drugs. And the judge looks and says, "But he is not a drug dealer." So, there is a lot of legacy of racism, of the past, of slavery. I think that today it's reflected in the process. – PD3

*

> So, I think we still live this drama of providing legal assistance on a formal level and failing to actually produce access to justice, and then we end up legitimising several practices of the reproduction of racism. – PD6

PD3 points directly to the racist legacies of enslavement as formative for the decisions of judges and PD6 expressed concerns that by taking part in the formal processes, public defenders lend legitimisation to a fundamentally structurally racist process. I refer again back to my observations, similar to those described above where some judges appeared to be relying solely on their own preconceptions.

> It sometimes appeared that he was merely waiting for the public defender to finish so that he could give his decision – which he appeared to be making by himself. It made me question how different this reality was to when the judge was merely passed the paperwork and asked to decide – as used to be the case. Really the whole time it appeared that people were speaking for the benefit of the tape, rather than an interactive dialogue taking place. – Field notes 7/6/2019

In most cases, there were no visual indicators that the judge was taking notice of the presentations, and while they may have been listening, I rarely saw suggestion that such presentations were considered. Several public defenders suggested that the judge's secretary or administrative assistant sometimes made the decisions before the hearings and so nothing that happens within them makes a difference. I took the opportunity to talk to one of the administrative assistants after hearings finished one day and she confirmed that this was true. The assistant explained that she intends to train as a judge and so occasionally providing recommendations for decisions is a great way to gain work experience and mentorship from the judge. This interaction confirmed that at least on some occasions, decisions are made in-part before the hearing takes place. This section has outlined how in many cases, there appears to be no relational aspect to judicial decision making, beyond that of identifying detainees as anti-citizens and thus treating them according to pre-existing punitive philosophies to punish and remove.

9.4 Discussion

One of my final field notes entries reads:

> I've observed many more hearings and, as a result, witnessed many adult men cry while being forced to remain silent. – Field notes 1/7/19

This final empirical chapter has considered how the philosophical points of departure discussed in previous chapters unfold in the dynamics of the custody hearing. It returns to noting the importance of race and space for understanding contemporary dynamics of the custody hearing courtroom.

My courtroom observations have been consistent with interviewee assertions of a normalised lower standard of treatment for targeted groups of people, i.e., young, black men from poor neighbourhoods, identified as bandidos or anticitizens and deemed unworthy of basic dignity and rights. These subjective dimensions cannot be considered without the overt link to colonial hierarchies and power dynamics (the temporal dimension). Indeed, one public defender observed statues that commemorated the treatment of enslaved people and it reminded her of the treatment of detainees awaiting custody hearings today.

In terms of the spatial dimension, again the physical space is integral to mention, before extending to Aliverti et al's (2021) metaphorical spatiality related to Western domination of ways of knowing. The physical architecture or "scenic distribution" of the courtroom creates from the outset an a-symmetry of power, whereby the judge and prosecutor are aligned and elevated above the detainee and defence. Rather than following state mandate, this dynamic is much more reminiscent of the inquisitional style of justice, which presumes guilt and considers torture and ill-treatments as constitutive of the normal actioning of justice practices. Legacies of colonial dynamics are further channelled via the non-mandatory but customary use of handcuffs for detainees, and lack of clothes and shoes which might constitute minimum levels of dignity. The collective impression is that detainees are processed as an administrative procedure, rather than treated as citizens with agency passing through a potentially life-altering state process.

Within the custody hearings, it remains unclear the extent to which judges consider the presentation of prosecution and defence, and all accounts suggest that this varies between judges. Prosecutors clearly felt more assured that judges do listen to their arguments and that they are generally aligned in their approach to decisions. The proximity between prosecutor and judge in the outside of the courtroom mirrored that within, leading various interviewees to label this "promiscuity" problematic (PD3, PD6, J6) or even "a bad symbiosis" (PD8). Public defenders broadly felt that their contributions were overlooked, with some reports including judges leaving the courtroom until the defence's presentation was over. This example was indicative of the overt and unashamed nature of judicial behaviour, where the defence was disregarded, and the prosecution were able to whisper directly into the ear of the judge or pass notes throughout the defence's arguments

Others felt that in many cases, decisions are made purely according to judges pre-existing philosophies. For those judges who consider their role to be one of actively fighting crime, the custody hearing is an unnecessary process (hence the consistent resistance from many judges at the introduction of custody hearings). In such cases, judges believe that they have all the information they need when considering the nature of the crime and the details of the individual. As the overwhelming majority of hearings are with those deemed be anti-citizens, the notion of checking for torture and ill treatment or considering release is unnecessary where it is assumed that public security is better served by removing them from society.

This chapter has contributed by situating the anticitizen and crime fighting judge in the custody hearing context and considered how the physical and relational dynamics inside and outside the courtroom inform judicial decision making. First-hand observations of differential treatment and a disregard for human rights corroborate interviewee assertions that judges act with an authoritarian presumption of supremacy and use the custody hearing processes as an oppressive instrument against dangerous Others.

Chapter 10 | Conclusion

10.1 Introduction

This concluding chapter revisits the initial problem statements and overarching aims of the thesis before focusing on the specific research question and noting key conclusions. Contributions to knowledge are identified and implications of the study are considered.

The problem identified at the beginning of this thesis is that while national and international protocols mandate that pre-trial detention should be used solely as a last resort, and human rights-based advocacy has championed a reduction in its use, judges continue to detain pre-trial in large numbers. The aim of the research was therefore to explore what factors do influence judges' decisions at the pre-trial stage in Rio de Janeiro, Brazil. I acknowledged that while there are many ways to examine judicial decision making, this research specifically applied a decolonial lens, which acknowledges from point of departure that legacies of colonialism can be important factors for understanding contemporary phenomenon. The interpretivist approach led to interrogation of cultural and historical factors pertinent to the specific context within Brazil on its own terms, rather than attempting to assess convergencies with other contexts.

10.2 Research Question & Conclusions

To restate the thesis research question:

> To what extent are judicial decisions during custody hearings in Rio de Janeiro, Brazil, informed by coloniality?

The colonial matrix of power remains a formidable force for shaping contemporary appreciations of power, citizenship status, and philosophies of justice. Coloniality is identifiable within the practice of judicial decision making during custody hearings in a variety of ways, detailed below using Aliverti et al's (2021) three dimensions to decolonising the criminal question as a thematic framework.

Temporal Dimension

Colonial era assumptions, dynamics and hierarchies were evident in the practice of custody hearings and continue to inform decisions of judges. The legacies of inquisitorial practice were clear where judges normalised to expect black peoples' pain, danger, and death are not impacted by talk of rights of detainees, but rather treat the violence as inevitable of inherent aspects of the justice processes. Actions to detain are legitimated in protection of society in a contemporary just war against crime. Anticitizens are drawn as dangerous Others to be pacified and many judges consider themselves to be crime fighters and actively look to hunt the perceived security threats in a modern moral crusade. The colonial division between the conqueror and the conquered remains in place.

Spatial Dimension

A review of the literature revealed as stark bias towards Western domination over the production and legitimation of knowledge, both for the discipline of criminology, but also for the training of judges and the broader *Europeanness* of the epistemologies they adopt. This dynamic can be identified in the treatment of residents of favelas by judges, presumed to be dangerous and crime-prone: enduring stereotypes of black and Indigenous people created during colonial eras. While in opposition, the judges viewed themselves as fonts of morality beyond the law and continued to indicate belief in a linear form of development where Europe represents logic, progressiveness, and rationality, and to which they are the natural connection. This elevated status is also made manifest in the courtroom, where the judge and prosecutor sit higher than the defence and detainee, illustrative of the asymmetry of power, and where on occasions, the judge may not listen to the defence at all.

Subjective Dimension

Where authoritarian approaches are taken by judges acting above the law, the powers they use are targeted to oppress a specific demographic. Interviews described racist attitudes that associated black people and those from favelas as bandidos, traficantes and in a way that white middle-class Brazilians never would be. My observations of custody hearings back-up this differential level of treatment. As well as overt racialised assumptions about criminality, the largely elite, white judicial corpus do not recognise themselves in the young black men

that they detain, illustrating the social and empathetic distance between them, which is not present when they shed tears for the white detainees and their mothers.

Intersectional coloniality

The combination of these conceptual colonial artifacts is not an additive eventuality, whereby aspects of differential citizenship can be stacked on top of white supremacist assumptions and uncritical judicial training. Rather these issues are intersectional. They coagulate to create something more than the sum of their parts to produce the modern functioning of the criminal justice system, to create the coloniality of justice. State criminal justice power, in this case as it relates to judicial decisions, cannot be separated from colonial logics of differential treatment according to racialised hierarchy and protection of worthy elites and their interests. In this sense, the research has described the coloniality of justice in Rio de Janeiro, Brazil.

10.3 Contribution to knowledge

> Indeed, there is something hauntingly unreal about a scholarly discipline dedicated to the study of crime, the criminal and the criminal law that focuses almost exclusively upon the actions of lawbreaking individuals, while turning a blind eye to the mass terrorism imposed upon innocent people by slavery, colonialism and their continuing legacies. (Pfohl, 2003: xii)

Criminology has been 'essentially a peace-time endeavour' (Carrington, Hogg and Sozzo, 2016: 3) and this research contributes by holding an overlooked decolonial lens to the colonial crafting of the criminal justice system, where war-like behaviours of state actors are justified according to a permanent state of exception and demonstrate how Brazil remains at war with an internal anti-citizen enemy.

The introduction of this 'anticitizen' Other has been an important conceptual contribution of the thesis. Building on Souza's conception of the subcitizen, the anticitizen and its cocreated figure of the heroic judge help to understand the framing of the war on crime in Brazil, which allows targeted violence and oppression in the name of protection and morality.

This research is also significant for the new empirical data presented, including accounts from currently serving judges, prosecutors, and public defenders, as well as observation of dynamics in and around the courtroom. There have been no other studies that have demonstrated how coloniality informs judicial decision making during custody hearings in Brazil. This thesis provides a direct response to field leading scholars' (Aliverti et al., (2021) provocation to 'decolonize the criminal question' by exposing and explaining how colonialism informs criminal justice practices, in this case, in relation to judicial decision making. In doing so it has forwarded the concept of the 'coloniality of justice', little explored in English and never before applied to custody hearings in Brazil.

The study has also asked valuable questions about the usefulness of human rights discourse in a context where a plurality of conceptualisations compete for dominance and judges' ontological positionalities find the notion of rights incongruous with the necessity to eliminate the dangerous internal enemy. The research supports criticism of positivist approaches to justice reform underpinned by universal assumptions, which present a 'One World World' (Escobar, 2020: 14), obfuscating the realities especially in global South and postcolonial contexts. The study contributes by supporting instead the appreciation of the reality of a pluriversal approach to human rights, resisting the temptation to represent the world as if it were one.

10.4 Implications

Although I have discussed the specific research question and conclusions, the thesis also aims to contribute towards the understanding of how the international criminal justice communities can better support reform efforts to reduce the overuse of pre-trial detention in the global South. This long-term aim relates to Aliverti et al.'s second aspect of "decolonizing the criminal question", which considers how to 'contribute to building alternative paths, both at the level of thinking and intervention (2021: 229).

If international criminal justice communities are to be able to effectively provide support to localised efforts to reduce the pain and suffering related to pre-trial detention, a thorough

understanding of the local context is required. For the Brazilian context, this includes understanding how coloniality informs criminological thinking and practice. The findings point to the limited utility of human rights discourse – the normative approach to influencing judicial decision making around pre-trial detention – where the concept has many interpretations with negative connotations, and in some cases has been vernacularised as obstructive to justice.

Findings indicate that in order for equal dignity and attribution of rights to seem logical assertions at a deep ontological level to those making decisions, ways need to be found to reduce the social, epistemic, and empathetic distance between the judges and the judged. This will require a reconning with colonial logics that continue to perpetuate the conqueror-conquered divide as a naturalised dynamic within Brazilian society.

Custody hearings have been operationalised across Brazil as an initiative aimed at reducing pre-trial detention and as such has been the government's most significant act to address hyperincarceration. This research has shown that even such an innovation, designed with progressive intentions, has not disrupted the coloniality of justice characteristic of judges' ways of being and knowing. Unless these fundamental colonial assumptions are addressed, every innovation and rule change risks becoming the next *lei para inglês ver*.

Appendix A: Interview Framework

Interviews were semi-structured and conversational in tone. Discussions tended to begin with general questions related to custody hearings as a relatively new process introduced in 2015, and thereafter follow-up questions were broadly in response to the flow of the conversation. Below are indicative questions illustrating the main topic areas raised by the interviewer. In most cases, the questions were not phrased precisely as below. They were rather phrased in whatever manner best naturally fit with the course of the conversation.

When interviewing judges, questions were framed primarily to ask them about their own thoughts and behaviours and subsequently about whether they believed that other judges felt similarly. When interviewing all other actors, I asked about their thoughts on judges' actions in general, which often led to discussions about majority or minority views within the judiciary.

Custody Hearings

- What do you think about the current discussion in the news relating to the possibility of removing custody hearings?
- How do you feel about custody hearings compared to what was in place before?
- What do you think about the functioning of custody hearings?
- Do you/judges feel differently about custody hearings compared to other court hearings?
- Does the layout of the courtroom affect the dynamics of the hearings?

The Role of the Judge

- What is the role of the judge in custody hearings?
- How do you/judges balance public security and individual rights of the detainee?
- What do you think about media coverage or publicised public opinion related to custody hearings and judges' decisions?
    - Does this impact judicial decision-making?

Decision Making

- What factors are helpful for decision-making?
- Do the contributions of the prosecutor and public defender/lawyer help your/judges' decisions?
- Do current prison conditions or the size of the population influence judicial decision-making?
    - Should they?

Detainees

- Does the behaviour of the detainee in the courtroom affect your/judges' decision?
- Do the behaviours of detainees affect decisions?
- Does the social context of the detainee's life affect decisions?
- What kind of crimes do you mostly deal with during custody hearings?

Human Rights

- Are international protocols – helpful to you/judges during custody hearings?
- What do you think about [examples of anti-human rights rhetoric]?
- Do you/judges receive training related to human rights?
- Is 'human rights' as a concept helpful for judicial reform?

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