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Judges as Agents of Coloniality: Understanding the Coloniality of Justice at the Pre-trial Stage in Brazil

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This paper exposes how colonial ways of knowing and being shape judicial behaviour in Brazil, where pre-trial detention is excessively used against racialised groups. I argue that judges continue to conceptualise and operationalise justice according to colonial logics and thus reveal the coloniality of justice. Drawing on decolonial theory from across South America and from interviews and court observations in Rio de Janeiro, I reveal how judges understand themselves as heroic crime fighters, acting beyond the law in a modern moral crusade. I examine how violence remains a central component of justice and consider how judges deal with the contradiction of neutrality and aggression. I argue that judges, by endorsing or tolerating violence, become agents of coloniality.

KEY WORDS: coloniality, decoloniality, pre-trial detention, judicial decision making, brazil

INTRODUCTION

Violence carried out by state actors is common and lethal in Brazil. The police were responsible for killing more than 6,400 citizens in both 2021 and 2022 (Fórum Brasileiro de Segurança Pública 2023: 20), with black and mixed-race young men vastly overrepresented amongst the slain (Fórum Brasileiro de Segurança Pública 2023: 31). While the focus is often understandably on the police violence, Duarte alerts us to the 'silent violence' of the judiciary (2020: 96),[1] where violent and unequal governance systems are justified and normalised via criminal justice discourses. Despite constitutional guarantees of equality, 'there are "invisible" mechanisms of discrimination that make some people less equal or less human, or non-human' (Alves 2017: 117).[2] This paper focuses on unpacking the silent violence of the judiciary and, more specifically, on exploring how judges understand their role and how this influences how they wield justice powers. Zaffaroni contends that the radical project to reduce the violence perpetrated

1 Quotes from this author are my translation from Portuguese.
2 My translation from Portuguese.

by the state as part of the normative functioning of justice begins with the delegitimisation of the penal system (Garcia and Sozzo 2023: 60). Anchored in decolonial theory from across the Americas of the South, this research directly contributes to this project of delegitimisation by highlighting the contradictions and inequalities inherent within justice practice in Brazil. The study also directly responds to Aliverti *et al.*'s (2021) provocation to 'decolonize the criminal question' by exposing and explaining how coloniality shapes contemporary criminal justice practices, in this case concerning the court's earliest point of contact with a detainee: pre-trial hearings.

Racialised groups are overrepresented in detention in Brazil. Although 55.9 per cent of Brazilians identify as black (10.6 per cent) or brown[3] (45.3 per cent) (Statista 2023), 67.8 per cent of the prison population are black (17 per cent) and brown (50.8 per cent) (SENAPPEN 2023).[4] Conversely, white Brazilians dominate judicial positions[5] (AMB 2018), reflecting a '*carceral continuum*' between enslavement and modern carcerality (Alves 2016: 231). I do not essentialise racial categories, acknowledging them as social constructs. However, racialisation means that non-white bodies are read as equating particular social positions and inheritances (Segato 2022: 193). Research is clearly needed to understand how judges make decisions. As Segato asserts, until we acknowledge that those oppressed during colonialism are those making up the majority of the imprisoned across Latin America, 'we will be unable to practice either a critical criminology or a sociology of punishment' (Segato 2022: 187).

While this paper is not about pre-trial detention per se, it contributes insights into how justice is enacted at this pivotal early phase of the justice process. Pre-trial conditions are often inhumane and labelled 'a human-rights disaster' (Human Rights Watch 2015: np). A UN report found that judges opt for detention as a default rather than a last resort and that 93 per cent of *flagrante delicto*[6] detentions across Rio de Janeiro and São Paulo were unwarranted (UN General Assembly 2014). Non-Brazilian readers should note that compared to UK and US contexts, which tend to be interpreted as *the norm*, Brazilian judges have greater discretional powers due to the active role of the judiciary in drafting the Constitution after the fall of the dictatorship in 1985 (Macaulay 2007). With such a level of operational autonomy, judges can and do disregard the law if they deem it unconstitutional and enforce their own interpretations of the Constitution as the superior measure (Dal Santo 2023).

Introduced in 2015 to mitigate pre-trial detention and torture rates (Medina 2016: 623), custody hearings necessitate detainees' presence before a judge instead of sole reliance on police records. However, studies found that hearings still predominantly lead to pre-trial detention (Lemgruber *et al.* 2016), indicating the incorporation of the new process into existing punitive practices (Gisi *et al.* 2023). The literature illustrates that legal reforms alone have not prevented the regular imprisonment of subordinated groups pre-trial (Silvestre *et al.* 2021; Azevedo *et al.* 2022; Gisi *et al.* 2023), proving that 'legality cannot produce democratic legitimacy' (Duarte 2020: 99). We must look elsewhere for answers.

This paper exposes and explains how colonial logics shape contemporary criminal justice systems, offering theoretical and empirical contributions. Theoretically, I present the concept of 'the coloniality of justice' as a lens to interpret contemporary justice practices. The paper draws on literature primarily from South America but also from decolonial scholars globally. I do not ignore scholarship from traditional centres of power; however, I prioritise context-linked sources as part of a situated epistemic dialogue. In the methods section, I will expand on my positionality and aim to contribute to the erosion of the centre-periphery dichotomous

3 Brown or '*Parda/o*': those with multiple heritages that may include black, Indigenous or white groups.
4 Prison statistics combine self-definition and categorisation by prison employees.
5 Only 1.9 per cent of first and second-degree judges are black and 13.2 per cent are brown (AMB 2018: 324).
6 *Flagrante Delicto:* Meaning caught in the act of committing a crime.

framings. Empirically, I include interview and observational data related to a group of Brazilian elites—judges—that are often hard to access. Other important court actors are also consulted. Again, I reflect on my privileged access and the negotiations required.

I will argue for the significance of the coloniality of justice for comprehending contemporary justice realities and for recognising judges as agents of that coloniality.

COLONIALITY AND CRIMINOLOGY ACROSS ABYA YALA[7]

Coloniality refers to 'long-standing patterns of power that emerged as a result of colonialism', which persist beyond the colonial period as logics and power dynamics that penetrate all ways of knowing and understanding the world (Maldonado-Torres 2007: 243). For this project, adopting a decolonial lens means that the point of departure for analysis is the understanding that all contemporary ways of knowing and being remain shaped by coloniality, and then working towards a world 'otherwise' (Escobar 2020).

The 'coloniality of power' emerged as a new regime of control when Portuguese and Spanish forces invaded and occupied the peoples and lands of Abya Yala in the late 15th and early 16th century[8] (Quijano 2000: 218). This regime was based on the dual logic of exploitation and domination, which involved the extraction of resources for the benefit of European powers and the classification of people according to their worth, first, through the binary of 'the conquerors and the conquered' and later via the invention of unequal racial categories operationalised as biological certainties (Quijano 2000: 216). Scholars have built on this to emphasise connected, multi-dimensional hierarchies alongside the invention of race, especially noting the influence of Christian hetero-patriarchy (Pires 2018; Tamale 2020; Gomes 2021; Segato 2022) and anthropocentrism (Mignolo 2002; 2011; Grosfoguel 2007; 2011; Santos 2016; Suárez-Krabbe 2016; Mignolo and Walsh 2018; Escobar 2020). While 'there is no such thing as a single-issue struggle' (Lorde 2012: 138), 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).

A significant factor that contributed to the strength and persistence of coloniality was the influence of Enlightenment philosophy, which claimed the superiority of European elites as the sole possessors of intellect and rationality (Olmo 1999: 24). This claim was based on a 'civilizational arrogance' (Santos and Meneses 2020: xxiii) that justified a civilising mission towards the rest of the world, and that ignored or dismissed the diversity and richness of other forms of knowledge and culture (Wallerstein 2006: 11). Moreover, some of the most prominent Enlightenment philosophers, such as Kant, Hegel and Locke, propagated explicitly white supremacist arguments, which linked racial differences to degeneration and inferiority, and that provided a rationale for the treatment of non-white peoples as objects or commodities (Saini 2019; Rutherford 2020; Shilliam 2021). These arguments were used by colonial states to legitimise the trans-Atlantic trade of enslaved people and to normalise the superior–inferior dichotomy that underpinned coloniality (Suárez-Krabbe 2016: 57).

Brazil is a paradigmatic case of the 'rearticulation of coloniality of power' (Quijano 2000: 567), as its formal decolonisation did not imply a break from the colonial regime but rather a

7 Abya Yala is the name many Indigenous activists use to replace reference to 'the Americas', which is a colonial imposition. It is used in the Kuna language to designate 'Land in full maturity' or 'land of vital blood' and has gained usage since the First International Conference of Indigenous Peoples 1975, where it was introduced by Takir Mamani (Walsh 2015; Pires 2018; Filosofia 2020). It is a necessarily imperfect solution as there was no pre-colonial name for the entire continent, with other names such as Pindorama (Land of the Palms) used by the Tupi peoples of Brazil (IELA, n.d.). Abya Yala serves as a symbol of unity among Indigenous groups and decolonising initiatives.

8 It should be noted that spatial understandings of 'South America' and temporal descriptors such as '15th Century' are Eurocentric explanations of the world that have become expressed as normative ways of knowing.

continuation of it under a different guise. The independence of Brazil in 1822 was not a result of an anti-colonial struggle but of a political manoeuvre by the ruling Portuguese Prince Regent, Dom Pedro I, who sought to preserve the interests of the land-owning elites, who also controlled the enslavement of people and the export-oriented economy (Green *et al.* 2019). Thus, the colonial dynamics of power remained intact and were reproduced and reinforced by the successive governance structures that followed. Brazil today is a complex socio-legal context that reflects the coexistence and contradiction of modernity and coloniality as 'two sides of a single coin' (Grosfoguel 2007: 218). Therefore, while Brazil can be understood as a modern, democratic and multicultural nation, it also reproduces and perpetuates the colonial patterns of power that oppress and marginalise. The judiciary is a crucial site and manifestation of this contradiction, where judges are considered neutral arbiters and defenders of modernity yet reproduce colonial dynamics. Thus, it is the validity of the justice system that is at stake here.

These unequal undercurrents create the foundational structures for understanding the world in the South American context and run intravenously through social dynamics. European culture and knowledge production have been established as the norm and the standard, and have been used to measure and judge the value and validity of other forms of culture and knowledge. As a result, the ways of knowing and being of Afro-descended Brazilians and Indigenous peoples have been devalued and dismissed as 'symbols of backwardness vis-à-vis capitalist modernity' (Da Costa 2014: 196).

Western theories of social order, such as the Hobbesian social contract, were never deemed applicable to enslaved peoples (Agozino 2003: 16). Consequently, knowledge production over centuries has been biased and hierarchical, privileging the Western bourgeois notion of Man as the universal human (Wynter 2003: 260), reducing all others to 'problems instead of people who face problems' (Gordon 2014: 84). Contemporary criminology still relies on many of these assumptions, such as the existence of a stable state with a monopoly on violence, which do not reflect the reality of millions of people who suffer from state and non-state violence around the world. Thus, criminology remains a peacetime practice (Carrington *et al.* 2016). Zaffaroni's Marginal criminological realism urges us to reject imported frameworks and critically examine the actual workings of justice, so that we can create an urgent praxis to transform reality by reducing violence (Garcia and Sozzo 2023: 60). The next section proposes a critical lens to understand the development of 'justice' as a concept at the margins of global powers (Zaffaroni 1988).

THE COLONIALITY OF JUSTICE

Segato names 'the coloniality of justice' (2007: 142)[9] in the subtitle of a paper, emphasising the enduring effects of colonial-era power asymmetries in criminal justice systems across South America. Prison population racial demographics reveal the selective nature of state justice mechanisms; however, Segato maintains that race is not the cause of inequality, but rather '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' (2007: 150). This is the root of my conceptualisation of the coloniality of justice.

This paper examines how coloniality and justice are intertwined. Despite the constitutional promise of equality, 'invisible mechanisms of discrimination' (Alves 2017: 117) shape policies that rank people on a scale of humanity and worth. This ranking rests on complex and intersecting systems of power, which Grosfoguel calls the Capitalist/Patriarchal Western-centric/

9 My translation from Spanish.

Christian-centric Modern/Colonial WorldSystem' (2011: np). To develop a theoretical lens for analysing the coloniality of justice in pre-trial judicial decision-making, I present two historical observations that illustrate how the meanings and mechanics of justice reinforce power asymmetries in Brazil.

Theological legitimations predate the use of 'Just War'[10] across Abya Yala, with the Portuguese labelling the peoples of Senegal 'Enemies-of-Christ' in 1444 to justify enslavement and land expropriation (Wynter 2003). This notion of a moral crusade validated violence against anyone who refused to convert to Christianity. It was deemed legitimate and logical that non-believers could be reduced to 'subjects without souls' (Suárez-Krabbe 2016: 55–56) and that rights of liberty and self-sovereignty were reserved for Christians (Brunstetter 2005: 117–118). In other words, denying humanity and freedom to people who did not conform to the colonial project was understood as enacting justice, with the blessing of the church and the crown. While these tactics were declared temporary measures during exceptional times, the occupation of the Americas created a permanent state of 'non-ethics of war' (Maldonado-Torres 2007: 247). The resulting binary framing of superior, rights-bearing conquerors and inferior, disposable conquered became naturalised and accepted at an ontological level by those with the power to assert their own position as dominant, and their own actions as justice.

Another significant aspect of the Christian moral crusade was the Iberian methods of Inquisition. While more commonly associated with Spanish rule, Brazil also received two inquisitional commissions in the 16th century (Aufderheide 1973). This process endorsed extreme violence and torture and legitimised it as a means to obtain a confession and 'determine the truth' (Batista 2016: 3).[11] The belief that there was an internal enemy to be eliminated was an activating principle, and the legitimate use of violence was embedded in what it meant to seek and enact justice. In these situations, judges presumed guilt with the burden on the accused to prove their innocence.

Both Inquisitional and Just War practices implied a moral imperative to act violently in the interests of groups deemed inherently superior. This was understood as integral to justice. Justice continues to be enacted according to a 'white epistemology', which has normalised black pain as constitutive of justice (Khan 2023: 174). The disproportionate over-representation of white individuals (mainly men) in positions of power 'is just one expression of this carceral continuum between slavery and the present-day penal system' (Alves 2016: 231). These symbolic and structural disparities translate into material inequalities and injustices. For instance, Truzzi *et al.* (2022: 27) highlighted the pronounced exposure of black individuals to homicide and physical assault, with 40 per cent of the disparity to white people remaining after accounting for socioeconomic conditions. State violence has become so normalised against certain groups that it has led to what Vera Batista (2010: 4) has referred to as the 'subjective adherence to barbarism'. Flauzina (2016: 131) underscores a clear 'naturalization of State terror targeting black bodies' accompanied by a detachment of international legal provisions from black suffering. In fact, by recognising the conception of violence as component of justice and drawing on Fanon's (1970) zones of Being and Non-Being, we can see how the criminal justice system is designed to distinguish those who are worthy of protection from those who are disposable (Pires 2018: 72). When considering disproportional police killings and arrests alongside premature deaths from disease, the carceral system in Brazil can be considered a part of the 'transnational neoliberal logic of black disposability' (Alves 2016: 230).

As I interpret it, 'the coloniality of justice' represents the conceptualisation and operationalisation of justice according to internalised colonial logics. These logics legitimate extreme

10 For a discussion of coloniality and legacies of 'Just War' for Brazil, see Darke and Khan (2021).
11 Quotes from this author are my translation from Portuguese.

violence and inequity as component of justice. The coloniality of justice was present during the colonial period, as demonstrated by examples of *Just War* and *Inquisition* practices, but it also 'succeeds and survives' (Gomes 2021: 93) beyond formal colonisation. In the four hundred years following the invasion and occupation of Abya Yala, religious reasons were adapted into pseudo-scientific rationalisations, culminating in the eugenicist policies of the 20th century and the preservation of the hierarchy of humanity. While overtly racist policies have given way to myths of racial democracy and equality, the necropolitical colonial logics of 'who may live and who must die' (Mbembe 2003: 11) remain integral to the ontological understanding of justice. Vernacularised anew by each generation, the dynamics of the hegemonic white supremacist Christian hetero-patriarchy underpin each successive conception of justice, preserving the justice system as a site for the reproduction of the coloniality of power.

This research aims to expose the persistence of this way of knowing and being within the Brazilian judiciary today without being drawn into a debate about a proposed uniqueness of a recent populist moment. I do not argue for an unbroken, linear philosophy of justice since empire; however, there is a 'historical continuity' between those whose racialisation justified enslavement and elimination in the past and imprisonment and disposability in the present (Segato 2022: 187). To label these dynamics as purely historical provides a 'false alibi that invisibilises the continuities of injustice' within the functioning of justice (Adébísí 2023: 41–42). The continuities manifest differently across history, but each expression adheres to an underpinning ontology, which this paper exposes.

METHODOLOGY

This research examines how coloniality influences how the judge's role is conceptualised and operationalised. Therefore, I interviewed those who could speak about their custody hearing experience. I conducted a scoping visit one year before the interviews to speak with experts and assess the viability of this study. Discussions about the realities of the courts in Rio de Janeiro informed my preparation of questions.

Data collection

I conducted 26 semi-structured interviews with seven judges, four prosecutors, eight public defenders (PDs) and seven subject matter specialists (those working in NGOs specialising at the pre-trial stage).[12] Interviews were between 45 minutes and two hours and recorded with informed consent after verbal and written project descriptions were provided. The interviewees chose the language of communication, resulting in 22 Portuguese interviews and four English interviews. One of the seven judges self-identified as black during conversation; the rest presented as white or did not mention their heritage. Interviews were complemented by non-participant observation of 64 custody hearings in Rio de Janeiro across three months in 2019.

Sampling

I contacted one judge directly, a member of *Associação Juízes para a Democracia* (Judges for Democracy Association), an organisation involved in critical discourse relating to the judiciary. I wanted to hear from this valuable critical perspective; however, I also wanted to speak with those judges (and other stakeholders) holding vastly differing opinions; therefore, to mitigate against bias, I used a combination of snowball and opportunity sampling (those available when I observed hearings) to gain all other interviews.

12 University of Westminster granted ethical approval ETH1718-1808.

While judges' appreciation of their role is central to the research, I also interviewed other relevant stakeholders to provide 'contextualist triangulation' (Madill *et al.* 2000: 9). I acknowledged 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). The approach also adhered to the decolonial option that advocates a pluriversal approach to knowledge rather than seeking positivist universalising truth (Grosfoguel 2011).

Interviews

Interviews began with general questions about custody hearings as a relatively new process introduced in 2015, and follow-up questions were adapted to the flow of the conversation. I asked judges how the topics relate to their thoughts and behaviours and whether they believed other judges felt similarly. When interviewing all other court actors, I asked about their informed opinions on judges' approaches. On several occasions, this led to discussions about majority or minority views within the judicial body. In some interviews with judges, I explicitly asked, 'what do you feel is the role of the judge during custody hearings?' in other cases, this topic occurred naturally. I also asked judges how they balanced public security and detainees' rights, which provided insights into their philosophies of justice.

Access and positionality

Access to judges is notoriously tricky, and I believe my status as an academic at a European institution helped me gain official court complex access. This is based on my impression and the feedback from some interviewees who expressed curiosity or admiration for my background. Once in the compound, I had to ask the presiding judge of a specific courtroom if they would allow me to silently observe the custody hearings due that afternoon and whether they would be willing to be interviewed. The observations were, therefore, solely opportunistic. I suspect that the novelty of a European approaching them in Portuguese may have been intriguing and perhaps lent me additional legitimacy in the eyes of some. I met Brazilian researchers and NGO experts who gained similar access but also several who had frequently been rebuffed or had negative experiences (especially women). I have previously worked in the international justice reform sector, and my positionality is partly defined by my critical stance towards normative approaches to judicial reform with which I previously worked. As a European man socialised within Western/Northern hegemony—despite also having heritage from elsewhere (what Carrington *et al.* 2016 may call the South within the North)—I do not claim a marginal position and make no attempt to speak for Brazilians. Rather, I aim to responsibly use my privilege to contribute to the critical discussion of coloniality and justice as one voice among many rather than claiming primacy. Brazilian Sociologist Jessé Souza (2017) underscores the importance of gaining distance from paradigmatic thinking to identify underpinning assumptions, so in this sense, my social and epistemic distance (Grosfoguel 2011) may help facilitate a diversity of perspectives. I am also reminded of Nelken's reflection that '[t]he ability to look at a culture with new eyes is, after all, the great strength of any outsider' (2007: 147).

Analysis

I used a thematic framework analysis based on Braun and Clarke's (2006) six-stage process, which involved multiple coding and reflection phases. My constructivist standpoint dictated that I did not search for some manner of objective truth hidden in the data but recognised that the world is understood through social constructions. Expressions of coloniality are found

'in the articulations between what is said and what is unsaid' (Duarte 2020: 98); therefore, the analysis focused on latent themes in interviewees' responses rather than remaining at the semantic level. This has been identified as an effective approach to 'uncover and understand the ideologies, cultural beliefs, and/or assumptions underlying the data' (Trahan and Stewart 2013: 67).

All interviewees have been given pseudonyms, and for many discussion points, the most evocative or representative examples are presented to illustrate a position rather than including all examples. Interviews focused on custody hearings, although some interviewees also related their thoughts to broader 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 when making decisions. Several interviews started with this more formal approach to the questions before developing more personalised ideas. I focus here on discussions highlighting divergences in attitudes from these *by-the-book* responses.

COLONIALITY AND THE ROLE OF THE JUDGE

This first empirical section considers how judges interpret their role. All justice systems are socially constructed and, as such, are conditioned by tradition and pre-understanding of ideas of freedom and punishment (Casara 2018). With its situated origins and histories, the law contains the desires of the powerful embedded within it (Adébísí 2023).

> 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—Judge Lais.

Judge Lais captures the tension in the subjective reality of supposed objective law. If the judges' subjectivity influences the outcomes, then it matters who the judges are, what experiences they bring, and what impact they have. Interviewees often began with gestures towards 'applying' or 'upholding' the law and ensuring that justice is done. However, as the conversation progressed, several interviewees, including judges, revealed that they believed that the average judge sees themselves not as an impartial arbiter, but as an agent empowered by the state to actively address crime and criminality.

> Judge Lais: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?
> Judge Lais:In their actions, but some 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, which contradicts the Constitution. This was relevant for the criminal justice system broadly, but interviewees were clear that this was acutely relevant to custody hearings.

> It was only in 2015 that they started to organise custody hearings. The resistance was very strong because the judges imbued themselves with a culture of not just being judges but of being responsible for public security. When a judge gets in their head that they are responsible for public security, they do not judge because they take a side, the police side, the prosecutor's side, the persecution side.—Judge Oscar

Judge Oscar paints a confrontational picture, where judges focused on public security are partial and promote prosecution. This will-to-action fuels 'persecution' and reflects the colonial

ontological construction of justice that dehumanises racialised groups and compels their annihilation (Da Costa 2014: 2). Judge Oscar continues and describes how the justice system upholds societal divisions.

> And justice, to a greater extent, has become 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.—Judge Oscar

The metaphor of a hunt is powerful, evoking the image of a dominant group organising to capture or eliminate a target or perceived threat. There are also overt echoes of inquisitional practice and similarities with how powerful European-descended elites would organise hunts to recapture enslaved people who had escaped. This statement, along with many others, emphasises the existence of an 'inquisitorial unconscious' (Casara 2018: 105)[13] that informs the active role many judges take in attempting to remove those they deem dangerous.

The prosecutors downplayed the judicial overreach and claimed that judges generally relied on the evidence. Prosecutor Camila admitted that judges are more attentive to violent crimes and, in such cases, often do not form their opinion until the 'H-hour'. This is a revealing choice of phrase as 'H-hour' is a military expression for the specific moment of attack: an aggressive act of war. It neatly illustrates the attitude that decisions can be wielded as weapons against a perceived threat. A public defender confirmed this:

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

PD Roberto observed that the punitive logic was so entrenched that any pre-trial release was interpreted as a defeat. Interpreted as a system failure at the micro level, this sense, coupled with high levels of violence on the street and corruption in government, led some to perceive system failure at the macro level. Casara (2018) argues that in Brazil's post-democratic state, freedom is not the absence of state interference but the presence of repressive state tactics. The lack of such repression is viewed negatively, and the media portrays acquittals (or pre-trial releases) as examples of impunity, while detentions (even if unjustified or unlawful) are presented as positive and necessary measures (Casara 2018).

The high levels of discretion afforded to Brazilian judges have allowed them to become important socio-political actors (Macaulay 2007; Dal Santo 2023), and Specialist José described how distrust of politicians has increased public appetite for judges to take more action. He was dismayed at the judges who, 'inebriated with their power', overstepped their boundaries and interfered with the executive and legislative branches. Instead of being seen as rogue agents who violated the Constitution, some judges have been heralded as heroes. Many interviewees mentioned former judge Sérgio Moro[14] as the epitome of a judge lionised in the public sphere for overstepping. Specialist José called Moro 'a judge with a police officer's soul', implying that many judges are driven by a desire to act, even if that means going beyond their mandate, rather than impartially weighing the evidence.

13 All quotes from this author are my translation from Portuguese.

14 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 across the media as a national hero, and images of him wearing a Superman 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).

Individuals from all interviewee groups (except the prosecutors) recognised the problem that Moro posed for the legitimacy of the judicial system. Judge Oscar expressed frustration at the societal glorification of 'superhero judges':

> Today, we have judges standing out as superheroes who are certainly breaking the law. They are breaking the law, they are doing political work; using the law as an instrument for 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 preferably, these enemies should be slaughtered through false applications and interpretations of the law. So, we are living in a dangerous society.

For Judge Oscar, some judges' wilful misuse of the law means they are no longer truly judges but political actors, putting their personal views and ideologies above the Constitution. Yet, this mirrors the behaviour of superheroes in popular culture. Comics and films celebrate violent acts outside the law because the hero claims some form of superiority—biological or moral—legitimising the actions to the audience. Of course, the European colonisers *did* consider themselves to be morally and biologically superior and justified their violence as a means to create a liberal society. In fiction, we accept the good-versus-evil dichotomy and the hero's vigilante justice, but this spills over into reality, where judges and prosecutors are applauded for overstepping the rule of law. Judge Oscar calls them 'Heroes in the conception of a hate society', who use 'false applications and interpretations' (or we could say colonial operationalisations and conceptualisations) of the law to eliminate certain groups. The sentiment fits with Adorno's (1995) argument that for black Brazilians, the law has always been a tool of punishment, not of rights protection.

This section has highlighted that a justice system reliant on superhero judges, driven by a violent philosophy or modern moral crusade, continues to facilitate the persistence of colonial power asymmetries and just war logics. Pre-trial procedures conceptualised and operationalised according to these dynamics illustrate the coloniality of justice. The following section explores how judges reconcile these philosophies with legal frameworks that promise equal treatment.

COGNITIVE DISSONANCE

A distinct quirk of this judicial 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, adopting a 'perspectivelessness' (Crenshaw 1988: 2) by positioning themselves and the law as outside of life. This cognitive dissonance leads to an ontological dualism where judges can claim neutrality while pursuing a specific philosophical agenda. Casara (2018) posits that Brazil's authoritarian tradition reinforces confusion between the functions of investigation, prosecution and judging, resulting in figures such as the judge-inquisitor or, in this case, the heroic moral crusader. A public defender puts it succinctly:

> So, I think there is a confusion of functions. I think Moro is an emblematic representation: the judge dressed as Superman. The moment the judge puts on a Superman cape, he removes his robe. There is no way! He stops being a judge.—PD Bruna

As PD Bruna presents it, a person can wear a judge's robe or a crusader's cape, but they cannot wear both. Several interviewees were visibly frustrated at what appeared to be nonsensical to them. 'There is no way', Bruna said, exasperated, because in her mind and according to law,

judges must be neutral and respect their legal mandate. However, as I have presented, many judges hold these two ideas together within their schema for justice, in the way that they conceptualise and subsequently operationalise justice. To understand this apparent paradox, I turned to the interviewee's reflections on the judges' projections of their unique status within, or perhaps more appropriately, above the law.

Several interviewees spoke about the assumptions of superiority that come with the status of a judge and how these lead to court outcomes that stray from constitutional objectivity. Several suggested that many judges act as if they are beyond the need to study or reflect. Some judges also expressed these sentiments:

> When a judge enters the magistracy, it seems like they take a pill and the next day thinks they are 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'.—Judge João

Judge João observed that many judges act as if they are uniquely placed to understand what is true and just. They see themselves as omnipotent rulers, 'all-powerful', much like a monarch or dictator, imposing their own political views as law. They claim their understanding is the only valid one, 'the purest truth', dismissing other perspectives as inferior or false. Such statements echo the colonial logics of domination and erasure of diverse ways of knowing and being. We see justice and a specific, situated truth where, having taken the pill and with pen in hand, some judges perceive themselves to be enshrined with the power to use exceptional and violent means to enforce their truth, such as abusing pre-trial detention.

Souza's (2007) three-stage theory of citizenship can help to interpret these ways of being. He argues that in many European contexts, most people are considered useful producers and citizens, enabling the rule of law and the normative expressions of citizenship.[15] However, in Brazil, the notions of natural equality and, thus, the potential for the universal application of human rights have not been extended to all. It is more than a historical echo or legacy to note that real-world outcomes today for those whose recent ancestors were legally deemed dead or property are far worse. Invisible networks and implicit understandings built over centuries prevent entire groups from full citizen status. Souza calls this full citizenship 'primary habitus', and those falling below this are relegated to *under-citizen*[16] status (precarious habitus), creating a 'structural underclass' (Souza 2007: 29).

Pertinent for this project, Souza (2007: 25) also identifies a 'secondary habitus' at the top of the citizenship hierarchy. Those in this category enjoy all the privileges of primary habitus but attract further levels of distinction. Based on the illusion of innate talent, elite groups transform economic and cultural capital into 'a type of invisible currency' (Souza 2007). They imagine themselves as inherently more gifted and deserving of being societal decision-makers, especially after passing the judicial exams. Under an ideology that links performance to worth and morality, these over-citizens are also understood as most suitable to make moral judgements and their actions are elevated to those above the law (Souza 2007). The law becomes a tool to be wielded by elites (Aniyar de Castro 1987; Zaffaroni 1989; Darke 2018) for the legitimate oppression of 'the hostile' (Zaffaroni 2006: 11) or under-citizen.

Uncritical self-supremacy was a common theme among interviewees when reflecting on judges' status, selection, and training. For some, the presumption of superiority was less linked to innate talent and something more akin to birthright. A perceived heritage as 'Enlightened

15 Many groups in Europe are not granted such status, but here, Souza is focused on the difference in citizenship development at the margins of empire.

16 Cited papers translate 'subcidadãos' as 'under-citizen', but others translate as 'subcitizen'.

minorities' (Olmo 1999: 24) and heirs to European Enlightenment thinking was presented as proving their natural capability to rule on truth and morality.

> 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.—Public Defender Ana

This speaks directly to the white supremacism of the colonial project. It is a perceived connection—via whiteness and Europeaness—to the upper echelons of the hierarchy of humanity, to *the white man's burden* as the most noble and rational, born to rule as part of the natural order. Duarte describes whiteness as 'a way of being for legal operators' (Duarte 2020: 105). The underpinning ontology is so naturalised that they lack the self-awareness of being racialised as white and are unaware that they are part of power structures that (re)produce racial inequalities.

SILENT VIOLENCE

This paper began with the 'silent violence' of the judiciary (Duarte 2020: 96) manifested in the actions and discourses normalised as everyday functioning of justice. Previous sections considered how justice is operationalised according to colonial logics via the overt hunt or attack-as-defence approach, and analysed the foundational colonial conceptualisations that facilitate the cognitive dissonance that some judges demonstrate. This final section examines aspects of the coloniality of justice that may not shout the loudest but exist on the same plane of power dynamics that uphold a hierarchy of humanity within the justice system. I draw on my observations of custody hearings and interviewee accounts.

During court observations, I did not view an attack at 'the H-Hour' or any overt *crime-fighting* behaviours. I did witness detainees who appeared to be suffering physically and emotionally. Some said they were beaten or tortured by the police. I observed how pairs of detainees were handcuffed with arms forcibly linked like romantic partners. They were held in dark, overcrowded holding cells and then ordered to stand in line with their faces millimetres from the wall until their turn to enter the courtroom. I noticed many were brought to court barefoot and in ill-fitting prison-issue clothing. Although judges do not create this situation, they do witness this treatment of detainees as they walk through the complex. Seeing such treatment—treatment that judges would never expect or tolerate for someone from their own social group—normalises the status of the detainees as below the abyssal line (de Sousa Santos 2007) or in the Zone of nonbeing (Fanon 1970), before the hearing begins.

Several interviewees noted the importance of non-verbal signs of worthiness, with some linking them to historical practices.

> I don't know if you noticed prisoners walking barefoot? This, at the time of slavery—whether a person walked barefoot or not—showed if he was a free man or a slave. So here I think we have a slave ship a day. I think the fact that they are barefoot has a symbolic effect that we overlook. But there is still a lot of the slave ship here inside the prison unit.—PD Bruna

PD Bruna refers to the symbolic message that is sent and received when people are forced to walk into a room full of people in suits but have no shoes themselves. By adding that 'there is still a lot of the slave ship here', the public defender also invokes the colonial ways of being that legitimated the masters and enslaved dynamics. She directly equates the inhumane treatment of enslaved people with the current treatment of detainees through the daily operationalisation of justice.

My sense was that the processing and treatment of detainees in this environment only served to reinforce the assumption that they were somehow inferior and undeserving of fundamental rights, thus facilitating judicial tendency to detain, or rather providing no reason to consider granting freedom. My notes at the time capture 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.—Research Notes 5/7/2019

The significance is how these dynamics are normalised. Violence up to and including this phase was treated as routine functioning of justice. This is how justice is operationalised. The dynamics continued into the courtroom, where detainees were escorted by security staff who pushed them as close to the desk as possible, confining them. I reflected: 'I could see people's flesh uncomfortably squeezed back into them to achieve this closeness to the table' (Research Notes 5/7/2019). Public defenders often complained about handcuffs in hearings, explaining that they were unnecessary and violated guidelines. Handcuffs were used in all cases I observed and thus serve as an example of judicial discretion to uphold a physical and symbolic boundary. Some public defenders contended that the use of handcuffs in court was not a factor overlooked by judges but a deliberate act by those wanting to create a hostile environment for detainees as part of the process.

> PD Thiago:Last week, I had a guy who only had one hand and still got handcuffed!
> Interviewer:Really? Why do you think they did that?
> PD Thiago:I think it was purely to create embarrassment in him.

PD Thiago notes the expression of power communicated in handcuffing a man with one hand in a context where guidelines oppose the use of handcuffs. The sense I got from many interviewees (which matched my experience) 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 presumed to have committed and, therefore, could rationalise handcuffing anyone. This point can be extended to include violence from police as an initial and deserved part of punishment symptomatic of the necropolitical normalisation of black pain.

My observations confirmed the positive racial capital of whiteness in the court setting. Of the few white-presenting detainees that I saw, all were in low-income and precarious situations, accused of drug-related crimes, yet all were given shoes, and all were released pre-trial. In a joint hearing for detainees accused of drug trafficking (with no discernible circumstantial differences), the white detainee was released, while the black detainee was detained pre-trial. Public defenders recounted similar experiences:

> 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 great legacy of racism, of the past, of slavery. I think that today it's reflected in the process.—PD Bruna
>
> I think we still live this fictional 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.—PD Ana

PD Bruna points directly to the racist imagination of a judge who linked criminality to race and connects this to legacies of enslavement as formative for the decisions of judges. PD Ana expressed concerns that public defenders lend legitimisation to a fundamentally structurally racist process when providing legal assistance in a context underpinned by colonial-era logics. These accounts show how justice is naturalised as discriminatory. As Duarte (2020: 100) writes, '(f)or some, normalization consists of closing their eyes and living in the world of law. For others, normalization consists of having their bodies and lives appropriated by everyday practices of violence'. The operationalisation of justice is such that judges need not adopt personas of heroes or active inquisitors to uphold historical power asymmetries because the system is built on a conceptualisation of justice that (re)produces inequality. Jurisprudence performs 'the role of an alibi' (Neves 2007: 74–75), allowing judges to close their eyes and calmly enact the process while also being appalled at state violence on the streets or in the prisons, confident that their hands are clean, thus validating a 'procedural fraud' (Duarte 2020: 113). In this sense, judges are agents of coloniality whether adhering to punitive policies of moral crusade or not. I give the last words to a Public Defender who encapsulated this notion that justice is conceptualised as inherently violent and that judges are agents of this dynamic:

> I think that the Brazilian Judiciary are the most responsible for human rights violations in Brazil today because they do not have the dirty job of pulling the trigger. They are comfortable sitting behind the paperwork legitimising who is pulling the trigger. So that is basically it. It is a very violent justice.—PD Antônia

CONCLUSION

> All the most important and compelling counter-hegemonic movements of the present clearly point in this direction: toward the need to unmask the persistence of the colonial and to confront the political meaning of race as a means of destabilizing the deep structure of coloniality (Segato 2022: 187).

This paper contributes to the counter-hegemonic project that Segato identifies by adopting the decolonial option to investigate how colonial logics shape the understanding of justice to produce discriminatory outcomes, in this case, the overuse of pre-trial detention. This paper also directly responds to Aliverti *et al.*'s (2021) call to decolonise the criminal question by exposing and explaining how coloniality influences the contemporary functions of criminal justice and the 'silent violence' (Duarte 2020) of the judiciary. I have argued for the usefulness of 'the coloniality of justice' as a concept for understanding the punitive and racialised overuse of pre-trial detention in Brazil. It goes beyond the simplistic explanations of individual or institutional racism and exposes the ontological constructions that naturalise such views. By considering how judges' conceptualisations of justice are shaped by violent colonial logics, this research contributes to the understanding of real-world operationalisations of justice. Therefore, we can identify the effect of the symbolic on the material. Moreover, the dynamic is mutually implicating as the justice system—particularly the judiciary—is a crucial site for the reproduction of coloniality.

Interview testimony and observations of court hearings suggest that violence remains constitutive of justice. A significant element of how judges interpret their role is via the active participation in fighting crime, in what can be considered a modern moral crusade. At times, this will-to-action, hunt or attack at the 'H-hour' has been celebrated publicly, with judges lionised as heroes for being seen to target an internal enemy via methods beyond the law. This ability to

go above the law relates to various expressions of superiority based in white supremacist and Eurocentric ways of knowing and being.

Some judges actively oppose such dynamics, and statements from interviewees make this clear. While multiple conceptualisations concurrently exist, this research has exposed the coloniality prevalent in judicial practice today. I do not claim that the current situation is a direct result of the past, but rather that identifying the coloniality of justice helps make sense of contemporary criminal justice practices that appear contradictory: where the violent use of state apparatus against specific groups is component of justice. In this way, the research also contributes to Zaffaroni's vital project of delegitimising the penal system, where it naturalises violence as inherent to its functioning (Garcia and Sozzo 2023). Whether via a proactive will-to-action or silent facilitation of law steeped in colonial assumptions, those judges conceptualising and operationalising justice according to colonial logics make manifest the coloniality of justice and can be understood as agents of coloniality.

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