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Coloniality, just war & carceral injustice in Brazil

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Abstract

The Portuguese empire brought inescapable violence to the indigenous communities of Brazil and to those it enslaved. Throughout the centuries of colonial subjugation, driven by the Iberian monarchical traditions of hierarchy, militarism and moral crusade, ‘just war’ narratives were employed to legitimate the use of violent legal and extra-legal measures against enslaved peoples and others deemed unruly or rebellious and a threat to colonial order. Two centuries after independence, Brazil remains at war with its ‘internal enemies’. Its justice practices continue to be characterised by colonial rationalisations. This paper illustrates the contemporary coloniality inherent in the carceral system from the moment of detention pre-trial through sentencing and imprisonment.

Keywords

coloniality, Brazil, just war, authoritarian oppression, *flagrante delicto*, judicial internment

Fearsome laws are needed to contain these barbaric people. Two million slaves, all of whom capable of taking up arms, will not submit to three million free people of both sexes and all ages. Nothing less than the ‘terror of death’ will keep these immoral people in their place. (Francisco de Paula Souza e Melo, speaker of the lower house of the Brazilian National Congress 1827–1833, debating the inclusion of the death penalty in the country’s first criminal code, quoted in *El País*, 7 December 2020)

They’re going to die in the streets like cockroaches... and that’s the way it should be... the outlaw has more rights than the good citizen (President Jair Bolsonaro, discussing 2019 Brazilian legislative proposals intended to extend the law of legitimate defence to all fatal police shootings with journalist Leda Nagle, quoted in *O Globo*, 6 August 2019)

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We open with these two quotes from influential politicians set almost two centuries apart as precursors to the discussion to follow. The dichotomous positioning of good, moral citizens in need of rights and protection opposed to the barbaric and immoral people, who require ‘terrorising’ and killing, is present in both colonial and contemporary eras. This paper explores the embedding of Portuguese colonial laws and rationalisations in Brazilian criminal justice. Inspired by Latin America’s rich tradition of ‘resistance’ (Codino, 2014) or ‘liberation criminology’ (Castro, 1987), we draw attention to the way Brazilian law functions as a barely disguised tool of ‘vertical discipline’ (Zaffaroni, 1989: 23) and ‘extermination’ (Zaccone, 2015), thinly justified as necessary oppression of ‘the hostile’ (Zaffaroni, 2006: 11), of the ‘enemies of society’ (Zaffaroni, 2006: 4). We will see that Brazilian justice continues to be characterised by authoritarian and oppressive legal and extra-legal practices 500 years since the first Portuguese settlers arrived from the Iberian peninsula in the 16th century, two centuries after the end of colonial rule, and nearly four decades beyond the most recent period of civilian or military dictatorship. While the death penalty was formally abolished with the official end of slavery in the late 19th century, Brazil’s post-colonial use of ‘fearsome laws’ to terrorise the unruly and rebellious continues in the 21st century in the shape of the country’s normalisation of police violence, celebrated by the current President Jair Bolsonaro.¹

Unlike North America and Western Europe, the Latin American region was not going through a period of economic modernisation at the time its legal and carceral systems were formed in the early decades of the 19th century (Salvatore and Aguirre, 1996). When Brazil gained independence from Portugal in 1822, its economy remained agricultural and dependant on forced labour. Its elites faced neither the threat of a revolutionary urban proletariat (Batista, 2003) nor rural peasantry (Prado, 1942). Instead, their main internal security concern was how to contain insurrection among the country’s enslaved population (Dieter, 2012), much as it had been for the previous colonial authorities. Enslaved Africans constituted the majority of the population in four of the country’s five provinces, including 64% in its most populous province, Rio de Janeiro (Pereira, 2020). When Brazil’s newly formed National Congress introduced the death penalty as necessary defence of society, its purpose was to replace previous violent colonial laws that had already been used to subjugate its enslaved peoples for three centuries.

In this paper, we focus on two areas of carceral controversy that Brazil shares with other parts of Latin America. Firstly, the *de facto* automatic remanding in custody and inevitability of successful prosecution of people arrested *in flagrante delicto*, widely considered a major case of ‘penal illegality’ across the region (Zaffaroni, 1989: 27) and often preceded by torture and punishment beatings. Followed by the lack of any consistent, legitimate rationale for sentencing and punishment, resulting in prisons serving little more purpose than ‘judicial internment’ (Birkbeck, 2011: 311) in one of the country’s ‘sub-human’ prisons (Calich, 2021: 21), described by Waquant (2003: 200) as ‘concentration camps for the dispossessed’. In all cases, we will see that the country’s victims of such openly oppressive criminal justice practices remain disproportionately young, poor and black (Alves, 2018; FBSP, 2020; Góes, 2021).²

Central to our analysis is that, contrary to globally hegemonic conceptualisations of universal rights, contemporary Brazilian society consists of a hierarchical reality in

which some are deemed worthy of legal rights and protection, while others continue to be deemed socially expendable, even killable, and the targets rather than beneficiaries of law. Not surprisingly, the means by which Brazilian legal and criminal justice traditions have been shaped by colonisation is extensively discussed in Brazilian criminology, little of which written in English and published in so-called established, authoritative journals or edited volumes peer-reviewed by European or American university-based academics (Aliverti et al., 2021). 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; for discussion of this point in the Latin American context, see Joseph, 2001). Acknowledging our positionality as those educated within Northern/Western ontology and scholarly practice, we note that the theories and concepts that we use to highlight the legacies of empire in contemporary Brazilian justice are distinctly born of or adapted in the Souths of America.

This paper places the coloniality of power (Quijano, 2000) at the centre of analysis by demonstrating that contemporary justice policies deployed by the Brazilian carceral state are just the latest attempts to legitimate violent techniques of war to disenfranchise and subordinate those deemed inferior, in the capitalist interests of European descended elites.

We outline the initial ‘just war’ narratives used during Portuguese colonisation and the actions taken by Brazilian elites to justify the maintenance of slavery and continued subjugation of the descendants of the victims of slavery into the 20th century, including Latin American criminology’s focus on criminal anthropology and complicity in social Darwinism and eugenics. In doing so, we illustrate the through-line of an emphasis on the rhetoric of war in the Brazilian case and its accompanying schema of justifications for the use of law to ‘disqualify’ (Batista, 2000: 108) and violently oppress.

Coloniality

Quijano provides us with clear illustration of how western theory, based on notions of linear development, social contract and a nation-state, are not appropriate for understanding historical and contemporary Brazil. With the invention of the Americas, a new kind of expression of power was created. Quijano names this ‘the coloniality of power’ and explains its two key elements (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 (Quijano, 2000). While through a European lens, labour has a temporal and value-laden progression from enslaved to serf, petty commodity production, and salaried labour; with the creation of a society designed from the outset to benefit an international market, something entirely new was produced. Alongside this, ‘race’ was constructed to divide and structure relations between ‘the conquering and conquered populations’ (Quijano, 2000). The exact definitions accorded to racial groups shape-shifted over time, but the core issue was that the groups were imbued with a naturalised sense of superiority and inferiority.

In considering the legacies of Quijano’s coloniality of power for contemporary Americas of the South, Mignolo and Walsh refer to the ongoing system of domination

as the ‘colonial matrix of power’, using ‘coloniality’ as its shorthand (Mignolo and Walsh, 2018: 4). For Mignolo and Walsh, ‘there is no modernity without coloniality’ (Mignolo and Walsh, 2018) due to the integral role that the hierarchical colonial philosophies and practices played in shaping the realities of today, and that makes coloniality ‘the dark side of modernity’ (Mignolo and Walsh, 2018: 111). They 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’ (Mignolo and Walsh, 2018: 5–6). As Quijano articulated himself:

In other words, the process of the independence of states without corresponding liberation of societies was not a process of the development of nation-states, in the European sense, but a rearticulation of the coloniality of power upon new bases. (Quijano, 2000: 227–228)

In reference to the Brazilian case, independence did not come about by popular revolution or via ideology of liberation. It was the rural land-owning elite who led the independence process to maintain power over what were considered ‘the great pillars of the nation: slave labor, large landholding, and an export-oriented monoculture economy’ (Green et al., 2019: 163). Green et al. (2019: 163) call on an apt literary phrase to describe the attitude of those wielding power at the time: ‘something needs to change so that everything can remain exactly as it is’.³

When considering the legacies of empire, it is perhaps particularly pertinent to note that while neighbouring countries were introducing independent republics, in 1822, Pedro I maintained the monarchy through Brazilian independence, later declaring himself Emperor. It is hard to imagine a moment of state decolonisation whereby the coloniality of power remained so clearly intact. Da Costa states that in reference to Brazil:

Coloniality refers to the system of power where values, representations, and forms of knowledge production turn racial and other colonial differences into hierarchical classifications and values that dehumanize Afro-descendant and indigenous peoples, and correspondingly turn their worldviews and ways of life into symbols of backwardness vis-à-vis capitalist modernity. (Da Costa, 2014: 196)

As we will continue to illustrate, these twin axis of the coloniality of power – the racialised hierarchicalisation and the centring of global capitalist endeavour – remain evident in contemporary Brazil. These elements are so experientially ingrained in Brazil that they form part of the foundational ontology from which the discourses and techniques of war are built to justify the targeted violence of the carceral state.

Just War

Examining the coloniality of contemporary justifications for violence against certain groups reveals a certain consistency in rationale. To find the origins of such thought, we must reach back beyond the 16th century Iberian colonial ‘kidnapping’ (Zaffaroni,

1989) of Latin America to established violence-condoning discourses of Catholic Western Europe. The rationalisation of a just war in the name of Christianity had precedence with European colonising practice. For example, in 1344, Pope Clement VI sanctioned the colonisation of the Canary Islands by the Portuguese and Spanish as a crusade against the indigenous people (Cagle, 2005: 10). Similarly, in 1415, Dom João I went to great lengths to ensure that an attack on the Moroccan city of Ceuta was legitimised as service to God (Cagle, 2005: 11).

The designation of a 'just war' was granted to situations meeting the criteria according to the theologian Thomas Aquinas:

First, he argued that 'the authority of the sovereign by whose command the war is to be waged' must be obtained. Second, 'that those who are attacked should be attacked because they deserve it'. And third, 'the belligerents should have a rightful intention, so that they intend the advancement of good'. (Metcalf, 2005: 376)⁴

Those carrying out the intra-Iberian processes of violent and selective repression across the Americas were therefore accustomed to using such religiously informed justification in their homelands after genocide perpetrated against the Semites (Jews and Muslims) and the Roma in the final years of the *Reconquista* (Re-conquest) in the late 15th century, where non-Christians who refused to convert were reduced to 'subjects without souls' (Suárez-Krabbe, 2016: 55–56). 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 due to the Alexandrine Bull of 1493⁵ granting them the land (Brunstetter, 2005: 16). The assertion was that, like the Semites of the Iberian peninsula, indigenous people had no right to refuse Christianity and that 'the superiority of Christianity gave rights such as liberty and self-sovereignty to Christians while denying them to others' (Brunstetter, 2005: 117–118).

Exercising the just war regulations in Northern colonial Brazil involved the use of '*tropas de guerra*' (war forces) which approved the use of lethal violence 'to punish hostile Indians or those who rejected or impeded the spread of Christianity' and allowed for the enslavement of captives (Sommer, 2005: 406). Additionally, '*tropas de resgates*' (rescue forces) were sanctioned expeditions to procure captives from inter-tribal warfare (via payment or force), using the logic that saving them from cannibalism⁶ and delivering them to a combination of Christianity and slavery would be a just act (Sommer, 2005). Also important to our understanding of the oppressive nature of Brazilian justice today, the Iberian version of just war involved the use of the Inquisition, established in Spain in 1478 to investigate the faithfulness of the *Converso* (convert) population, a short while before they began to be expelled from the peninsula altogether with the end of the *Reconquista* and the consolidation of Europe's first absolutist state in 1492 (Virdee, 2021). Not only was the Inquisition extraordinarily violent in its quest to 'determine the truth' (Batista, 2016: 3), but it 'rooted out' those it identified as heretics – the 'real criminals' (Batista, 2016), that is the 'real enemies' of the emerging western societies – through denunciation and confession, the latter of which just as

often resulted in pardon, especially when it was unsolicited (Aufderheide, 1973). While the inquisition was less active in Portugal than in Spain, two inquisitorial commissions were sent to Brazil in the 16th century.

Jesuits voiced objections to the enslavement of the continent's Amerindian peoples at the time, arguing that it was not conducive to their goal of saving souls, yet still illustrated their adherence to just war thinking when providing guidance on circumstances in which enslavement was legal and justifiable (Metcalf, 2005), or in their support for the violent suppression of rebellions that threatened the colonial project or their missionary (Russell-Wood, 2005). Over time, those looking to legitimate their actions found ever more creative ways to bypass Jesuit protestations and align with royal or governor approved just wars⁷. Using a lexicon distinctly linked to a law and order rationale, peoples deemed obstructive to plans would be 'reduced to peace and civil conformity', and the notion of 'defensive wars' could be employed to address any indigenous aggression or threat to land (Langfur, 2005: 440). As Russell-Wood (2005: 368) concludes, '[p]acificisation was a euphemism for conquest'.

By the time the Jesuit order was expelled from the Portuguese empire in 1759, the Amerindian population had been drastically reduced by the spread of disease, from an estimated 80 million indigenous people across the Americas in 1500 to 10 million in 1600 (Batista, 1996). Over three centuries, 1550 to 1850, as many as five million Africans were enslaved and transported to Brazil, mostly to be put to work on sugar plantations, many of which were owned by Jesuits. Indeed, the Jesuit order had itself played a major role in instigating the transatlantic slave trade, having set up missionaries in Angola and the Congo at the same time as Brazil (Alencastro, 2006). In a study of the Brazilian economy published in 1711, Jesuit leader André João Antonil implored slave owners to 'punish with impetus, with vengeful spirit, by hand and with fearsome instruments... with fire or burning seals, to mark the poor (the enslaved) on the face' (quoted in Zaffaroni et al., 2003: 415).

Although the dependency on the overt religiously-sanctioned just war weaned over time, the underlying European/white supremacist assumptions remained and were used to justify violent repression of all other groups. The racial make-up of the Brazilian population was clearly a preoccupation of late 19th century ruling elites, and with the birth of Brazil as a new republic, national unity and nation-building were high on the agenda. For those championing a national civilisation, people of African heritage were considered foreigners (Domingues and Sá, 2001), despite generations of families born to Brazilian soil. Through an explicit policy of 'whitening' the population, the aim was not just exclusion, but elimination.

The desire for population whitening was based on the continued ontological position that presented the hierarchicalisation of racial groups as obvious and natural. Such views were enhanced in the late 19th century with the development of what was framed as scientific evidence proving these long-held assumptions. Consideration was given to how the racial make-up of the population could be controlled, both externally and internally. Given the need for a continuing rural workforce after the abolition of slavery, the government considered policies targeting people from various countries, yet the exclusive immigration of Europeans continued to be campaigned for. 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 (dos Santos and Hallewell 2002: 65–67). Nabuco provides the whitening argument 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. (in dos Santos and Hallewell 2002: 66)

Here, Nabuco gestures towards the Darwinian ‘survival of the fittest’ arguments, twisted from the biological to the social. Such arguments were used to advocate for the practice of eugenics, which while contested by many, became a notable intellectual consideration among the ruling elites. Raimundo Nina Rodrigues, a Brazilian medic and son of former slave-owners, named ‘the apostle of criminal anthropology in South America’ in 1896 by the father of the Italian school of criminological positivism Lombroso (del Olmo, 1999: 40), specifically advocated for ‘ethnic criminality’ to be acknowledged in legislation (Rosenblatt and de Mello, 2017: 347). Rodrigues infamously concluded his 1894 book, *As Raças Humanas e a Responsabilidade Penal no Brasil* (The Human Races and Criminal Responsibility in Brazil), with the words ‘may the awareness of superiority that assists us in this particularity guide the Brazilian legislator in preparing our criminal legislation’ (cited in Santos, 2019: 226). The inference drawn from this and Rodrigues’ subsequent work on crime was that black African and ‘*mestiço*’⁸ people were less capable of following or understanding legal norms due to supposed cultural inferiority (Rosenblatt and de Mello, 2017). The prejudiced connection of racialised groups to criminality led to much discussion about how criminal justice could be used as a vehicle for population curation through the violence of enforced sterilisation (Rosenblatt and de Mello, 2017).⁹

Explicit reference to eugenics in the Brazilian press was rare until 1917, when Renato Kehl 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’, and cautioned that preventing marriage for certain groups, such as ‘degenerates and criminals’ would not be enough to shape the population according to their ideals (Hochman et al., 2012: 500–501). In 1931, Kehl opened the Brazilian Central Commission of Eugenics 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). We can observe the embracing of such policies by the influential elements of the press via the response to Nazi Germany’s enactment of sterilisation

laws the same year. Newspapers such as *O Globo* discussed the law's 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' (de Souza and de Souza, 2016: 11 & 16).

The coloniality of power remained clear to see in the overt policy agenda of elites, far beyond the official colonial period, through the prolonged abolition of slavery and well into the mid-20th century. At each stage, the interests (financial and social) of the descendants of Europeans were centred as the interests of society. Extreme violence was justified against groups racialised as 'Other' and characterised as a threat to such interests. Legitimated by authorities of the time – be they religion or science – the *Others* were presented as enemies in the war for the future of the nation, enemies who could be justly eliminated.

Quijano (2000: 216) contends that the colonial European approach to the new continent was to create states specifically designed around extracting resources to generate wealth for European elites, thus founding states within a world capitalist model of exploitation. This connection of a willingness to exploit for profit and the malleability of the just war parameters allowed for lethal violence and enslavement within legal and religious frameworks. We have seen that when Brazil became a sovereign nation, the major concern of its rural elites was how to maintain its agricultural economy and discipline over the workforce, the majority of which was still enslaved. At the same time, Brazil was also concerned to appease the British, who had financed its independence from Portugal and upon whom it continued to rely for international commerce. In 1831, the country's new-formed monarchical government legislated to criminalise the slave trade but resisted international pressure to enforce the law for another two decades. Meanwhile, the slave trade continued almost unabated. Slavery itself was criminalised only in 1888. Brazil became a republic in 1889.

To mitigate the risk of insurrection from the enslaved population, we have already noted that elites lobbied for 'fearsome laws' in Brazil's first criminal code, including for the continuation of the death penalty. Before independence, capital punishment had been provided for across the Portuguese empire by the 1603 Philippine Ordinances, passed into law during the 1580–1640 Iberian Union between Portugal and Spain. Other colonial ordinances continued under Brazil's 1830 Criminal Code included whipping and (for men aged 18–60) forced (shackled) labour, both of which were applied exclusively to enslaved people. In effect, the code preserved the selective repression that had characterised the Portuguese empire. 'Citizens' could still discipline their enslaved workers with impunity, and they could still pass the most unruly onto governmental authorities to be subjected to more extended periods of state-sanctioned violence. The only major difference was that enslaved people were no longer *coisas* (things) in law (Dieter, 2012). They now had quasi-legal status, albeit only in the context of being officially responsible for their crimes.

Our contention is that the discourses and techniques of war that accompanied the Iberian monarchical traditions of hierarchy, militarism and moral crusade were some of the foundational elements on which Brazilian colonial society was built. From this base, a framework categorising peoples and legitimating lethal state violence has

been justified and naturalised. Thus, contemporary just war arguments (whether related to drugs, crime or corruption etc.) are symptomatic of coloniality, in that the legitimising arguments for violent authoritarian oppression are the fruit of the ontological position established during initial imperialist exploits which understood a hierarchy of humanity to be natural and that violence was justifiable to forward an extractive capitalist agenda.

As Holston (2008) demonstrates in his genealogical analysis of what he describes as ‘differentiated citizenship’ and the ‘misrule of law’, Brazilian law played an instrumental role in allowing the country’s elites to maintain the extreme levels of socio-economic hierarchy and its accompanying schema of authoritarian oppression throughout both the 19th and 20th centuries. This included the populist mid-20th century period of President Getúlio Vargas, who was accredited with industrialising and democratising the country, as well as strengthening federal government at the expense of local elites. Not only did half of the population remain in absolute rural poverty until the 1960s, but the majority of citizens were legally excluded from voting due to illiteracy. Some socio-economic advances have been achieved during the post-dictatorial period from the late 20th century, especially during the 2003–2016 period of centre left government under the presidencies Luiz Inácio Lula da Silva and Dilma Rousseff. Still, the poor remain divided between those who have found salaried work and achieved property rights, and those who are tied to the informal economy and the unregulated slums of the country’s vast urban peripheries. Today, the poorest 30% of the Brazilian population earn less than 7% of national income, while the richest 10% of Brazilians earn half of national income (World Bank, 2020). White Brazilians earn on average 74% more than black or brown Brazilians (IBGE, 2019). Under these circumstances, as Holston concludes, legal rights – including our focus on the presumption of innocence, fair trial and humane treatment – continue to be regarded as earned privileges. Moreover, the political left remains equally as punitive as the political right (Karam, 2021).

In this final part of this paper we examine the contemporary justice landscape to demonstrate how such fundamental rights are disregarded for the benefit of elites’ interests and justified with the same ontological positioning that illustrates the continuing coloniality of justice.

Arrest and prosecution

The use of the law as a tool of authoritarian oppression is evident when we examine who is arrested and who is detained prior to a guilty conviction. Many Brazilians are acutely aware of their position of relative social weakness and have little expectation that they will be provided with protections on the street or in court, especially those in the poor urban areas of large cities such as Rio de Janeiro (Goldstein, 2013) and São Paulo (Caldeira, 2000). Alves explains that this justice and power differential leads to a ‘favela-prison pipeline’, and it is ‘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).

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 university degrees are treated as ‘VIP’ prisoners and are held on remand separately from ‘common prisoners’ or under home detention in a clear demonstration of the greater value attributed to 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 *em flagrante delicto* (caught in the act) (CESeC, 2016).

The validity of such detention has often been called into question, with a UN report finding that pre-trial detention was not sufficiently justified in 93% of *flagrante delicto* detentions across Rio de Janeiro and São Paulo states (UN General Assembly, 2014). The time spent in unjustified detention heightens the risk of torture, and UN reports have documented allegations of assaults, beatings and intimidation by police (Subcommittee on Prevention of Torture, 2016). The use of violence as a legitimate means to resolve conflict with oppressed communities (Pires, 2018) and the use of torture as an acceptable method to extract confessions have patent echoes of Iberian inquisition (Batista, 2016; Neder, 2018). President Bolsonaro ascended to power on a platform that explicitly condoned torture as a way to gain confessions. Bolsonaro is quoted as stating:

I defend torture. A drug dealer who acts on the streets against our children must be immediately put on a parrot’s perch¹⁰. They have no human rights in this case. There would be parrot’s perch, beating. The same thing for kidnappers. The guy must be broken to open his mouth (Terra, 2018: np).

The prevention of torture was one of the primary reasons for the introduction of custody hearings in 2015, whereby a detainee would be able to declare torture or maltreatment at the hands of state officials. However, as with many pieces of legislation that claim to reduce violence and improve equality of underserved populations in Brazil, the reality is that elites with the power to operationalise the policies do not take the required actions. A study in Rio de Janeiro found that in 43% of custody hearings, judges did not ask the detainee if they had been tortured, and of the occasions the question was asked, 39% said they had suffered some form of aggression (Justiça Global, 2016).

Other studies noted the repeated disregard for the presumption of innocence, alongside flawed questioning about police violence and excessively restrictive criteria preventing the initiation of investigations (Nascimento dos Reis, 2017). Reflecting on the lack of effective judicial response to the violent practices, and the complicity between penal agencies, the Vice-President of a specialist NGO lamented that ‘most of these actors are concerned only with cases of repercussions in the press. There they investigate, they want exemplary punishment, they become *Torquemadas*’¹¹ (ISER, 2016: 226). Echoing justifications during the inquisition, today we see a modern moral crusade that legitimates violence to convict, imprison and eliminate from society all those who are not considered as part of the core group to be protected. This social construction of

many defendants as public enemies has led to the complete disregard of their testimony by some judges (Semer, 2019), and despite the worryingly high amount of police violence, there remains a heavy reliance on police testimony for convictions. In relation to drug trafficking – the crime for which Bolsonaro has advocated torture as well as extra-judicial killings – in some cases, over 90% of prison sentences were awarded purely on the basis of police testimony (Rodas, 2017). It is clear that civil hierarchy, selectivity and violence remain core elements of justice mechanisms before a defendant has been found guilty.

Judicial internment

Our second illustration concerns the inhumanity of Brazilian prisons. Similar to the use of whipping and hard labour as legal punishments for enslaved people during the post-colonial monarchical period of the 19th century (Dieter, 2012), imprisonment in Brazil should be understood first and foremost as a legalised measure of last resort; as a system of belated ‘intimidation and discipline’ (Dieter, 2012: 623) rather than rehabilitation, where other violent measures – including extra-legal police beatings – have failed. As in other parts of Latin America, Brazil had inaugurated a ‘modern’ penitentiary system across much of the country by the late-19th century in place of its colonial system of ad hoc detention on naval vessels and in forts and dungeons by military, local government and religious authorities (Aguirre, 2009). Yet, in contrast to their North American and Western European counterparts, Brazil’s new prisons proved to be ‘houses of disease and death’ (Salvatore and Aguirre, 1996: 9), not houses of correction as they were officially promoted. In Rio de Janeiro, the majority of remand prisoners were eventually acquitted (Chazkel, 2009), and a third of prisoners serving 2 years or more imprisonment did not make it to the end of their sentence (Bretas, 2009).

Brazilian prisons remained places of ‘judicial internment’ (Birkbeck, 2011: 311) throughout the 20th century. Among the very few academic studies of Brazilian prisons completed in the pre-1985 democratic period, Coelho (2005) described conditions of detention in Rio de Janeiro of as little as 1.5 square metres of cell space per prisoner. The inhumanity of the pre-democratic Brazilian prison system was also highlighted in prisoner autobiographies, including the novelist Graciliano Ramos (Ramos, 2015), who was held without charge for ten months as a political prisoner in Rio de Janeiro between 1936 and 1937, William da Silva Lima (Lima, 1991), who played a central role in forming Brazil’s first major prison gang, the Red Command, in the early 1980s, and Luiz Alberto Mendes (Mendes, 2009), who spent three decades in prison in São Paulo between 1972 and 2001. All three authors describe conditions of severe overcrowding and periods in which they were locked up 23 or 24 h a day, three to five per single cell. Lima and Mendes describe numerous incidences in which they were subjected to disciplinary beatings by prison guards or during raids by military police.

As one of the current authors has previously described (Darke, 2018), today it is quite usual for a prisoner to be accommodated in poorly ventilated cells or multi-occupancy dormitories holding two or three per square metre, with little access to running water or healthy food. Only half of the country’s prisons have functioning health centres,

and most are served by a fully qualified doctor just half a day per week. While a third of sentenced prisoners gain some form of paid employment, much of this work is unskilled and is confined to cellblock exercise yards rather than prison workshops. Prisons typically operate with approximately one officer on duty per 100 prisoners in the daytime and half as many officers during the night. Officers rarely enter the cellblock corridors except to lock and unlock cell doors. In their place, prison routines and inmate discipline are managed by the prisoners themselves, usually with the support of prison managers. Since major prison gangs like the Red Command emerged from the 1980s, disciplinary beatings by guards have become rarer. However, prisoners continue to report incidences of violence and torture by the police before they are taken to prison or during transport from one prison to another.

Finally, the Brazilian prison population remains overwhelmingly poor and black (Darke, 2018). Most Brazilian prisoners left school before the statutory minimum age of 14 (MJSP, 2020) and were not in formal employment at the time of their arrest (MJSP, 2020). In contrast, just 0.6% of prisoners have completed higher education, compared to 17% of the general population. As previously noted, under Article 295 of the 1941 Penal Code – still in force despite being passed into law during Brazil's first post-imperial period of dictatorship – these 'special' prisoners cannot be detained in 'common' prison spaces until they have exhausted all legal avenues of appeal, by which time most will be eligible for home detention or conditional release, or will have avoided prison sentence altogether. Other privileged categories of prisoner granted such legal protections include politicians, military, church and court officials.

Conclusion

Criminology has been developed in the global North as a peace-time practice (Carrington et al., 2016), yet Brazil remains at war. Any examinations of the carceral estate that overlook the continuing legacies of empire for Brazilian justice in favour of Euro-American-centred ontology not only risk misunderstanding the reality but also strengthen the veil of coloniality. Since invasion, elites in Brazil have constructed a scenario of war to suit their needs and justify the tools of war – authoritarian oppression – couched as morale crusade and actioned through justice mechanisms. The continuity of the ontological positioning established during colonisation is made manifest in the actions of the contemporary Brazilian carceral state. It is an ontology that understands racialised hierarchy to be natural and lethal violence justifiable for protecting those at the top. While just war was officially sanctioned by the crown and the cross, and undergirded actions taken during initial imperialist exploits, contemporary 'wars' are also framed as moral crusades. Here the notion of moral action is infused with a multifaceted civic hierarchy whereby a person's positioning predicates whether state violence is legitimated for their protection or oppression. Indeed, with such moralistic reasoning, the techniques of war are pursued with the militaristic vigour of a crusade and this allows for the targeted violence of the carceral estate we have described. Thus, just war framing is symptomatic of the coloniality of justice.

We have seen that those considered citizens today are still able to pass the *killable Others* on to the state, where violence remains legitimate as a tool of disciplinary punishment and a means of gaining convictions in the torturous style of inquisition, and people at the bottom of the country's strict socio-economic hierarchies are removed and imprisonment or eliminated from society with scant regard for due process of law under the guise of public security. The highly selective and authoritarian nature of the Brazilian rule 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'). This phrase, popularised by Getúlio Vargas, Brazil's longest-serving president (including through periods of civilian dictatorship), highlights the sentiments expressed across much of Latin America's powerful elites 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). This hierarchy of social strength, defining those who are rights-bearing citizens and those in such positions of social weakness that they are unable to escape the violent techniques of justice institutions is clearly evident in the overrepresentation of racialised and marginalised groups in contemporary police cells, courts and prisons. It is less that the law has failed to protect certain populations, but that the law has been used by the powerful in a targeted manner against a constructed internalised enemy.

Enduring problems of racism, classism and the brutalising, authoritarian style of policing 'erode the legitimacy of the State and its interventions' (Cavalcanti, 2020: 47), all the while ruling elites insist that violent actions are necessary. This justification for violence is followed into the system, whereby torture is normalised to the extent that judges do not fulfil their duties to investigate, and extreme right punitive populists advocate for its use based on a modern moral crusade. In this sense, Brazil has never been anything but a state of exception, whereby state-sanctioned violence is justified. This state of exception – this state of justified war – has allowed elites to legitimate the continual breaching of national and international prohibitions on torture and killing. The carceral state in Brazil continues to be characterised by colonial rationalisation, allowing openly selective repression. Contemporary justifications for war-like behaviours may be different from the previous incarnations of religiously-sanctioned just war or pseudo-science backed population curation, but they are the manifestations of coloniality for our generation. Coloniality will continue to evolve, as in order to maintain the racialised hierarchy and the centring of elites' capitalist interests, something will always have to change for everything to remain the same.

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Notes

1. There were a record 6357 documented police killings in 2019 (FBSP, 2020). These are officially defined as ‘deaths resulting from police intervention’ but colloquially referred to by the police as ‘resistance followed by death’.
2. Of people who died at the hands of the Brazilian police in 2018, 82 percent had left school by the age of 14, and the peak age of death was 20 (FBSP, 2019). Forty-five percent of the general Brazilian population is white, yet black people made up 75% of victims (FBSP, 2019).
3. Green et al. (2019) take the quote from Italian writer Giuseppe Lampedusa’ 1958 book *The Leopard*.
4. Metcalf is quoting from: Thomas Aquinas, *The Summa Theologica*, trans. Fathers of the English Dominican Province, 3 vols (New York: Benziger Brothers, 1947).
5. The Alexandrine Bull of 1493, was a Papal decision that divided the newly discovered lands between Portugal and Spain.
6. Some indigenous nations such as the Tupi practiced cannibalism ceremonies using those captured in battle.
7. In 1570, King Dom Sebastião legislated that indigenous people hostile to the Portuguese settlers could be legally enslaved as part of a just war (Cagle, 2005). However, subsequent rulings illustrate conflicting views. 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) (Cagle, 2005). Yet in 1611, due to dissatisfaction and unrest from colonial elites, arguing for the need of labour for maintenance and expansion of land, the enslaving of people according to a just war was again legalised (Cagle, 2005).
8. The term *mestiço/a* was used in colonial Brazil to describe a person with parents from different ‘racial’ groups. Interestingly, Raimundo Nina Rodrigues, was defined as a *mestiço* during his time. The government currently use ‘pardo/a’ to describe people with plural heritage.
9. For broader discussion of Italian biological positivism’s influence on the emergence of Criminology as a scientific discipline in Latin America, see del Olmo, 1981.
10. The ‘parrot’s perch’ is a bar on which the victim is suspended from the back of their knees, with their hands tied to their ankles. Once on the perch, the victim, usually stripped naked, is subjected to beatings, electric shocks, and near-drowning (Mariner and Cavallaro, 1998).
11. Tomás de Torquemada was the Inquisitor General of the Kingdoms of Castile and Aragon in the 15th century.

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